Global Investigations Review

The Practitioner's Guide to Global Investigations

Volume I: Global Investigations in the United Kingdom and the United States

Fifth Edition

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

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Fines, Disgorgement, Injunctions, Debarment: The US Perspective

Charles D Riely, Amanda L Azarian and Grace C Signorelli-Cassady[1]

26.1 Introduction

This chapter provides an overview of the potential fines, penalties and other collateral consequences that corporates and individuals may face in the United States when defending against, or settling an enforcement action with, US authorities. The chapter then provides examples of the fines, penalties and other remedies associated with particular federal criminal statutes of potential interest, including the Foreign Corrupt Practices Act and anti-money laundering statutes.

US enforcement authorities have a variety of means to seek redress from corporates and individuals, including financial penalties and equitable remedies. The general purpose and policy objectives behind these remedies are (1) to deter the defendant and others from committing such offences in the future, (2) to protect the public, (3) to punish the defendant and (4) to promote rehabilitation of the defendant.[2] In considering fines and penalties, the US enforcement authorities and courts will consider the facts and circumstances of the matter, including whether the defendant accepts responsibility for the conduct, any remediation that has been effected and co-operation by the defendant with the relevant enforcement authorities.[3]

See Chapter 10 on co-operating with authorities

1 Charles D Riely is a partner, and Amanda L Azarian and Grace C Signorelli-Cassady are associates, at Jenner & Block LLP. The authors wish to acknowledge the contribution of Gayle E Littleton, former partner at Jenner & Block, to this chapter in this current edition and the fourth edition, and Rita D Mitchell of Willkie Farr & Gallagher, the original author of the chapter in previous editions on which this chapter is partly based.

2 See, e.g., Department of Justice, Justice Manual § 9-27.110.

3 See, e.g., Department of Justice, Justice Manual § 9-27.420.

In recent years, both the Department of Justice (DOJ) and Securities and Exchange Commission (SEC) have been successful in extracting significant financial penalties as part of their enforcement actions and settlements.[4] These penalties depend on the facts and circumstances and range from penalties in the five- to six-figure range[5] to settlements in excess of several million dollars.[6] These include cases brought by the DOJ, individual US attorney offices and the SEC. For example, in 2019, the DOJ obtained more than US$3 billion in total settlements and judgments from civil cases brought pursuant to the False Claims Act alone.[7] Likewise, in 2019, the US Attorney's Office for the District of Maryland, which includes some of the area surrounding the US capital, Washington, DC, collected more than US$77 million in criminal and civil actions,[8] and the US Attorney's Office for the Northern District of Georgia, which includes Atlanta, was credited with over US$169 million in criminal and civil collections.[9] In fiscal year 2019, the SEC brought 862 enforcement actions and obtained judgments and orders totalling approximately US$4.3 billion in disgorgement and penalties.[10]

4 For example in 2018, Société Générale agreed to pay over US$1 billion to US and French authorities to resolve charges relating to bribery of officials in Libya and manipulation of the London Inter-Bank Offered Rate, of which US$860 million was in criminal penalties and US$475 million was in regulatory penalties and disgorgement. (Department of Justice press release, 'Société Générale S.A. Agrees to Pay $860 Million in Criminal Penalties for Bribing Gaddafi-Era Libyan Officials and Manipulating LIBOR Rate' (4 June 2018), available at https://www.justice.gov/opa/pr/soci-t-g-n-rale-sa-agrees-pay-860-million-criminal-penalties-bribing-gaddafi-era-libyan.) In March 2019, a Russian telecommunications company, Mobile TeleSystems PJSC (MTS), settled Foreign Corrupt Practices Act (FCPA) violations with the SEC and DOJ for a total of US$850 million, none of which will be paid to non-US enforcement authorities. (Department of Justice press release, 'Mobile Telesystems Pjsc and Its Uzbek Subsidiary Enter Into Resolutions of $850 Million with the Department of Justice for Paying Bribes In Uzbekistan' (7 March 2019), available at https://www.justice.gov/opa/pr/mobile-telesystems-pjsc-and-its-uzbek-subsidiary-enter-resolutions-850-million-department.)

5 Department of Justice press release, 'Kansas Hospital Agrees to Pay $250,000 To Settle False Claims Act Allegations' (31 May 2019), available at https://www.justice.gov/usao-ks/pr/kansas-hospital-agrees-pay-250000-settle-false-claims-act-allegations.

6 Department of Justice press release, 'Department Of Justice Reaches $5.5 Million Settlement With Van Andel Research Institute To Resolve Allegations Of Undisclosed Chinese Grants To Two Researchers' (19 December 2019), available at https://www.justice.gov/usao-wdmi/pr/2019_1219_VARI.

7 Department of Justice press release, 'Justice Department Recovers over $3 Billion from False Claims Act Cases in Fiscal Year 2019' (9 January 2020), available at https://www.justice.gov/opa/pr/justice-department-recovers-over-3-billion-false-claims-act-cases-fiscal-year-2019.

8 Department of Justice press release, 'Maryland U.S. Attorney's Office Collects Over $77 Million in Civil And Criminal Actions for U.S. Taxpayers in FY 2019' (26 December 2019), available at https://www.justice.gov/usao-md/pr/maryland-us-attorney-s-office-collects-over-77-million-civil-and-criminal-actions-us.

9 Department of Justice press release, 'U.S. Attorney's Office credited with over $169 million collected in civil and criminal actions in fiscal year 2019' (26 February 2020), available at https://www.justice.gov/usao-ndga/pr/us-attorney-s-office-credited-over-169-million-collected-civil-and-criminal-actions.

10 Securities and Exchange Commission, Division of Enforcement 2019 Annual Report, available at https://www.sec.gov/files/enforcement-annual-report-2019.pdf.

In addition, in 2018, the DOJ issued a policy emphasising the importance of prosecuting individuals and discouraging 'disproportionate enforcement of laws by multiple authorities.' The policy provided that prosecutors should 'avoid the unnecessary imposition of duplicative fines, penalties, and/or forfeiture' against a corporate being investigated by multiple enforcement authorities.[11] The policy requires DOJ lawyers from all departments to coordinate internally and, when possible, with 'other federal, state, local, or foreign enforcement authorities' to curb the practice of 'piling on' fines and penalties, 'with the goal of achieving an equitable result'.[12] Although it is difficult to measure the impact of these policies in practice, US authorities have continued to bring actions with multiple regulators and serious financial ramifications. Accordingly, corporates and individuals facing enforcement action should be mindful of the potential consequences and the opportunities to manage and reduce the ultimate fines and penalties.

26.2 Standard criminal fines and penalties available under federal law

26.2.1 Financial penalties

Many federal statutes contain their own fining provisions, which typically include a maximum fine amount. Additionally, for some crimes, the Alternative Fines Act provides for an alternative maximum fine of double the gross gain (or gross loss caused to another) from the unlawful activity.[13] Where a fine is imposed against an officer, director, employee, agent or shareholder of a corporate issuer, the fine may not be paid, directly or indirectly, by the corporate issuer.[14]

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11 Department of Justice, Justice Manual § 1-12.100 – Coordination of Corporate Resolution Penalties in parallel and/or Joint Investigations and Proceedings Arising from the Same Misconduct (May 2018).

