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DOJ must beware unintended consequences, as multilateral settlements rise

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Jenner & Block partners David Bitkower, the criminal division's former second-in-command, and Nicholas Barnaby together with associate Marguerite Moeller argue that multilateral investigations could increase the DOJ's leverage in settlement negotiations and lead to unfair consequences for companies.

In public remarks over the past two weeks, the acting assistant attorney general for the criminal division, Ken Blanco, and the acting chief of the fraud section, Sandra Moser, emphasised the continuing importance to the Department of Justice (DOJ) of investigating and prosecuting transnational corporate crime. Indeed, it has become commonplace for businesses to face prosecution in the US for misconduct that took place primarily abroad. More recently, foreign enforcement authorities - with American encouragement - are showing newfound energy in pursuing their own prosecutions of business crime, with the result that companies increasingly face the prospect of simultaneous prosecutions in two or more countries for the same alleged violations. As commentators have noted, and as borne out in Blanco's and Moser's recent remarks, has appropriately recognised the potential for unfairness when prosecutions pile up like this, and there have been encouraging signals that this concern remains on DOJ's radar in the new administration.

But DOJ officials have also recently indicated that their flexibility may have limits. And these limits could in turn have some unfair and potentially unintended consequences for corporations that find themselves under the scrutiny of multiple sovereigns at the same time. The risk of unfairness will only grow as the world gets smaller, and foreign enforcement authorities take note of the benefits of pursuing corporate investigations. Global businesses will need to attune themselves to this changing landscape, and to the message from DOJ, as they seek to manage risk and secure appropriate resolutions.

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The multiplayer arena

Over the past decade, the US has significantly expanded its criminal enforcement efforts aimed at alleged corporate misconduct taking place primarily or entirely abroad. This trend is perhaps most prominent under the Foreign Corrupt Practices Act (FCPA), which explicitly targets overseas corruption, but includes other types of crime such as financial fraud and rate-rigging as well. The exercise of American jurisdiction in those scenarios can be perfectly appropriate in an increasingly globalised age, where overseas actors can inflict serious harm on American citizens and the American economy. But it also increases the risk of multiple prosecutions for the same conduct when local authorities - or other foreign authorities reaching beyond their own borders - see a benefit to exercising jurisdiction as well.

More and more, foreign authorities are doing so, and sovereigns are bumping up against each other. Just as examples, British and American authorities both pursued resolutions with Deutsche Bank in the Libor scandal in 2015; and British, American, and Brazilian authorities proceeded on corruption-related charges against Rolls Royce in 2017. In 2016, Brazilian prosecutors - who have exposed momentous bribery schemes in that country in recent years - and their American counterparts both brought parallel bribery cases against multinationals Odebrecht, Braskem, and Embraer; the Swiss joined in on the Odebrecht and Braskem cases. And the Americans and Dutch reached simultaneous corruption-related resolutions with communications giant VimpelCom in 2015. What's more, we are probably seeing only the first stirrings of this phenomenon. A combination of trends, including a commendable international focus on the harms caused by corruption; an increase in lead-sharing and coordination among law enforcement agencies; and the obvious value of massive corporate penalties to government treasuries will likely stoke the existing fires and light other ones around the world.

Ensuring fairness by offsetting penalties

In the centre of this busy scene, American officials have acknowledged the potential for unfairness that can come with multiple prosecutions for the same conduct, and affirmed their willingness to work to avoid multiple penalties. For example, the most-recent Senate-confirmed head of the department's criminal division, Leslie Caldwell, stated last year that, in recent cases involving multinational resolutions, DOJ "calculated the total criminal sanctions that were appropriate based on the offence conduct and other factors and then reduced the share payable to the US to account for penalties imposed by other countries or by regulators for the same conduct." And there is a track record to bear out this policy statement: As far back as the FCPA case against Siemens in 2008, the plea documents set forth that the company's US fine was reduced in part due to its payment of penalties in the related prosecution in Germany. More recently, the numbers have been more specific: In the VimpelCom FCPA case, for example, DOJ calculated that the overall criminal penalties should be approximately US$460 million, but then credited 50% of that amount to offset penalties imposed by the Dutch authorities. That US$230 million discount was actually greater than the roughly US$210 million credit VimpelCom received from DOJ for its decision to cooperate with the investigation.

