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Cross-Border Investigations: Navigating International Requirements


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Introduction

Since the ratification of the 1999 Organisation for Economic Co-operation and Development ("OECD") Anti-Bribery Convention, signatory nations have stepped up their efforts by enacting and enforcing laws to prosecute companies and individuals involved in corruption. The US were trailblazers, vigorously enforcing the Foreign Corrupt Practices Act ("FCPA") since the early 2000s, with the UK and France joining the fray with the passage of the Bribery Act in 2010 and Sapin II in 2016, respectively.

The Airbus Deferred Prosecution Agreement ("DPA") in January 2020 may prove to be a watershed moment in international cooperation, demonstrating the potential of increased inter-agency collaboration and information sharing; the apparent loss of momentum resulting from the COVID-19 pandemic could risk leaving it as the high-water mark. As the investigative world re-emerges, and the US Department of Justice ("DOJ"), UK Serious Fraud Office ("SFO"), French National Financial Prosecutor's Office ("PNF") and international counterparts begin to grapple with the backlog of cases and pursue additional priorities, 2022 will reveal whether the close bonds between the various agencies will resume from where they left off in early 2020.

In this chapter, we will look at: how the US, UK and French anti-corruption agencies conduct investigations; the considerations they take into account when deciding whether or not to prosecute wrongdoing; and the alternative resolutions available to companies.

Standards for Investigation

Each enforcement agency employs its own standards in determining whether to initiate an investigation. However, the general principles across all three are substantially similar: they receive information; conduct preliminary inquiries; and weigh up evidential and public interest factors when determining whether a full investigation is warranted.

The DOJ prosecutes all US federal criminal matters, including the FCPA.[1] The DOJ has taken an expansive and aggressive view on its territorial jurisdiction, and even minimal US touchpoints may expose foreign entities and individuals involved in overseas conduct to rigorous DOJ scrutiny.[2]

The Federal Bureau of Investigation ("FBI") typically conducts preliminary inquiries and can open a full investigation based on a "reasonable indication" of criminal activity, a low bar that is easily cleared.[3] Prosecutorial decisions, including whether or not to open an investigation, are guided by the DOJ's *Principles of Federal Prosecution of Business Organizations*.[4] Prosecutors apply nine factors, including: the nature and seriousness of the offence; the pervasiveness of wrongdoing in the organisation; the organisation's willingness to cooperate; the organisation's voluntary disclosure of wrongdoing; and the corporation's remedial actions.

Unlike the DOJ, the SFO does not have a general authority or duty to prosecute crimes in the UK. The SFO investigates only the most serious and complex fraud, bribery and corruption cases. In relation to corporate bribery, the SFO has jurisdiction over "failure to prevent bribery"[5] offences by companies incorporated or carrying on "part of their business" in the UK, regardless of where in the world the conduct occurred. Investigations relating to bribery of another person or a foreign official, or being in receipt of bribes[6] (undertaken anywhere in the world), can be commenced by the SFO where the act or omission involves persons with a "close connection" to the UK (i.e. a body incorporated in the UK, British citizens or persons who are ordinarily resident in the UK), or where the conduct occurs in the UK.[7]

In deciding whether to authorise an investigation, the SFO considers: (1) whether harm may be caused to the public; (2) the reputation and integrity of the UK as an international financial centre; and (3) the economy and prosperity of the UK. It will also consider whether the complexity and nature of the suspected offence warrant the application of the SFO's specialist skills, powers and capabilities to investigate and prosecute.[8]

The PNF was created in 2013 to strengthen France's ability to investigate and prosecute "tax fraud and large-scale economic and financial crime".[9] The PNF focuses on the most complex and serious financial crime, including corruption, misappropriation of public funds, aggravated tax fraud, money laundering and market abuse. It can investigate offences committed on French territory and those committed abroad by a person or entity regularly domiciled in France.[10]

Much like its US and UK counterparts, the PNF can receive initiating information from domestic or foreign authorities, as well as from whistleblowers, self-reports or the media.