12 The policy sets out various factors that should be considered when coordinating between multiple DOJ units or enforcement authorities, including 'the egregiousness of a company's misconduct; statutory mandates regarding penalties, fines, and/or forfeitures; the risk of unwarranted delay in achieving a final resolution; and the adequacy and timeliness of a company's disclosures and its cooperation with the Department, separate from any such disclosures and cooperation with other relevant enforcement authorities'. (Department of Justice, Justice Manual § 1-12.100 – Coordination of Corporate Resolution Penalties in parallel and/or Joint Investigations and Proceedings Arising from the Same Misconduct (May 2018).) A recent example of this policy in action can be found in the Department's March 2019 US$850 million settlement with MTS and related SEC settlement carrying a civil penalty of US$100 million. According to a press release: 'Consistent with Coordination of Corporate Resolution Penalties in Parallel and/or Joint Investigations and Proceedings Arising from the Same Misconduct (Justice Manual 1-12.100), the Department of Justice agreed to credit the civil penalty paid to the SEC as part of its agreement with MTS. Thus, the combined total amount of criminal and regulatory penalties paid by MTS and [its subsidiary] to U.S. authorities will be $850 million.' (Department of Justice press release, 'Mobile Telesystems Pjsc and Its Uzbek Subsidiary Enter Into Resolutions of $850 Million with the Department of Justice for Paying Bribes In Uzbekistan' (7 March 2019), available at https://www.justice.gov/opa/pr/mobile-telesystems-pjsc-and-its-uzbek-subsidiary-enter-resolutions-850-million-department.)

13 See 18 U.S.C. § 3571; *Southern Union Co. v. United States*, 132 S.Ct. 2344, 2350-52 (2012).

14 15 U.S.C. § 78ff(c)(3).

In addition, for certain offences, the DOJ may seek criminal or civil forfeiture, or both, of property that constitutes, or is derived from proceeds traceable to, the offence.[15] Recent examples of forfeiture include (1) nearly US$1.1 billion in assets recovered in connection with various forfeiture cases related to the international money laundering and bribery scheme involving the Malaysian sovereign wealth fund 1MDB,[16] and (2) more than US$54 million forfeited in 2020 related to the DC Solar Ponzi scheme where at least half of the solar generators claimed to have been manufactured by the defendant did not actually exist.[17]

Defendants may also be required to pay restitution, taking into consideration the amount of loss sustained by each victim, the financial resources of the defendant and any other factors the court deems appropriate.[18]

Although corporates may attempt to reduce the amount of financial fines or penalties by claiming an inability to pay, the DOJ closely scrutinises any such arguments. On 8 October 2019, the DOJ issued a non-binding policy memorandum to Criminal Division attorneys that provides 'guidance and an analytical framework' on evaluating a company's ability to pay a criminal fine or criminal monetary penalty when inability to pay is claimed.[19] The memo sets forth various legal considerations and relevant factors to take into account into account if legitimate questions remain after an analysis of an inability-to-pay questionnaire. These factors include background on current financial position, alternative sources of capital, collateral consequences and victim restitution considerations.

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15 See, e.g., 18 U.S.C. § 982(a) (in connection with sentencing persons convicted of certain federal offences, including money laundering and other financial crimes, courts shall order criminal forfeiture of property 'involved in such offense, or any property traceable to such property'); 18 U.S.C. § 981(a) (property involved in certain federal offences, including money laundering and other financial crimes, 'or any property traceable to such property', is subject to civil forfeiture). Under civil forfeiture statute 18 U.S.C. § 981(a)(1)(C), property relating to a 'specified unlawful activity' as defined in 18 U.S.C. § 1956(c)(7) is subject to civil forfeiture. Among the 'specified unlawful activities' listed in 18 U.S.C. § 1956(c)(7) are racketeering, bribery of a public official, fraud by or against a foreign bank, export control violations and violations of the FCPA. Further, 28 U.S.C. § 2461(c) 'permits the government to seek *criminal* forfeiture whenever civil forfeiture is available *and* the defendant is found guilty of the offense'. *United States v. Newman*, 659 F.3d 1235, 1239 (9th Cir. 2011) (original emphasis).

16 Department of Justice press release, 'United States Reaches Settlement to Recover More Than $49 Million Involving Malaysian Sovereign Wealth Fund' (6 May 2020), available at https://www.justice.gov/opa/pr/united-states-reaches-settlement-recover-more-49-million-involving-malaysian-sovereign-wealth.

17 Department of Justice press release, 'Court-Orders Final Forfeiture of Over $54 Million in Connection with Billion Dollar Ponzi Scheme' (15 April 2020), available at https://www.justice.gov/usao-edca/pr/court-orders-final-forfeiture-over-54-million-connection-billion-dollar-ponzi-scheme.

18 18 U.S.C. § 3663(a)(1)(B)(i).

19 Department of Justice, Criminal Division, Memorandum on Evaluating a Business Organization's Inability to Pay a Criminal Fine or Criminal Monetary Penalty (8 October 2019), https://www.justice.gov/opa/speech/file/1207576/download.

26.2.2 United States Sentencing Guidelines

Federal courts in the United States use the United States Sentencing Guidelines (the Sentencing Guidelines) as guidance in considering the aggravating and mitigating circumstances of a crime and imposing a sentence. These apply to both corporates and individuals. Although district courts must consult the Sentencing Guidelines and take them into account, they are not required to apply them.[20] A recent study, in fact, suggests that federal trial judges 'now follow the advisory fraud guideline range in less than half of all cases', providing for sentences 'well below the fraud guideline'.[21]

For corporates, the calculation of the applicable fine under the Sentencing Guidelines is made by (1) identifying a 'base fine',[22] (2) identifying the minimum and maximum multipliers that combined with the base fine create a 'fine range'[23] and (3) considering whether any factors warrant any adjustments, upwards or downwards, to the fine range.[24]

In calculating the base fine under the Sentencing Guidelines, the first step is to identify the 'offence level', which depends on the characteristics of the crime. The 'base offence level' is set according to the nature of the conduct or the statute violated, and then the overall offence level will increase or decrease depending on certain factors.[25] For example, for an anti-bribery violation under the Foreign Corrupt Practices Act (FCPA), the base offence level is 12.[26] Factors that may affect the overall offence level include the number of bribes, the dollar amount involved and the position of the foreign official receiving the payment or benefit.[27] The total offence level helps to determine the base fine, which is the greatest of the amount specified in a table that translates the offence level into a base fine, the pecuniary gain to the organisation from the offence, or the pecuniary loss from the offence caused by the organisation, 'to the extent the loss was caused intentionally, knowingly, or recklessly'.[28]

The second step is to calculate the 'culpability score', which yields the minimum and maximum multipliers to be applied to the base fine. The culpability score is based on the characteristics of the defendant. Relevant factors may include the size of the organisation and the degree of participation in, or tolerance of, the wrongdoing; the defendant's prior criminal history; whether the defendant has violated

20 The Sentencing Guidelines were mandatory until the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005).

21 Mark Bennett, Justin Levinson and Koichi Hioki, 'Judging Federal White-Collar Fraud Sentencing: An Empirical Study Revealing the Need for Further Reform', *Iowa Law Review*, 989, Vol. 102:939 (2017); George Pierpoint, 'Is white-collar crime treated more leniently In the US?', BBC News (11 March 2019), available at https://www.bbc.co.uk/news/world-us-canada-47477754.

22 United States Sentencing Commission, Guidelines Manual, § 8C2.4.

23 United States Sentencing Commission, Guidelines Manual, §§ 8C2.6, 8C2.7.

24 United States Sentencing Commission, Guidelines Manual §§ 8C4.1-8C4.11.

25 Base offence levels are set out in Chapter Two of the Guidelines Manual.

26 United States Sentencing Commission, Guidelines Manual § 2C1.1.

27 United States Sentencing Commission, Guidelines Manual §§ 2C1.1(b)(1)-(3).

28 United States Sentencing Commission, Guidelines Manual § 8C2.4.

an order or injunction, or violated a condition of probation by committing similar misconduct to that for which probation was ordered; obstruction of justice; the existence of an effective compliance programme; and self-reporting, co-operation and acceptance of responsibility.[29] The potential multipliers can range from 0.05 (a reduction of 20 times the base fine) to 4.0 (four times the base fine), depending on the culpability score. The fine range reflects the minimum and maximum multipliers as applied to the base fine. In addition to the fine, any gain to the corporate from an offence that is not otherwise part of the corporate's restitution or remediation is subject to disgorgement.[30]

Finally, the Sentencing Guidelines allow for adjustments from the fine range. This may include a reduction for substantial assistance to the government in its investigation of others[31] or remedial costs that exceed the gain to the corporate.[32] Unlike the factors that are considered for calculating the offence level and culpability score, the detriments or benefits that result from adjustments are not quantified. The court in its discretion imposes a fine within the fine range, or above or below the range. For negotiated resolutions, a corporate through its counsel and the government will often negotiate the fine range.