Most notable, perhaps, is the Odebrecht example. In connection with an FCPA resolution in 2016, DOJ calculated that Odebrecht's decade-long pattern of bribing public officials in a dozen countries merited a total penalty of US$2.6 billion, after taking into account a US$1.5 billion credit for "the defendant's full cooperation and remediation," and a further US$1.9 billion discount to reflect the company's ability to pay. But DOJ also agreed to offset the vast majority - 90% - of that US$2.6 billion to account for penalties levied by Brazil, where the company is headquartered and much of the investigative work was done, and Switzerland. Thus, at the end

of the day, the value of the offset granted by DOJ in the Odebrecht case was worth over US$2.3 billion, far more than the value of the credit granted for cooperation and remediation. Ultimately, Odebrecht only paid US$93 million to US authorities due to a further reduction reflecting the company's ability to pay.

Offsets such as these, which even the prosecutors agree can be essential to preserve fairness, are not specifically accounted for in the law. The major international corruption conventions say nothing to address global resolutions. And neither the relevant US statutes, such as the FCPA, nor the US sentencing guidelines explicitly require that an American penalty take into account fines paid to foreign jurisdictions for the same conduct. Thus, the developing practice of calculating offsets - even though it can be equally important or more important than the calculation of cooperation credit - has been regulated only informally. Like much of the rest of the practice governing corporate resolutions, it has developed through negotiation between corporate counsel and DOJ prosecutors based on principles of fairness and precedent, and in the shadow of what a federal court would likely determine if confronted with a disputed sentencing proceeding. But disputed criminal resolutions can be catastrophic for a corporation, which highlights the reliance our system places on fairness in negotiations with the government.

Limits to DOJ's flexibility?

The department's current leadership has mostly hewed to the prior line when it comes to the fairness of global resolutions. In speeches in March and April of this year, using identical language, two senior Justice Department officials reaffirmed that the department seeks to reach global resolutions for misconduct in order to ensure that companies "are not unfairly penalized for the same conduct" by multiple prosecuting authorities. As other commentators have noted, this emphasis on fairness in global resolutions affirms that avoiding duplicative penalties is an important consideration.

But some additional considerations about the appropriateness of offsets have begun to creep into DOJ's language as well. In the March speech, for example, Acting Assistant Attorney General Blanco, emphasised the fairness of "global resolutions that apportion penalties between the relevant jurisdictions," but added the qualification that such resolutions are intended for companies "seeking to accept responsibility." And in the April speech, another criminal division official was more explicit about potential limits on offsets, explaining that the department's "willingness to apportion or credit penalties based on resolutions with other regulators assumes that the company cooperated with our investigation and did not engage in forum shopping to avoid department involvement in the matter."

Neither official offered a specific example to illustrate what this new language was meant to convey or whether it signalled a policy shift, and no recent resolutions have clearly presented this issue. And it would be difficult to argue with the premise that a company's decision to cooperatively resolve potential liability in multiple forums would, at a minimum, greatly facilitate the process of offsetting penalties among those jurisdictions. But the implication that negotiated offsets may not be available at all to companies that opt not to cooperate, or that are deemed to have engaged in "forum shopping," could be highly significant for companies that are exposed to possible FCPA risk.

First, if DOJ is serious about denying negotiated offsets to companies that do not cooperate with its investigations, the incentives for a multinational company to cooperate - already quite high - will likely vault even higher. As the Odebrecht and VimpelCom resolutions demonstrate, the value of offsets can be as important as or even more important than the credit DOJ is willing to afford for cooperation - in the Odebrecht case, the

value was over US$2.3 billion. By seeking to condition the availability of that credit on cooperation, DOJ could instantly and massively increase its potential leverage on a company facing potential charges.