Conduct of Investigations

The DOJ utilises several tools at its disposal to gather evidence, including wiretaps, informants and cooperating witnesses. It typically conducts investigations through federal law enforcement agencies (such as the FBI) operating in conjunction with grand juries – independent bodies vested with expansive investigative powers tasked with determining if there is probable cause that a federal crime has been committed. Grand jury powers include the ability to compel the production of corporate documents and records, and command testimony from anyone within the US. The DOJ can also obtain, via court order, warrants to enter, search and seize materials from premises.

The rules governing grand juries prevent "unreasonable or oppressive" demands for material,[11] and grand jury subpoenas

require that: (i) requests are relevant to the matter being investigated; (ii) there is a reasonable belief that the requested materials will yield admissible evidence; and (iii) the requests are sufficiently specific to the matter being investigated.[12] Moreover, a grand jury cannot demand materials or information that are protected by "recognized constitutional, common law or statutory privileges" such as attorney-client privilege.[13]

The recipient of a grand jury subpoena may challenge its validity in court, but grand jury powers are broad, and courts are loath to curb them without a clear cause.

The SFO relies on Section 2 of the Criminal Justice Act 1987 ("CJA") to compel persons or entities believed to have relevant information, to: (i) answer questions or provide information for any matter relevant to the investigation; and (ii) produce and explain relevant documents. However the SFO's ability to compel foreign companies to produce information held abroad, without resorting to Mutual Legal Assistance ("MLAT") requests to foreign authorities, was recently limited by the Supreme Court in *KBR, Inc.*[14] The SFO can also obtain court-ordered warrants to enter and search premises, and take possession of documents or other materials relevant to its investigation.

Like the DOJ, the SFO can enlist support from the police in conducting its investigations, thereby accessing more extensive police powers.

The PNF is also assisted by the police or specialised offices such as the *Office central de lutte contre la corruption et les infractions financières et fiscales* ("OCLCIFF"), which focuses on complex international corruption.[15]

The scope of the PNF's powers includes: (1) conducting compelled interviews, dawn raids and wiretaps; (2) retrieving data held by telecommunications operators; and (3) running undercover operations.

Whilst the tools may be similar, there are a number of areas where diverging approaches and processes can cause friction and create dilemmas for both investigating authorities and those under investigation.

French Blocking Statute

Originally enacted in 1968, the French Blocking Statute ("FBS") prohibits the disclosure of: (i) information relating to economic, commercial, industrial, financial or technical matters by any individual of French nationality or residence and any officer, representative, agent, employee of an entity having their office or an establishment in France of information which would harm the sovereignty, security or essential economic interests of France; and (ii) information of an economic, commercial, industrial, financial or technical nature by any person, including French companies, subject to international treaties or agreements with a view to gathering evidence in or in connection with foreign judicial or administrative proceedings. By criminalising French individuals' and companies' direct cooperation with foreign investigations, the FBS can create significant hurdles for international authorities conducting investigations within France.[16] By the same token, the FBS also fosters international cooperation by allowing the PNF to become aware of foreign interest in conduct involving France, open its own parallel investigation, and demand a role in a resulting joint investigation.

Resolution

While each agency employs their own individual procedures and standards in determining how to resolve investigations, the commonalities can be encapsulated in three overarching factors: (1) the weight and severity of the wrongdoing; (2) the nature and behaviour of the entity; and (3) public policy factors.

The DOJ, when deciding whether to proceed with or decline prosecution, relies on the same nine factors in the *Principles of Federal Prosecution of Business Organizations* that guide the opening of an investigation. Under these standards, if a company has voluntarily disclosed, fully cooperated, and remediated appropriately, they will likely receive a DPA or Non-Prosecution Agreement ("NPA"), absent aggravating factors.[17]

NPAs, in large part, are similar to DPAs: they generally require a company to pay a fine, admit to relevant facts, cooperate with the government, and enter into compliance and remediation commitments. The key difference is that while a DPA must be approved by a judge in court proceedings and is generally publicised, an NPA does not require court approval and is generally kept private; it is simply a letter of agreement between the DOJ and the offending corporate entity. This lack of publicity presents obvious benefits to the subject corporate; for example, its share prices can be protected from the downturn that generally follows negative publicity.