Civil penalties 26.3

Civil monetary remedies can include penalties, disgorgement and prejudgment interest. Each of these has a different purpose and method of calculation.

The SEC may impose civil monetary penalties on any person who violates or causes a violation of the securities laws. For example, the Securities Act of 1933 and the Securities Exchange Act of 1934 authorise three tiers of civil penalties, and the civil penalties imposed under these statutes can range from under US$10,000 to over US$1 million, per violation, after adjusting for inflation. Less serious civil violations fall into the first tier, where the penalty is no more than US$9,639 for an individual or US$96,384 for a corporate for 'each act or omission' violating the federal securities laws. The second tier applies to violations involving fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement, for which the maximum penalty is US$96,384 for individuals and US$481,920 for corporates, again for each act or omission. Finally, the third tier applies to violations involving fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement that also directly or indirectly resulted in 'substantial losses . . . to other persons' or 'substantial pecuniary gain to the person who committed the act or omission'.[33] Third-tier penalties have a limit of US$192,768 for individuals

29 United States Sentencing Commission, Guidelines Manual § 8C2.5.

30 United States Sentencing Commission, Guidelines Manual § 8C2.9.

31 United States Sentencing Commission, Guidelines Manual § 8C4.1.

32 United States Sentencing Commission, Guidelines Manual § 8C4.9.

33 15 U.S.C. § 78u-2(b); 17 C.F.R. § 201.1001 and Securities and Exchange Commission, 'Inflation Adjustments to the Civil Monetary Penalties Administered by the Securities and Exchange Commission (as of 15 January 2020)', available at https://www.sec.gov/enforce/civil-penalties-inflation-adjustments.htm (effective 15 January 2019). The maximum civil penalty amounts noted

and US$963,837 for corporates, for each act or omission.[34] The SEC sometimes asserts that the defendant's conduct involved multiple violations and seeks a penalty for each violation. Therefore, in addition to determining the relevant tier, courts generally consider whether the conduct alleged constituted multiple violations. Civil penalties for insider trading depend on the amount of the profits generated by the illicit trading. A district court can order civil penalties up to three times the profit gained or loss avoided by the violative trade.[35]

When imposing corporate penalties against corporate issuers, the SEC is mindful that this may mean that shareholders are harmed twice by others' wrongdoing: once if the misconduct decreased share prices and again if the cost of paying the penalty to the SEC will be passed on to shareholders.[36] The SEC attempts to balance a desire to protect shareholders who may have been harmed by misconduct with its desire to hold corporate issuer's accountable for wrongdoing. There are many ways the SEC may do this. Among them, it may seek penalties from individual offenders acting for a corporate issuer and may also consider the extent to which a penalty may be passed along to victimised shareholders and the extent to which the shareholders have changed.[37] In doing so, the SEC may consider whether an economic analysis of the securities violation indicates the presence or absence of a corporate benefit to shareholders, a factor that multiple SEC commissions have stated could influence their decision regarding whether to levy fines against a corporation.[38]

The DOJ likewise may seek civil penalties in certain types of matters, such as violations of federal financial, health, safety, civil rights and environmental laws.[39] For example, in April 2020, Guaranteed Rate Inc agreed to pay over US$15 million to resolve allegations it violated the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, and also the False Claims Act, by knowingly violating requirements when originating and underwriting certain mortgages.[40]

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above are for violations after 2 November 2015. Maximum civil penalty amounts will be adjusted annually for inflation, as described in 17 C.F.R. § 201.1001.

34 Id.

35 15 U.S.C. § 78u-1(a).

36 SEC press release, 'Statement of the Securities and Exchange Commission Concerning Financial Penalties' (4 January 2006), available at https://www.sec.gov/news/press/2006-4.htm.

37 Id.

38 Michael S. Piwowar, SEC Commissioner, Reflections of an Economist Commissioner (13 April 2018), https://www.sec.gov/news/speech/speech-piwowar-041318; Daniel M. Gallagher, SEC Commissioner, Remarks at Columbia Law School Conference (Hot Topics: Leading Current Issues in Securities Regulation and Enforcement) (15 November 2013), https://www.sec.gov/news/speech/2013-spch111513dmg. Such benefits might include, for example, additional revenue from fraud related products, or equity offerings and stock-based acquisitions that occur while the fraud is inflating the value of the company's securities.

39 See, e.g., 12 U.S.C. § 1833a (providing a civil money penalty provision to the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 which allows the DOJ to seek civil penalties against persons who violate one of 14 enumerated statutes); 42 U.S.C. § 3614(d)(1)(C) (allowing it to seek civil penalties for violations of the Fair Housing Act of 1968).

40 Department of Justice press release, 'Guaranteed Rate to Pay $15 Million to Resolve Allegations It Knowingly Caused False Claims to Government Mortgage Loan Programs' (29 April 2020),

Disgorgement and prejudgment interest 26.4

The SEC may also seek disgorgement to prevent an entity or individual from profiting from illegal conduct and to deter subsequent misconduct.[41] Disgorgement has often accounted for a significant portion of the overall enforcement sanction. For example, in July 2020, pharmaceutical company Alexion Pharmaceuticals Inc agreed to pay more than US$21 million to settle allegations that it had violated the FCPA, of which over US$14 million was disgorgement, as compared with approximately US$3.7 million in prejudgment interest and a US$3.5 million penalty.[42] Disgorgement can also be sought in certain circumstances even when the DOJ declines to prosecute the corporate under its Corporate Enforcement Policy. For example, it declined to prosecute Cognizant Technology Solutions for violations of the FCPA, yet the company agreed to pay nearly US$20 million in disgorgement, which represented 'all profits fairly attributable to the bribery conduct'.[43]

While disgorgement will continue to be an important remedy, a recent decision by the US Supreme Court imposed potential limitations to disgorgement. Specifically, in June 2020, in *Liu v. SEC*, the Court held that the SEC may continue to seek disgorgement pursuant to its power to award 'equitable relief' under Section 21(d)(5) of the Securities Exchange Act. Importantly, however, the Court held that the SEC could only do so where the disgorgement sought does not exceed the defendant's net profits and is awarded for victims. In doing so, the majority, without reaching any conclusions, also raised the possibility that disgorgement awards may not be an equitable remedy – and not allowed under the relevant statute – in situations where courts decline to deduct expenses from the award, impose joint-and-several liability or fail to return money to investors. Open questions related to the SEC's enforcement abilities therefore still remain.

While the precise contours of the SEC's disgorgement remedy will likely be litigated in lower courts over the coming years, the Supreme Court's decision in Liu can be expected to have immediate impact. First, to the extent that the SEC's disgorgement powers are limited, the SEC will likely rely more heavily on its power to seek civil penalties, an SEC remedy already discussed above. Second, in both litigation and non-public negotiations with the SEC, parties should be

available at https://www.justice.gov/opa/pr/guaranteed-rate-pay-15-million-resolve-allegations-it-knowingly-caused-false-claims.

41 See *SEC v. Huffman*, 996 F.2d 800, 802 (5th Cir. 1993); *SEC v. Cavanaugh*, 445 F.3d 105, 117 (2d Cir. 2006) (noting that disgorgement 'has the effect of deterring subsequent fraud').