This increased leverage, in turn, would magnify the impact of other DOJ policies that define what type of assistance qualifies as "cooperation" in the first place. For example, the department's 2015 policy on individual accountability (the "Yates Memo") denies any cooperation credit to a company unless the company provides prosecutors with all relevant facts regarding the individuals involved in the wrongdoing. And the criminal division's own FCPA pilot programme, currently under review for potential extension, has gone even further, requiring companies to do things such as make witnesses available from overseas, translate documents, and seek creative ways around foreign data privacy laws. Companies are already under significant pressure to adhere to these demands in order to earn valuable cooperation credit; but if the availability of offsets is tethered to cooperation, the pressure to adhere to these policies could in some cases become effectively irresistible.

Second, a policy to foreclose offsets for companies that "forum shop" could complicate a company's decision whether and how to self-disclose violations to authorities, lest it be accused by DOJ of doing so in the wrong way. There are many valid reasons why a company might want to disclose potential wrongdoing to a foreign country before going to the US. For example, the company may be based abroad and have committed most or all of the relevant conduct in its home country; or it may have a good-faith belief that the US has no jurisdiction over the conduct; or it may have been asked by foreign authorities to keep quiet pending an ongoing investigation.

In any of these cases, a DOJ policy that penalises companies that choose to self-disclose in a foreign forum first will put pressure on those companies to disclose to the US simultaneously or soon thereafter - and risk the downsides of that decision, whether they include potentially unnecessary investigative costs or even raising the ire of local authorities. Moreover, one can imagine other governments adopting a reciprocal rule, requiring, say, an immediate call to the UK's Serious Fraud Office or the Brazilian prosecutor whenever a company self-reports to DOJ.

DOJ will presumably have occasion to clarify exactly what it means by "forum shopping," but there is certainly a possibility that these dynamics could backfire and chill self-disclosures. Companies will likely think even more carefully about turning themselves in if the result is that every case - no matter how marginal the connection to a particular country, or how tenuous the jurisdictional tie - is likely to become a pile-up. Indeed, it is counterintuitive in this regard that DOJ has granted offset credit to companies such as Odebrecht and VimpelCom that did not self-disclose in the first place, but is now suggesting that it may withhold offset credit from companies that do self-disclose, but do so in the wrong manner. By contrast, DOJ might more reasonably say that a company expecting offset credit may self-disclose first to another sovereign, but should not negotiate a resolution absent the opportunity for coordination with authorities in the US.

Finally, depending how any such policies were implemented, they could create a significant risk of unfairness. There is no requirement in American law to cooperate with an investigation of oneself, much less to comply with the Yates Memo or the strictures of the FCPA pilot programme. Companies have a constitutional right to forsake cooperation credit and hold the government to its burden of proof. Although the government can offer benefits for cooperation and acceptance of responsibility, the law prohibits it from penalising defendants for exercising their rights. If DOJ intends to require cooperation as a precondition for offset credit, it should articulate how that requirement is consistent with the law, and with the fairness principles its own leadership has articulated. Similarly, companies facing a multitude of potential prosecutors are already in a difficult position when deciding whether and where to self-report. Particularly if it wants to promote such disclosures, DOJ should be clearer

about what it views as inappropriate "forum-shopping," and how it would react if other countries took the same position.

What's next?

DOJ has been at the vanguard of identifying and remedying some of the risk of unfairness that comes along with the rise in multijurisdictional prosecutions. But as offsets assume an ever-greater importance in assuring appropriate global resolutions, so too does the responsibility of American prosecutors - and those in other governments - to use their leverage judiciously. Companies with potential exposure for misconduct that occurred abroad should closely watch statements from DOJ officials on the availability of offset credit, and carefully analyse resolutions in such cases. If DOJ ultimately takes an approach likely to result in multiple penalties for the same conduct, we may ultimately see a corporate defendant seeking a more judicious ruling from a court.