DPAs and NPAs "occupy an important middle ground between declining prosecution and obtaining the conviction of a corporation",[18] as they can, when used appropriately, help "restore the integrity of a company's operations" while "preserv[ing] the financial viability of a corporation", as well as "the government's ability to prosecute" should the corporate fail to meet the terms of the agreement.[19] While a proposed DPA and the corresponding dismissal of charges against the company must be judicially approved, this approval is, in practice, essentially a rubber-stamp, with judges having "no power" to deny a prosecutor's motion to dismiss charges based "on a disagreement with the prosecution's exercise of charging authority".[20] Judges have, however, recently expressed strong reservations with this approach, with one judge complaining: "I have absolutely no choice in this matter, no discretion whatsoever…I'm obliged to swallow the pill, whether I like it or not."[21]

On the other hand, failure to cooperate or the presence of aggravating factors may lead to prosecution, at which point the company may opt to plead guilty or go to trial. In October 2021, US Deputy Attorney General Monaco clarified that the DOJ, when making charging decisions, will consider *all* of the corporation's prior misconduct, whereas in the past DOJ policy required consideration only of a corporation's history of "*similar* misconduct".[22]

Beyond the above, the DOJ can also resort to civil actions and settlements as an alternative route to criminal enforcement.

In the UK, the DPA Code of Practice[23] ("the DPA Code") guides the SFO's decision on offering a DPA to companies suspected of wrongdoing.

In order to offer a DPA, the SFO must apply two tests: (i) the evidential test; and (ii) the public interest test. To meet the evidential test, the SFO must show that either: (a) there is sufficient evidence to provide a realistic prospect of conviction; or (b) there is a reasonable suspicion based upon some admissible evidence that the company has committed an offence, and there are reasonable grounds for believing that continued investigation would, within a reasonable time, provide sufficient admissible evidence to establish a realistic prospect of conviction. The SFO must also be satisfied that the public interest is properly served by entering into a DPA rather than proceeding to prosecution. If the evidential test is not satisfied, the investigation may be closed, or may continue in an effort to obtain sufficient evidence to meet the test. If the public interest demands prosecution rather than a DPA, then subject to there being sufficient evidence to provide a realistic prospect of conviction, full prosecution will follow.

Approval of a DPA is considered in a public hearing by a judge, who must conclude that the DPA is in the interests of justice and that its terms are fair, reasonable and proportionate. The role of the judiciary in the UK, as compared to the US, is of particular importance to the DPA process as the reviewing

judge has ultimate discretion over whether to approve a DPA. Therefore, whilst a judge has yet to reject a proposed DPA in the UK, the threat of refusal provides a strong incentive for negotiations to result in proposed penalties that are proportionate and justifiable, and therefore unlikely to be rejected.

Where a company is not offered a DPA, but is charged, it remains possible to enter plea negotiations over the terms of a guilty plea, as seen in the recent *GPT*[24] and *Petrofac*[25] cases. A statement of facts may be agreed along with a joint sentencing proposal, thereby obtaining greater predictability over the likely outcome. The penalty after a guilty plea, however, is a matter for the sentencing judge, who may go outside of the proposal.

In France, the Public Prosecutor will decide at the conclusion of an investigation whether there is sufficient evidence to proceed to trial or whether a company should be offered a *convention judiciaire d'intérêt public* ("CJIP") – an option available where that result would be in the public interest and public proceedings have not begun.[26]

CJIPs must be validated by a judge during a public hearing. The judge will assess whether the company should be offered a CJIP by determining: (1) whether it is appropriate to enter into a settlement; (2) whether all procedural rules have been followed during the negotiations between the company and the prosecutor; (3) whether the fine imposed is lawful;[27] and (4) the fine's proportionality to the gains derived from the company's wrongdoing.

Considerations for a DPA/CJIP

Where a company (and in the US, also individuals) decides that they would rather engage meaningfully with the authorities and secure a DPA/CJIP, rather than risk the uncertainty of potentially lengthy court proceedings, they must comply with the standards of cooperation set forth by the enforcement agencies.