42 Department of Justice press release, 'Fresenius Medical Care Agrees to Pay $231 Million in Criminal Penalties and Disgorgement to Resolve Foreign Corrupt Practices Act Charges' (29 March 2019), available at https://www.justice.gov/opa/pr/fresenius-medical-care-agrees-pay-231-million-criminal-penalties-and-disgorgement-resolve; Securities and Exchange Commission press release, 'SEC Charges Medical Device Company With FCPA Violations' (29 March 2019), available at https://www.sec.gov/news/press-release/2019-48.

43 Department of Justice Declination Letter, 'Re: Cognizant Technology Solutions Corporation' (13 February 2019), available at https://www.justice.gov/criminal-fraud/file/1132666/download.

prepared to explain how the limitations on disgorgement the Court discussed might apply to the facts of their case, such as by producing evidence that the disgorgement sought by the SEC exceeds net profits or will not be distributed to investors.

The SEC's disgorgement remedy is also subject to a strict five-year statute of limitations. Although the SEC had taken the position that disgorgement was an equitable remedy not subject to a statute of limitation (and this position was adopted by circuit courts),[44] the US Supreme Court unanimously rejected the SEC's position in *Kokesh v. SEC*. The Court held that '[d]isgorgement in the securities-enforcement context is a "penalty" . . . and so disgorgement actions must be commenced within five years of the date the claim accrues'.[45]

Since the Supreme Court's 2017 ruling in *Kokesh*, this statute of limitation has impacted the SEC's ability to obtain disgorgement. In its 2019 annual report, the SEC estimated that the *Kokesh* ruling had 'caused the [SEC] to forgo approximately $1.1 billion dollars in disgorgement in filed cases'.[46]

The SEC also generally obtains prejudgment interest on any disgorgement amount. The rules that apply to administrative proceedings cases brought by the SEC require that such amounts be included in any disgorgement.[47] District courts presiding over actions generally may determine whether prejudgment interest is appropriate.[48] The interest rate applied is typically the 'underpayment' rate set by the IRS.[49] There is no single approach for measuring when the clock begins to run on interest calculations. In some cases, it has been measured from the date the ill-gotten funds were received, up to the date of judgment.[50]

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44 *Kokesh v. SEC*, 137 S.Ct. 1635, 1640-41 (2017); *SEC v. Contorinis*, 743 F.3d 296, 306-07 (2d Cir. 2014) ('[W]hile both criminal forfeiture and disgorgement serve to deprive wrongdoers of their illicit gain, the two remedies reflect different characteristics and purposes – disgorgement is an equitable remedy that prevents unjust enrichment, and criminal forfeiture a statutory legal penalty imposed as punishment. . . . Moreover, unlike disgorgement, which is a discretionary, equitable remedy, criminal forfeiture is mandatory and a creature of statute. Thus, unlike the criminal forfeiture case, the district court's discretion in determining disgorgement is not confined by precise contours of statutory language, but rather serves the broader purposes of equity.').

45 *Kokesh v. SEC*, 137 S.Ct. 1635, 1639 (2017).

46 Securities and Exchange Commission, Division of Enforcement Annual Report (2019), available at https://www.sec.gov/files/enforcement-annual-report-2019.pdf.

47 17 C.F.R. § 201.600(a).

48 *SEC v. First Jersey Sec., Inc.*, 101 F.3d 1450, 1476 (2d Cir. 1996).

49 Id., 101 F.3d at 1476 (citing SEC Rules and Regulations, 60 Fed. Reg. 32738, 32788 (23 June 1995)). See also 17 C.F.R. § 201.600(b). The underpayment rate charged by the IRS is three percentage points above the federal short-term rate and for purposes of calculating interest on sums disgorged is compounded quarterly. 26 U.S.C. § 6621(a)(2); 17 C.F.R. § 201.600(b).

50 *SEC v. DiBella*, 2008 WL 6965807 at *3 (D. Conn. 18 July 2008); *SEC v. GMC Holding Corp.*, 2009 WL 506872 at *6 (M.D. Fla. 27 February 2009) ('The time frame for the imposition of prejudgment interest usually begins with the date of the unlawful gain and ends at the entry of judgment.') (quoting *SEC v. Yun*, 148 F. Supp. 2d 1287, 1293 (M.D. Fla. 2001).

In others, it may run from multiple dates where the matter involves multiple transactions,[51] or, where the applicable dates are difficult to identify, from the date of the complaint.[52]

Injunctions 26.5

The DOJ may also seek affirmative relief through an injunction where it is deemed necessary to advance public interests or enforce government functions. Such injunction actions may be specifically provided for by statute, may be used to enforce statutes that do not specifically provide for injunctive relief or may be sought from an appellate court pursuant to the All Writs Act.[53]

Likewise, the SEC may seek either a preliminary or permanent injunction when it appears that a person is engaged in, or is about to engage in, acts or practices constituting a violation of the securities laws.[54] For example, in March 2020, the SEC obtained a preliminary injunction barring the company Telegram from delivering digital tokens called Grams, after the court held that the SEC had shown there was a sufficient likelihood that Telegram's sales were part of a larger scheme to unlawfully distribute the Grams.[55]

Other consequences 26.6

In addition to the criminal and civil penalties noted above, defendants may face other consequences as a result of a US criminal or civil action. For one, defendants may also face civil and criminal forfeiture of assets, including real and personal property constituting, or derived from proceeds traceable to, a violation, or to a conspiracy to commit a violation.[56] For certain offences, courts are required to order that property traceable to an offence be forfeited.[57]

See Chapters 18 on individuals in cross-border proceedings and 31 on individual penalties

Further, investigation or prosecution by authorities in one jurisdiction may also lead to investigations, prosecutions or resolution short of prosecution by authorities in other jurisdictions. For example, in January 2020, the largest foreign bribery settlement to date was entered into between airplane manufacturer Airbus

51 S*EC v. Savino*, 2006 WL 375074 at *18 & n.10 (S.D.N.Y. 16 February 2006) (calculating interest from the first day of the month following each improper trade).

52 *SEC v. United Energy Partners, Inc.*, 2003 WL 223392 at *2 n.12 (N.D. Tex. 28 January 2003), aff'd, 88 F. App'x 744 (5th Cir. 2004) (using date of complaint for accrual of prejudgment interest award where dates on which defendant acquired disgorged funds were not clear); *SEC v. GMC Holding Corp.*, 2009 WL 506872 at *6 (M.D. Fla. 27 February 2009) (same).

53 28 U.S.C. § 1651(a). See US Department of Justice Civil Resource Manual, 'Injunctions', available at https://www.justice.gov/jm/civil-resource-manual-214-injunctions.

54 15 U.S.C. § 77t(b); 15 U.S.C. § 78u(d).

55 SEC Press Release, Telegram to Return $1.2 Billion to Investors and Pay $18.5 Million Penalty to Settle SEC Charges (26 June 2020), available at https://www.sec.gov/news/press-release/2020-146.

56 See 18 U.S.C. §§ 981, 982; 28 U.S.C. § 2461.

57 See 18 U.S.C. § 982. Examples of offences where forfeiture is required include, but are not limited to, laundering of monetary instruments under 18 U.S.C. § 1956, engaging in monetary transactions derived from specified unlawful activity under 18 U.S.C. § 1957, receipt of commissions or gifts for procuring loans under 18 U.S.C. § 215 and fraud by wire, radio, or television under 18 U.S.C. § 1343.

and authorities in France, the United Kingdom and the United States. Airbus agreed to pay combined penalties of over US$3.9 billion to resolve anti-corruption and export control violations.[58] It is expected that this trend of multinational investigations and co-operation across jurisdictions will continue in the coming years.

See Chapter 24 on negotiating global settlements

Defendants may also face a variety of actions from other US government agencies, international organisations, other corporates or even shareholders and employees, actions which may involve additional litigation and other monetary penalties or debarment. These 'tag along' actions can even arise from investigations of unrelated conduct that are assisted by co-operation clauses required by prior settlements.[59]

In addition, in connection with certain types of enforcement actions, such as FCPA enforcement, money laundering and sanctions violations, corporates may also be required to retain corporate compliance monitors. For example, in June 2019, Walmart entered into a three-year non-prosecution agreement pursuant to which it agreed not only to pay a combined penalty of US$137 million but also to retain an independent corporate compliance monitor for two years to resolve the government's FCPA investigation.[60]

See Chapter 33 on monitorships

Finally, in some circumstances, individuals or entities may be barred or suspended from doing business with the executive branch of the United States government.[61] Debarment may be triggered by a criminal conviction or, in some circumstances, even an adverse civil judgment, and applies to all subdivisions of a corporation unless the decision is limited by its terms to specific divisions or organisational units.[62] Suspension may occur upon adequate evidence that certain wrongdoing was committed and when it is in the public's interest.[63] Like debarment, suspension affects all organisational divisions of a corporation, unless otherwise specified.[64]

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58 See Department of Justice press release, 'Airbus Agrees to Pay over $3.9 Billion in Global Penalties to Resolve Foreign Bribery and ITAR Case' (31 January 2020), available at https://www.justice.gov/opa/pr/airbus-agrees-pay-over-39-billion-global-penalties-resolve-foreign-bribery-and-itar-case.

59 For example, in 2016, Odebrecht entered into a plea agreement with the DOJ for FCPA violations requiring it to co-operate fully with investigations conducted by multilateral development banks. On 29 January 2019, the World Bank debarred Odebrecht SA's Brazilian construction and engineering subsidiary for three years, crediting "[d]isclosures from prior settlements" as contributing to the World Bank's investigation. Plea Agreement, United States District Court E. Dist. of NY against Odebrecht S.A., Cr. No. 16-643 (RJD) (21 December 2016), at 11, available at https://www.justice.gov/opa/press-release/file/919916/download; World Bank Group Sanctions System Annual Report FY19, at 20, available at http://documents1.worldbank.org/curated/en/980641572096094561/pdf/World-Bank-Group-Sanctions-System-Annual-Report-FY19.pdf.

60 See Department of Justice press release, 'Walmart Inc. and Brazil-Based Subsidiary Agree to Pay $137 Million to Resolve Foreign Corrupt Practices Act Case' (20 June 2019), available at https://www.justice.gov/opa/pr/walmart-inc-and-brazil-based-subsidiary-agree-pay-137-million-resolve-foreign-corrupt.

61 48 C.F.R. §§ 9.406-1(c), 9.407-1(d).

62 48 C.F.R. §§ 9.406-1(b), 9.406-2(a).

63 48 C.F.R. §§ 9.407-1(a), 9.407-2(a).

64 48 C.F.R. § 9.407-1(c).

Remedies under specific statutes 26.7

By way of example, the fines, penalties and other remedies associated with particular federal criminal statutes of potential interest are outlined below.

Foreign Corrupt Practices Act 26.7.1

The FCPA criminalises bribery of foreign officials, either directly or through an intermediary, to obtain business or some other benefit. Its anti-bribery provisions apply not only to all US corporates and persons, but also can apply to foreign corporates that issue securities within the United States or file certain reports with the SEC (issuers) and to these issuers' officers and employees, among others. The FCPA also criminalises actions taken in the United States by foreign corporates or their agents that are in furtherance of an improper payment or offer. Further, the FCPA's books and records and internal controls provisions also require corporates whose securities are listed in the United States or who file reports with the SEC to keep accounting records that accurately reflect the corporate's transactions and to maintain a system of internal controls.[65]

Violations of the FCPA can result in heavy penalties. For one, corporate entities may be subject to financial penalties of up to US$2 million per violation of the FCPA's anti-bribery provisions,[66] US$25 million per violation of the FCPA's accounting provisions,[67] or up to twice the gross pecuniary gain or loss from the violation pursuant to the Alternative Fines Act.[68] In addition, civil penalties for FCPA anti-bribery and accounting provisions violations may apply.[69]

Further, certain individuals may be either fined up to US$100,000 (US$250,000 under the Alternative Fines Act or twice the gain or loss from the violation) or imprisoned for up to five years, or both, for a criminal violation of the FCPA's anti-bribery provisions.[70] For criminal violations of the FCPA's accounting provisions, certain individuals can be subject to a fine of up to US$5 million or imprisonment for up to 20 years, or both.[71] Individuals may also face civil

65 15 U.S.C. §§ 78dd-1(a), 78dd-2(a), 78dd-3(a), 78(m).

66 15 U.S.C. §§ 78dd-2(g)(1)(A), 78 dd-3(e)(1)(A), 78ff(c)(1)(A).

67 15 U.S.C. § 78ff(a).

68 18 U.S.C. § 3571 (c)(2), (d).

69 15 U.S.C. §§ 78ff(c)(1)(B), 78u(d)(3); 17 C.F.R. § 201.1001; Securities and Exchange Commission, 'Inflation Adjustments to the Civil Monetary Penalties Administered by the Securities and Exchange Commission (as of January 15, 2019)', available at https://www.sec.gov/enforce/civil-penalties-inflation-adjustments.htm.

70 15 U.S.C. §§ 78dd-2(g)(2), 78dd-3(e)(2); 18 U.S.C. § 3571 (b)(2), (b)(3), (d).

71 15 U.S.C. § 78ff(a).

penalties for FCPA anti-bribery and accounting provisions violations.[72] Issuers, as defined under the FCPA, are prohibited from paying these individuals' criminal and civil fines.[73]

Moreover, the DOJ may also bring a civil action to seek an injunction against domestic concerns and persons other than issuers to prevent a current or imminent FCPA violation.[74] Likewise, the SEC may seek injunctions to prevent FCPA violations from occurring.[75]

In addition, disgorgement often is a key component of a civil resolution of the FCPA. By way of example, in April 2018, Dun & Bradstreet agreed to pay more than US$9 million to resolve FCPA charges alleging that two Chinese subsidiaries made improper payments to Chinese government officials and third parties to benefit the business, and then falsely recorded these payments as legitimate business expenses. Of the total amount paid by Dun & Bradstreet (more than US$9 million), more than US$6 million was disgorgement.[76] However, as discussed above in detail, the SEC's use of disgorgement in civil actions has been limited by the Supreme Court's decision in *Liu v. SEC*.[77]

For corporates seeking to avoid the heaviest penalties, however, the FCPA Corporate Enforcement Policy establishes a presumption that, 'absent aggravating circumstances' such as involvement by executive management in the misconduct or significant profit to the corporate from the misconduct, a corporate will receive a declination if it 'has voluntarily self-disclosed misconduct in an FCPA matter, fully cooperated, and timely and appropriately remediated'. Moreover, even if aggravating circumstances are present, for a corporate that voluntarily self-discloses, fully co-operates and timely and appropriately remediates, the DOJ will still recommend a 50 per cent reduction off the low end of the US Sentencing Guidelines fine range, except in the case of a recidivist.[78]

Recently, on 20 November 2019, the FCPA Corporate Enforcement Policy was amended to clarify that a corporate that voluntarily discloses misconduct need not disclose 'all relevant facts known to it', but simply 'all relevant facts known to it at the time of the disclosure'. In addition, the new policy explains that, for a corporate to fully co-operate, it must identify 'relevant evidence not in the

72 15 U.S.C. §§ 78ff(c)(2)(B), 78u(d)(3); 17 C.F.R. § 201.1001; Securities and Exchange Commission, 'Inflation Adjustments to the Civil Monetary Penalties Administered by the Securities and Exchange Commission (as of January 15, 2019)', available at https://www.sec.gov/enforce/civil-penalties-inflation-adjustments.htm.

73 15 U.S.C. § 78ff(c)(3).

74 15 U.S.C. §§ 78dd-2(d), 78dd-3(d).