Self-reporting

Self-reporting requires extremely careful and informed consideration and an in-depth analysis of the short-, medium- and long-term risks and benefits of doing so. Whilst law enforcement agencies strongly encourage self-reporting, it is possible for a company that did not initially self-report to ultimately obtain a DPA/CJIP if their subsequent cooperation is sufficient to compensate for that failure. However, failure to promptly self-report may lead to heavier penalties, particularly in the UK, where Lord Justice Edis in the *Amec Wheeler Foster* DPA described the decision of the company to not self-report earlier as "deplorable", noting that the "…whole outcome of the case would have been far better" had it self-reported at an earlier stage.[28]

Cooperation

Cooperation is the essential factor considered by the authorities when determining whether a DPA/CJIP is an appropriate resolution. Typically, it is the overall level of cooperation that matters, and any "initial reluctance to cooperate fully can be dealt with when considering the discount on any financial penalty".[29]

A company seeking a DPA/CJIP will generally be expected to identify suspected wrongdoing and those who committed it, report it within a reasonable time, and preserve and provide available evidence to the authorities.

There has recently been a shift in DOJ policy in this area, emphasising that in order to receive cooperation credit, organisations must provide "all non-privileged information about individuals involved in or responsible for the misconduct at issue".[30] During the Trump administration, disclosure requirements extended only to non-privileged information about individuals *substantially* involved.

The US deviates somewhat from its UK and French counterparts with respect to the waiver of legal privilege. In the US, a corporate can cooperate fully with a DOJ investigation without waiving legal privilege. Indeed, DOJ policy specifically forbids prosecutors from suggesting that a corporate under investigation waive privilege,[31] and its Corporate Enforcement Policy states that "[e]ligibility for cooperation or voluntary self-disclosure credit is not in any way predicated upon waiver of the attorney-client privilege or work product protection".[32]

The SFO, whilst not demanding waiver, views a corporate's waiver of privilege over materials generated during the course of an internal investigation as a "strong indicator of cooperation", favourably impacting its ability to achieve a DPA.[33] In the Airlines Services Limited DPA, the limited waiver of privilege over the content of the company's internal investigations was viewed by Justice May as an indication of the company's high level of cooperation with the SFO, which in turn led to a 50% discount to its ultimate financial penalty.[34]

The PNF asserts that maintaining legal privilege can meaningfully harm a company's ability to negotiate a CJIP.[35] According to the Guidelines issued by the PNF and the *Agence française anti-corruption* ("AFA"), (i) the work product created during an external lawyer's internal investigation will not be covered by French professional secrecy ("*secret professionnel*") as a matter of course, and (ii) a company's failure to provide documents on grounds of professional secrecy can be viewed as non-cooperation.[36]

Compliance programme

Enforcement authorities in the US, UK, and France have all made clear the importance, and potential benefit, of a robust anti-corruption compliance programme. DOJ Assistant Attorney General, Brian Benczkowski, told the Ethics and Compliance Initiative 2019 Annual Impact Conference that a good compliance programme "is the first line of defense that prevents the misconduct from happening in the first place. And if done right, it has the ability to keep the company off our radar screen entirely".[37] He also noted that even where a compliance programme does not prevent misconduct, it allows for better detection and investigation of the wrongdoing by the government: "At the end of a corporate investigation, prosecutors would weigh heavily the company's compliance program when determining whether and how to resolve the case." The SFO's compliance programme guidance provides that during investigations, the SFO "will need to assess the effectiveness of the organisation's compliance programme".[38]

The key attributes that the US, UK and French authorities cite as characteristics of a robust anti-corruption compliance programme broadly align, encouraging a dynamic, tailored, and proportionate programme, which: implements an internal framework for investigations and compliance violations; provides training to employees; and effectively monitors third parties operating on behalf of the company. Each authority also stresses the need for management to actively promote a culture of compliance.

The DOJ considers the state of a compliance programme, both at the time of the offence and at the time of the charging decision, when deciding whether to prosecute. On 1 June 2020, the DOJ updated its guidance to prosecutors on how to assess corporate compliance programmes, calling for "a reasonable, individualized determination in each case" of the programme's effectiveness.