75 15 U.S.C. § 78u(d)(1).

76 Securities and Exchange Commission press release, 'SEC Charges Dun & Bradstreet With FCPA Violations' (23 April 2018), available at https://www.sec.gov/enforce/34-83088-s.

77 *Liu v. SEC*, No. 18-1501, 2020 WL 3405845, (U.S. 22 June 2020).

78 Department of Justice, FCPA Corporate Enforcement Policy, available at https://www.justice.gov/jm/jm-9-47000-foreign-corrupt-practices-act-1977#9-47.120.

company's possession' that the corporate is aware of.[79] However, the corporate is no longer required to identify opportunities 'to obtain relevant evidence not in the company's possession and not otherwise known to the Department' that the corporate 'is or should be aware of'.[80]

Federal criminal money laundering 26.7.2

The principal federal criminal money laundering statues are 18 USC Sections 1956 and 1957. Section 1956 generally prohibits a person who knows that property represents the proceeds of certain unlawful activities from engaging in financial transactions that either promote further unlawful activity, conceal the proceeds, evade taxes or avoid reporting requirements. Section 1957 also prohibits a person from knowingly engaging in a monetary transaction involving property valued at more than US$10,000 that derives from specified unlawful activities. In regard to both sections, the specified unlawful activities include proceeds resulting from offences involving bribery of a foreign official.[81]

Any violation of Section 1956 is punishable by imprisonment for not more than 20 years, a fine of up to US$500,000 or twice the value of the property involved, or both. In addition, such violations can incur a civil penalty up to the greater of US$10,000 or the value of the property involved in the offence, plus asset forfeiture. For Section 1957, the maximum penalty is 10 years' imprisonment or a fine of up to twice the value of the property involved, or both.[82]

See Chapters 18 on individuals in cross-border proceedings and 31 on individual penalties

Export controls and trade sanctions 26.7.3

The US Department of the Treasury's Office of Foreign Assets Control (OFAC) administers and enforces most US economic sanctions. However, the US Commerce Department's Bureau of Industry and Security and DOJ National Security Division also enforce some aspects of US sanctions. Generally, these sanctions, such as the blocking of assets and trade restrictions, are used to accomplish national security and foreign policy objectives.

The sanctions can be either comprehensive for a jurisdiction, such as Cuba,[83] or targeted to particular individuals and entities, such as the sanctions imposed on one Chinese government entity and specific officials pursuant to the global

79 Id. On 3 July 2020, the DOJ and the SEC issued the first comprehensive update to the FCPA Resource Guide since it was first published in 2012, which now includes a section on the FCPA Corporate Enforcement Policy. A Resource Guide to the U.S. Foreign Corrupt Practices Act, Second Edition, at 51 (July 2020), available at https://www.justice.gov/criminal-fraud/file/1292051/download.

80 Department of Justice, FCPA Corporate Enforcement Policy (updated March 2019), available at https://www.justice.gov/criminal-fraud/file/838416/download.

81 18 U.S.C. §§ 1956, 1957.

82 Id.

83 Continuation of the Exercise of Certain Authorities Under the Trading With the Enemy Act, 83 Fed. Reg. 46347 (10 September 2018).

Magnitsky Human Rights Accountability Act.[84] Typically, US sanctions either restrict activities that take place in the US or restrict activities that involve a 'US person', generally defined widely to include US citizens, permanent residents, persons present in the United States, and corporates organised under the laws of the United States or any jurisdiction therein, as well as those corporates' foreign branches.[85] However, non-US persons and corporates can face penalties under US sanctions as well, including for 'causing' a violation by a US person.[86] For example, in 2019, OFAC entered into a settlement with British Arab Commercial Bank plc, a UK-based commercial bank, in part for causing US financial institutions to engage in prohibited conduct involving Sudan.[87]

Fines for violations of the sanctions regulations can be significant, although 2020 has seen substantially lower statistics than previous years. As of 10 July 2019, OFAC had settled 18 enforcement actions, with civil penalties totalling more than US$1.2 billion compared with having settled only six enforcement actions for just over US$10 million as of 16 July 2020.[88] Criminal penalties for wilful violations of OFAC sanctions can include fines ranging up to US$1 million per violation or imprisonment of up to 20 years, or both.[89] Under Title 18, Section 3571, the government can also pursue fines and penalties against an organisation of up to US$500,000 or twice the pecuniary gain or loss derived from the offence, as well as forfeiture under 18 USC Section 981. Further, penalties for violations of the Trading with the Enemy Act, which provides the statutory authority for the Cuba sanctions, can be up to US$90,743 per violation (which may be adjusted for inflation), and criminal penalties can reach US$1 million.[90] Financial penalties for violations of the International Emergency Economic Powers Act, which underlies other sanctions programmes, are also possible; associated civil penalties can be up to US$250,000 or twice the amount of the unlawful transaction, and criminal penalties permit a fine of up to US$1 million and imprisonment of up to 20 years.[91]

See Chapter 45 on sanctions

84 Department of the Treasury, 'Treasury Targets Iranian-Backed Hizballah Officials for Exploiting Lebanon's Political and Financial System' (9 July 2019), available at https://home.treasury.gov/news/press-releases/sm724.

85 See, e.g., 31 C.F.R. §§ 560.312, 560.314.

86 See, e.g., 50 U.S.C. § 1705(a).

87 Department of the Treasury, 'Settlement Agreement' (July 2017), available at https://www.treasury.gov/resource-center/sanctions/CivPen/Documents/transtel_settlement.pdf.

88 Department of the Treasury, '2019 Enforcement Information', available at https://www.treasury.gov/resource-center/sanctions/CivPen/Pages/civpen-index2.aspx.

89 See, e.g., 50 U.S.C. § 1705(c).

90 31 C.F.R. § 501.701; Continuation of the Exercise of Certain Authorities Under the Trading With the Enemy Act, 83 Fed. Reg. 46347 (10 September 2018) (extending the expiration of Cuba sanctions pursuant to the Trading with the Enemy Act until September 2019).

91 50 U.S.C. § 1705; 31 C.F.R. § 501; Congressional Research Service, 'The International Emergency Economic Powers Act: Origins, Evolution, and Use' (20 March 2019), available at https://fas.org/sgp/crs/natsec/R45618.pdf.

Racketeer Influenced and Corrupt Organizations Act 26.7.4

The Racketeer Influenced and Corrupt Organizations Act (RICO) provides criminal penalties as well as a civil, private cause of action for acts performed as part of a criminal organisation or enterprise.[92] The statute contains variations on the proscribed conduct, but generally criminalises participation in an 'enterprise' in interstate or foreign commerce using ill-gotten gains that result from a 'pattern of racketeering activity'.[93] Such racketeering activity includes mail and wire fraud and money laundering violations under Sections 1956 and 1957, as outlined above.[94]

RICO violations are punishable by fines and imprisonment for up to 20 years, plus forfeiture of any interest acquired or maintained through the violation, any interest in any enterprise that was established, operated, controlled, conducted or participated in as part of the RICO violation (or the property of such an enterprise) and any property constituting or derived from any proceeds that the person obtained, directly or indirectly, from racketeering activity.[95]

Additionally, the government may seek pre-indictment restraining orders for the purpose of preventing defendants from transferring assets the government may potentially seek to have forfeited. To obtain such an order, the government must establish that (1) there is a substantial probability that it will prevail on the forfeiture issue, (2) property will be destroyed or placed beyond the court's reach without the order and (3) the need to maintain the property's availability outweighs the hardship of a restraining order. Pre-indictment restraining orders are effective for 90 days, but can be extended for good cause or as a result of the filing of an information or indictment.[96]

There are also civil remedies under RICO available to any person injured by a RICO defendant, which include treble damages sustained by the injured party and the cost of the lawsuit, including reasonable attorneys' fees.[97]

92 18 U.S.C. §§ 1961, et seq.

93 18 U.S.C. § 1962. The first variation makes it unlawful for any person who has received any income derived from a pattern of racketeering activity to use any part of such income or its proceeds to acquire, establish or operate any enterprise involved in interstate or foreign commerce. 18 U.S.C. § 1962(a). The second variation makes it unlawful for any person to engage in a pattern of racketeering activity to acquire or maintain any interest in any enterprise involved in interstate or foreign commerce. 18 U.S.C. § 1962(b). The third variation makes it unlawful for any person employed by or associated with any enterprise involved in interstate or foreign commerce to conduct the enterprise's affairs through a pattern of racketeering activity. 18 U.S.C. § 1962(c). The statute also makes it unlawful for a person to conspire to participate in the conduct outlined in (a), (b) or (c). 18 U.S.C. § 1962(d).

94 18 U.S.C. § 1961(1).

95 18 U.S.C. § 1963(a).

96 18 U.S.C. § 1963(d).

97 18 U.S.C. § 1964(c).

26.8 Conclusion

Corporates and individuals may face a variety of fines, penalties and other collateral consequences when defending against or settling an enforcement action with US authorities. As has been explained, these risks can be substantial. That said, these risks can be managed, mitigated or avoided by engaging knowledgeable external counsel, who can evaluate the situation, provide advice and thereby enable the corporate or individual to make an informed decision about how to proceed.

Appendix 1

About the Authors of Volume I

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Charles Riely is a partner at Jenner & Block and a member of its investigations, compliance and defence, markets and trading and securities litigation and enforcement practices. Before joining Jenner & Block, he served as a lawyer at the SEC for more than a decade, most recently as assistant regional director for the SEC's Division of Enforcement. While with the SEC, he worked on matters involving disclosure failures by public companies, alleged fraud and regulatory violations by investment advisers and broker-dealers, insider trading, anti-money laundering violations, 'spoofing' and other forms of market manipulation, failure-to-supervise violations, the adequacy of firms' cybersecurity procedures and protections, and a variety of other fraud and regulatory matters. Mr Riely also coordinated investigations with the US Department of Justice and worked on more than a dozen publicly filed SEC enforcement actions in which criminal authorities filed a parallel case. He graduated from the University of Michigan Law School and served as a law clerk to the Honorable Frank Maas of the US District Court for the Southern District of New York. He is admitted to practise in New York.

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Amanda Azarian is an associate at Jenner & Block's London office focusing on investigations, compliance and defence. Ms Azarian has extensive experience in working on a range of government enforcement actions in the United States and United Kingdom, including large, complex matters involving the SFO, NCA, DOJ, SEC and OFAC, with a concentration on economic crime. Her practice includes the representation of both corporates and individuals, conducting and advising on global internal investigations, defending against allegations relating to financial crime and responding to government requests, offering compliance advice including in relation to anti-bribery and corruption, anti-money laundering, and sanctions

and developing and implementing tailored compliance programmes, due diligence and risk assessments. Prior to joining Jenner & Block, Ms Azarian worked for the Washington, DC, and London offices of an international law firm. Ms Azarian received her law degree from the Catholic University of America, Columbus School of Law, where she served as a staff member of the *Catholic University Law Review* and interned for the Hon. Heidi Pasichow at the Superior Court for the District of Columbia. She is admitted to practise in both Maryland and Washington, DC.

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Grace Signorelli-Cassady is an associate at Jenner & Block focusing on investigations, compliance and defence. Her experience includes assisting corporates in responding to government enquiries, including by US and European enforcement authorities, assisting corporates in conducting complex, worldwide internal investigations, including in connection with allegations of money laundering, bribery and corruption, and representing criminal defendants at trial and post-conviction, including individuals in white-collar matters, including for misrepresentations to investors and mail and wire fraud. She has also drafted eight *amicus curiae* briefs regarding white-collar and criminal law issues, seven of which were filed with the US Supreme Court. Prior to joining Jenner & Block, Ms Signorelli-Cassady served as a law clerk to the Hon. Roslyn O Silver of the US District Court for the District of Arizona, during which time she assisted with matters taken by designation in the US Court of Appeals for the Ninth Circuit. Ms Signorelli-Cassady received her law degree from Harvard Law School, where she was the managing editor of the *Harvard Journal on Legislation*, selected as a criminal justice fellow and trained in negotiation techniques. She is admitted to practise in Illinois.

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Part I

Regional Overviews

2

Europe Overview

Robert Dalling, Kelly Hagedorn and Matthew Worby[1]

Introduction

The European investigations landscape is characterised by a patchwork of varying legislative and regulatory frameworks and enforcement approaches, which are often shaped by past events and current political priorities in particular jurisdictions. These variations and the pace of change mean that cross-border investigations, whether involving multiple European jurisdictions or parallel investigations by enforcement authorities in other regions (or sometimes both), frequently present thorny practical and tactical challenges.

This overview does not seek to duplicate the commentary and analysis set out in many of the chapters in this volume. Rather, it looks at some of the key priorities of enforcement authorities, focusing on anti-bribery, corruption and anti-money laundering. These are areas where there is particularly significant ongoing activity, and in which some authorities are adapting their approaches to make effective use of changes in the law and additions to their toolkits. It also looks ahead to seek to identify the key issues and trends on which those who are subject to investigations throughout Europe should be focusing.

Areas of enforcement risk

Anti-bribery and corruption

A substantial number of investigations by enforcement authorities have arisen following significant legislative developments that introduced corporate offences of failure to prevent bribery, which have extraterritorial effect (such as the UK Bribery Act 2010 (UKBA) and France's Sapin II Law). These legislative developments have been accompanied by new mechanisms enabling criminal investigations that involve corporate organisations to be concluded

1 Robert Dalling and Kelly Hagedorn are partners, and Matthew Worby is an associate, at Jenner & Block London LLP. This chapter updates the Europe Overview in the fourth edition, written by Judith Seddon, Amanda Raad and Chris Stott of Ropes & Gray LLP.

through negotiated settlements. To date in Europe, these mechanisms have been used mainly (although not exclusively) in cases concerning historic bribery and corruption involving corporate organisations.

The continuing expansion of corporate criminal liability for financial offences, however, is not a foregone conclusion. In the United Kingdom, despite enforcement agencies lobbying for the corporate offences of 'failure to prevent' relating to bribery and the facilitation of tax evasion[2] to be extended to cover economic crime more generally,[3] there appears to be little legislative appetite to enact such an offence.

Further important changes to anti-bribery and corruption legislation are in progress in other European jurisdictions. For example, in Ireland an offence analogous to the UK corporate offence of failure to prevent bribery came into force in July 2018.[4] This offence has not yet formed the basis of any publicised enforcement action. There is no guidance akin to that published by the UK Ministry of Justice in relation to 'adequate procedures' under the UKBA. There is some remaining uncertainty, therefore, among corporate organisations and their advisers as to exactly what 'taken all reasonable steps and exercised all due diligence' means, and how to avail oneself of a defence to the corporate offence. In addition, the introduction of deferred prosecution agreements (DPAs) is under consideration in Ireland as an additional measure to bolster its enforcement capabilities in the near future. Together, these developments may increase the number of investigations in this area. Given the nature of the Irish economy, and in particular its attractiveness to multinational technology and financial services companies, there is potential for these investigations to have significant cross-border elements.

Other significant changes are in prospect in Germany and Poland. Broadly, German criminal law does not currently recognise the concept of corporate criminal liability. However, in August 2019, the German government announced legislation that would introduce the concept to German law and impose strict penalties for corporate criminal conduct.[5] It is anticipated that the legislation will be implemented before autumn 2021, when the current parliamentary session ends. In Poland, legislation enabling prosecutors to take action against organisations for anti-bribery and corruption and other economic offences is expected to be enacted in 2021.