In the UK, Sir Brian Leveson noted in his preliminary judgment of the Sarclad DPA that the government made "a policy

choice in bringing DPAs into the law of England and Wales, that a company's shareholders, customers and employees (as well as those with whom it deals) are far better served by self-reporting and putting in place effective compliance structures. When it does so, that openness must be rewarded and be seen to be worthwhile".[39]

Section 7(2) of the UK's Bribery Act 2010 also provides a defence to companies which have put in place adequate procedures designed to prevent a bribery offence from being committed. Even where procedures cannot be said to be adequate, the extent to which efforts were made to institute such procedures will be relevant to whether the case merits prosecution, a DPA, or no action.

In France, Sapin II requires companies with over 500 employees and revenues greater than EUR 100 million to implement effective compliance programmes.[40] Joint guidance issued by the PNF and AFA[41] provides that the effectiveness of a compliance programme will be "carefully examined by prosecutors when considering the possibility of entering into a CJIP". An ineffective compliance programme will not preclude the company from obtaining a CJIP, however the company will need to take active steps to demonstrate that it is serious about compliance and is willing to change its culture.

A circular issued by the French Ministry of Justice in June 2020 emphasised the importance of a well-tailored compliance programme in order for a company to be eligible for a CJIP, requiring particular attention to ensure that such programme is adequate and proportionate to the risks faced.[42]

DPA/CJIP Implications

Irrespective of the degree of cooperation offered by companies to the authorities, the end result of a DPA/CJIP is likely to be a substantial financial penalty. Each of the authorities has their own method of calculating the penalty and making appropriate reductions, as outlined below. In a multijurisdictional investigation, the calculation of the penalty may be influenced by any other penalties that are to be imposed in different jurisdictions so as to allow for a coordinated global resolution which is fair and proportionate, and which does not involve multiple fines for the same conduct.

Penalties

United States

The US Sentencing Guidelines are the starting point for sentencing determinations.[43] Calculating penalties pursuant to the Guidelines involves consideration of: (1) the offence; (2) the value of the loss; and (3) aggravating and mitigating factors.

Where a company is found to have met all the requirements of cooperation for a DPA, the DOJ will recommend a "50% reduction off of the low end of the US Sentencing Guidelines fine range, except in the case of a criminal recidivist". For those who failed to voluntarily disclose misconduct, but "later fully cooperated and timely and appropriately remediated", the DOJ will recommend up to a 25% reduction.

United Kingdom

The value of any fine proposed in a DPA must correspond to the value of a fine that the court might have imposed if the company had pleaded guilty.[44] Companies found guilty of bribery of another person, being bribed, or bribery of a foreign public official are liable to an unlimited fine. The applicable UK Sentencing Guidelines divide the sentencing process into a series of steps.[45] The appropriate level of fine is determined by assessing the gross profit from the contract obtained, retained or sought as a result of the bribery offence (the "harm figure"), then multiplying that figure by a multiplier (between 20–400%) determined by the level of culpability attributable to the company, and the presence of a series of aggravating and mitigating factors.

The Guidelines stipulate that whilst the fine must be sufficiently substantial to have a real economic impact, the court should ensure that the effect of the fine is proportionate to the gravity of the offence and will take into account whether the fine would have the effect of putting the company out of business.

The company must also disgorge profits made from the offending behaviour and cover the legal costs incurred by the SFO.

The fine element under a DPA may be discounted by up to 50% depending on the level of cooperation provided, compared with the maximum one-third discount generally available for entering an early guilty plea following charge.

France

In the context of a CJIP, Sapin II imposes a cap on fines at 30% of a company's average annual revenue over the prior three years.[46] The PNF calculates fines as a multiple of the benefit to the company from the criminal conduct, determined by a number of aggravating and mitigating factors. Aggravating factors include: (1) repeated or systemic acts of corruption; (2) the corruption of public officials; (3) prior convictions/sanctions imposed in France or abroad; and (4) the use of the company's resources to conceal the acts of corruption. Mitigating factors include: (1) self-reporting within a reasonable time; (2) excellent cooperation; (3) the implementation of an effective compliance programme; and (4) remedial measures.

Monitorships

US authorities are the leading proponents of monitorships, with nearly 60% of DOJ corporate resolutions in FCPA cases requiring the appointment of an independent compliance monitor for a set period of time.

While there was a retrenchment in the DOJ's monitorship policy in the last few years, with a monitorship only considered appropriate where "the proposed scope of a monitor's role is appropriately tailored to avoid unnecessary burdens to the business's operations",[47] Deputy Attorney General Monaco announced in 2021 that this policy was "rescind[ed]", and that the DOJ was "free to require the imposition of independent monitors whenever it is appropriate to do so in order to satisfy our prosecutors that a company is living up to its compliance and disclosure obligations under the DPA or NPA".[48]

In the UK, it was anticipated that under the stewardship of Director Osofsky, a former US prosecutor and a former monitor in private practice, monitorships would become more prevalent in UK DPAs. However, the G4S C&J DPA in July 2020 remains the only UK DPA to require the appointment of a monitor (in this case, referred to as an external third party "reviewer") to report on the implementation of compliance measures.

The CJIP Guidelines also provide for ongoing monitoring under a CJIP. Responsibility for monitoring companies registered or operating in France or on French territory is delegated to the AFA,[49] and the company can apply for a period of up to three years, pursuant to a five-stage process: (1) the AFA will carry out an initial audit to assess the measures in place within the company to prevent and detect fraud; (2) the company will propose an action plan; (3) the action plan proposed will be approved by the AFA; (4) the AFA will validate the key tools of the anti-corruption programme, carry out targeted audits and prepare annual reports; and (5) the AFA will carry out a final audit and transmit its report to the PNF.

Conclusion

Changes in working practices and disruption to established operating and compliance processes as a result of COVID-19 will no doubt be an area of particular focus for the enforcement agencies as the corporate world begins to recover. Nevertheless, companies can ensure that they are prepared for tough regulator questions by reviewing, adjusting and strengthening their compliance practices to fit changed circumstances, and ensuring that any flaws in the system are recognised in good time.

Law enforcement processes and procedures long established in the US have been increasingly adopted and adapted by the UK and French authorities, who in turn are influencing the thinking of their American counterparts. Companies need to be cognisant of the nuances of each agency's enforcement procedures, as well as their respective avenues for resolving investigations.

Where wrongdoing has been discovered, engaging with the authorities in a meaningful way with the intention of obtaining a DPA/CJIP will not be in every company's interest. However, in the current, aggressive corruption enforcement environment, companies should anticipate increased scrutiny and be ready to navigate multiple legal regimes, enforcement authorities and procedures. Companies with potential liability in multiple jurisdictions should carefully consider their strategy and options at the outset and seek advice from experienced outside counsel.

Endnotes

1. Justice Manual 9-2.001; 28 U.S.C. § 547, available at https://www.justice.gov/jm/jm-9-2000-authority-us-attorney-criminal-division-mattersprior-approvals.
2. The DOJ's position is being tested in the courts. In June 2019, a Lebanese citizen alleged to have coordinated USD 200 million in kickbacks was acquitted by a jury. Post-trial polling revealed that the jury acquitted because they could not understand how Brooklyn prosecutors had the authority to prosecute crimes not occurring within their jurisdiction. The jury rejected the prosecutors' argument that the fact that bribes had passed through the US financial system via correspondent bank accounts was sufficient to establish jurisdiction. *See United States v. Boustani*, 1:18-cr-00681 (E.D.N.Y.).
3. AG Guidelines, available at https://www.justice.gov/archives/ag/attorney-generals-guidelines-general-crimes-racketeering-enterprise-and-domestic#:~:text=The%20standard%20of%20%22reasonable%20indication,a%20prudent%20investigator%20would%20consider.
4. FCPA Manual, Chapter 5, available at https://www.sec.gov/spotlight/fcpa/fcpa-resource-guide.pdf.
5. Section 7, Bribery Act 2010, available at https://www.legislation.gov.uk/ukpga/2010/23/section/7.
6. Sections 1, 2 and 6, Bribery Act 2010, available at https://www.legislation.gov.uk/ukpga/2010/23.
7. Section 12, Bribery Act 2010, available at https://www.legislation.gov.uk/ukpga/2010/23/section/12 and Ministry of Justice, The Bribery Act 2010 Guidance, available at https://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf.
8. Available at https://www.sfo.gov.uk/about-us/.
9. The PNF was created by Law No. 2013-1117 of 6 December 2013 on combatting tax fraud and large-scale economic and financial crime. Also *see* the CJIP Guidelines, 26 June 2019, available at https://www.agence-francaise-anticorruption.gouv.fr/files/files/Lignes%20directrices%20PNF%20CJIP.pdf.
10. Articles 435-6-2 and 435-11-2 of the French Criminal Code.
11. Rule 17 (c)(2), Federal Rules of Criminal Procedure, available at https://www.federalrulesofcriminalprocedure.org/title-iv/rule-17-subpoena/.
12. *See* e.g. *United States v. Komisaruk*, 885 F.2d 490, 494 (9th Cir. 1989). This requirement may also excuse compliance with a subpoena if it would result in violation of a foreign law; *see In re Grand Jury Subpoena*, 912 F.3d 623, 633 (D.C. Cir. 2019) (holding that compliance with the grand jury subpoena was neither unreasonable nor oppressive because the appellant failed to meet its burden that compliance would be contrary to the foreign state's laws).
13. *In re Grand Jury Matters*, 751 F.2d 13, 18 (1st Cir. 1984).
14. *R (on the application of KBR, Inc.) v. Director of the Serious Fraud Office* [2021] UKSC 2.
15. OCLCIFF teams are trained in accounting, corporate law, public procurement law and other relevant knowledge that is necessary to unravel international financial crime schemes.
16. Punishable by imprisonment of up to six months and/or a fine of up to EUR 18,000 for an individual and EUR 90,000 for a company; Article 3, Law No. 68-678 of 26 July 1968, available at https://www.legifrance.gouv.fr/loda/id/JORFTEXT000000501326/1980-07-17/.
17. Department of Justice Corporate Enforcement Policy, available at https://www.justice.gov/criminal-fraud/file/838416/download.
18. Department of Justice, Justice Manual, 9-28.200, available at https://www.justice.gov/jm/jm-9-28000-principles-federal-prosecution-business-organizations.
19. Department of Justice, Justice Manual, 9-28.1100.
20. *United States v. Fokker Services B.V.*, 818 F.3d 733, 742 (D.C. Cir. 2016) ("[f]or instance, a court cannot deny leave of court because of a view that the defendant should stand trial notwithstanding the prosecution's desire to dismiss the charges, or a view that any remaining charges fail adequately to redress the gravity of the defendant's alleged conduct…. [t]he authority to make such determinations remains with the Executive").
21. Arraignment, *United States v. U.S. Bancorp,* No. 18-cr-150, at 10 (S.D.N.Y. Feb. 22, 2018), ECF No. 9; *see* also *United States v. Transport Logistics Int'l, Inc.*, No. 18-CR-00011, at *3 (D. Md. Apr. 2, 2018).
22. Deputy Attorney General Lisa O. Monaco, American Bar Association ("ABA")'s 36th National Institute on White Collar Crime (Washington, D.C., 28 October 2021), available at https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-o-monaco-gives-keynote-address-abas-36th-national-institute.
23. The SFO and Crown Prosecution Service, "Deferred Prosecution Agreements Code of Practice: Crime and Courts Act 2013", available at https://www.cps.gov.uk/sites/default/files/documents/publications/DPA-COP.pdf.
24. *Regina v. GPT Special Project Management Limited*, Southwark Crown Court (Case No: T20200397 [2021]).
25. *Regina v. Petrofac Limited*, Southwark Crown Court, 2021.
26. CJIP Guidelines, p. 6, 27 June 2019, available at https://www.agence-francaise-anticorruption.gouv.fr/files/files/EN_Lignes_directrices_CJIP_revAFA%20Final%20(002).pdf.
27. Fines in France are capped at 30% of the annual turnover of a company over the past three years, and any fines exceeding that amount are not permitted.
28. *Serious Fraud Office v. Amec Foster Wheeler Energy Limited* [2021]; Edis LJ at paras 20, 35 and 44, available at https://www.sfo.gov.uk/download/amec-foster-wheeler-energy-limited-deferred-prosecution-agreement-judgment/.

29. *SFO and G4S Care and Justice Services (UK) Limited*; Davis J at para. 27 of the judgment, available at https://www.judiciary.uk/wp-content/uploads/2020/07/SFO-v-G4S-Judgment.pdf.
30. Deputy Attorney General Lisa O. Monaco, ABA's 36th National Institute on White Collar Crime (Washington, D.C., 28 October 2021), available at https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-o-monaco-gives-keynote-address-abas-36th-national-institute.
31. Department of Justice, Justice Manual, 9-28.710, available at https://www.justice.gov/jm/jm-9-28000-principles-federal-prosecution-business-organizations.
32. FCPA Corporate Enforcement Policy, p. 4, available at https://www.justice.gov/criminal-fraud/file/838416/download.
33. Lisa Osofsky, Director of the SFO, speaking at the Royal United Services Institute in London on 3 April 2019, available at https://www.sfo.gov.uk/2019/04/03/fighting-fraud-and-corruption-in-a-shrinking-world/.
34. *Serious Fraud Office v. Airline Services Limited* [2020], available at https://www.sfo.gov.uk/download/airline-services-limited-deferred-prosecution-agreement/.
35. The CJIP is the French equivalent of a DPA and became available following Sapin II. CJIPs are available for companies (but not individuals) in matters of corruption, influence peddling, and laundering of the proceeds of tax fraud and related or connected offences. *See* CJIP Guidelines, p. 10, 27 June 2019, available at https://www.agence-francaise-anticorruption.gouv.fr/files/files/EN_Lignes_directrices_CJIP_revAFA%20Final%20(002).pdf.
36. CJIP Guidelines, 27 June 2019, available at https://www.agence-francaise-anticorruption.gouv.fr/files/files/EN_Lignes_directrices_CJIP_revAFA%20Final%20(002).pdf.
37. Assistant Attorney General Brian A. Benczkowski, Ethics and Compliance Initiative 2019 Annual Impact Conference (Dallas TX, 30 April 2019), available at https://www.justice.gov/opa/speech/assistant-attorney-general-brian-benczkowski-delivers-keynote-address-ethics-and.
38. "Evaluating a Compliance Programme", SFO Operational Handbook, available at https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/guidance-for-corporates/evaluating-a-compliance-programme/ (hereinafter "SFO Guidance").
39. *Serious Fraud Office v. Sarclad* [2016], available at https://www.sfo.gov.uk/download/sarclad-ltd-and-sfo-deferred-prosecution-agreement-judgment/.
40. Article 17, Sapin II.
41. "*Guidelines on the Implementation of the Convention Judiciaire Intérêt Public*", AFA, at 7 (20 September 2019), available at https://www.agence-francaise-anticorruption.gouv.fr/fr/traduction-en-anglais-des-lignes-directrices-convention-judiciaire-dinteret-public-elaborees-par.
42. *Circulaire de politique pénale en matière de lutte contre la corruption International*, French Ministry of Justice (2 June 2020), available at http://www.justice.gouv.fr/bo/2020/20200611/JUSD2007407C.pdf.
43. United States Sentencing Commission, Federal Sentencing Guidelines Manual (2018).
44. Crime and Courts Act 2013, Schedule 17, para. 5(4).
45. The Sentencing Council, "*Sentencing Guidelines for use in Crown Court*", available at https://www.sentencingcouncil.org.uk/wp-content/uploads/Fraud-Bribery-and-Money-Laundering-offences-definitive-guideline-Web.pdf.
46. The French Code of Criminal Procedure – Article 41-1-2.
47. Assistant Attorney General Brian A. Benczkowski, Ethics and Compliance Initiative 2019 Annual Impact Conference (Dallas TX, 30 April 2019), available at https://www.justice.gov/opa/speech/assistant-attorney-general-brian-benczkowski-delivers-keynote-address-ethics-and.
48. Deputy Attorney General Lisa O. Monaco, ABA's 36th National Institute on White Collar Crime (Washington, D.C., 28 October 2021), available at https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-o-monaco-gives-keynote-address-abas-36th-national-institute.
49. "*Guidelines on the Implementation of the Convention Judiciaire D'Interêt Public*", 26 June 2019, at Annex 1.

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