In jurisdictions where changes have already been made, clearer legislation and high-profile successes have buoyed the confidence of authorities and bolstered their resources.[6]

2 UK: Namely UK Bribery Act 2010, section 7, and Criminal Finances Act 2017, sections 45 and 46.

3 UK: See the oral evidence given to the Justice Committee, 18 December 2018, at http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/justice-committee/serious-fraud-office/oral/94785.html.

4 Ireland: Criminal Justice (Corporate Offences) Act 2018.

5 Germany: draft Corporate Sanctions Act.

6 For details of the increases in and reorganisation of resources devoted to anti-bribery and corruption investigations and enforcement action in France, see, e.g., French Anti-Corruption Agency, 'Annual Report 2017', at https://www.agence-francaise-anticorruption.gouv.fr/files/files/AFA_rapportAnnuel2017GB.pdf. For details of revenue generated by deferred prosecution agreements in the UK, see, e.g., Serious Fraud Office [SFO], 'Annual Report and Accounts 2018–19', at https://www.sfo.gov.uk/wp-content/uploads/2019/07/SFO-Annual-Report-and-Accounts-2018-2019.pdf.

Anti-money laundering

Although approaches to and the resources available for investigations vary quite considerably between European jurisdictions, anti-money laundering (AML) remains high on most enforcement authorities' agendas. Some of the highest penalties imposed in recent years have resulted from investigations by Sweden's Financial Supervisory Authority[7] and the Netherlands' Public Prosecution Service.[8] These fines were issued for breaches of regulatory requirements and criminal law by major institutions in relation to their AML systems and controls. This marks a change, since France and the United Kingdom have historically imposed the heaviest fines in the region for AML-related transgressions.

The level of fines is not the only notable feature of enforcement activity in this area. Reflecting an increasingly close focus on individual accountability (particularly in financial services, as discussed in more detail below), regulators are now ready and able to pursue individuals whom they consider to have played a part in AML failings.

In recent years, enforcement activity in this area has been particularly intense in Scandinavia, where regulators and prosecutors are taking action against a number of institutions and individuals in relation to well-publicised AML failings. The uptick in enforcement activity already seen in this part of the region looks set to continue more broadly across Europe as authorities seek to restore confidence in the robustness of financial crime compliance regulation. Several investigations into German and Dutch financial institutions are under way in respect of AML failings.

Enforcement action in future cases is likely to be conspicuously more decisive and coordinated, and penalties considerably higher than those imposed in past cases. National legislators have signalled their intent clearly. For example, in Denmark, it is intended that the maximum fine that may be imposed for AML failings will be increased eightfold.[9]

Elsewhere in Europe, some authorities are increasingly exploring how AML compliance provides a template for how firms should comply with their other regulatory obligations. For instance, in the United Kingdom, the Financial Conduct Authority (FCA) has stated that it expects regulated firms to take steps to prevent, rather than simply react to, criminal market abuse.[10] In doing so, it has taken rules that have long been a central tenet of AML compliance and applied them to a different section of its financial crime remit.

7 Sweden: Swedbank was fined US$386 million for compliance deficiencies relating to Baltic money laundering.

8 Netherlands: ING Groep was fined US$900 million for broad failures relating to financial crime compliance controls.

9 Denmark: See Danish Financial Services Authority, government statement and report, 28 January 2019, at https://www.dfsa.dk/~/media/Nyhedscenter/2019/Report_on_the_Danish_FSAs_supervision_of_Danske-Bank_as_regards_the_Estonia_case-pdf.pdf?la=en, at https://em.dk/media/10757/english-summary-aml-agreement_september-2018.pdf.

10 UK: See, e.g., Financial Conduct Authority [FCA] Handbook, Senior Management Arrangements, Systems and Controls, Rule 6.1.1 (Adequate policy and procedures), at https://www.handbook.fca.org.uk/handbook/SYSC/6/?view=chapter, and Financial Crime Guide, at https://www.handbook.fca.org.uk/handbook/FCG/1/?view=chapter.

Increased pressure and incentives to co-operate

In England and Wales, the body of cases in which DPAs have been concluded between the Serious Fraud Office (SFO) and co-operating corporate organisations is slowly growing, although the figure of 20 agreements per year predicted during the passage of the legislation that introduced DPAs seems unlikely to be achieved in the near term. Indeed, the SFO has itself been under pressure, having failed to date to secure the conviction of any individual named as an alleged offender in any of the DPAs. Against this backdrop it remains to be seen if the UK DPA regime will be considered a success. This may have knock-on consequences for the appetite of other jurisdictions to adopt a similar model. The SFO may also find itself under increasing scrutiny after it was revealed that the agency's enforcement activity was markedly reduced during the coronavirus pandemic.

In France, the authorities responsible for investigating and prosecuting financial crime, the French Anti-Corruption Agency (AFA) and Le Parquet National Financier (PNF), have now concluded 10 published judicial public interest agreements (CJIPs) with companies of various sizes, including one in which the global penalties imposed exceeded US$3.9 billion. However, in light of the coronavirus pandemic, the AFA has announced that it will temporarily cease inspecting businesses for compliance with French anti-corruption laws.

Mechanisms similar to DPAs and CJIPs (or aspects of them) exist in some other jurisdictions around Europe, including Belgium, the Czech Republic, Romania and Slovakia. However, these arrangements do not cover corruption offences in all cases, nor is the practice and procedure as clearly set out in these jurisdictions. Concluded cases of the same magnitude as seen in the United Kingdom and France have yet to be publicised.

As noted above, it is possible that Ireland will be the next jurisdiction in which corporate organisations may conclude criminal investigations through a negotiated settlement. In August 2019, the Irish Law Reform Commission proposed the adoption of arrangements similar to the UK's DPA regime. This would closely follow the entry into force of a new corporate offence of failure to prevent bribery.

The different approaches of European jurisdictions should be considered when dealing with global settlements. Dutch company VEON, for example, entered into a joint global settlement with Dutch and US authorities to resolve an enforcement action under the US Foreign Corrupt Practices Act (FCPA), whereas Ericsson became the subject of an investigation by the Swedish authorities shortly after reaching a settlement to resolve an FCPA action with the US authorities.

Authorities' and courts' expectations of co-operating corporate organisations for (1) negotiations to take place, and (2) a settlement to be agreed and approved, are becoming clearer. In particular, the AFA and the PNF in France, and the SFO in the United Kingdom (in June and August 2019, respectively) have released guidance that clarifies their views on the co-operation needed to create the right conditions for a negotiated settlement to follow.[11] Courts and prosecutors have also provided guidance on whether corporate organisations are

11 UK: See SFO, Corporate Co-operation Guidance, at https://www.sfo.gov.uk/download/corporate-co-operation-guidance/?wpdmdl=24184. France: https://www.agence-francaise-anticorruption.gouv.fr/files/files/Lignes%20directrices%20PNF%20CJIP.pdf; https://www.agence-francaise-anticorruption.gouv.fr/fr/lafa-et-parquet-national-financier-precisent-mise-en-oeuvre-convention-judiciaire-dinteret-public.

demonstrating the required levels of co-operation, while maintaining claims to legal professional privilege (where it is available).

Culture and individual accountability

Among the most prominent themes in investigations concerning corporate organisations is the focus on culture, both at the time when alleged misconduct occurred and when any investigation is commenced. The definition of what constitutes 'good culture' is elusive. Authorities, deciding whether to commence, continue and discontinue investigations and selecting which charges to pursue, attach substantial importance to whether they consider alleged conduct (including individuals' conduct outside the workplace) to be indicative of a poor culture.

In some cases, culture is forming the primary basis for enforcement action. In the United Kingdom in 2018–2019, the FCA opened more cases concerned with culture and governance than in any previous year. The FCA's most recent statistics indicate that this type of case now accounts for more than 10 per cent of all active investigations.[12] The FCA has announced that one of its key priorities for 2019–2020 was to extend the Senior Managers and Certification Regime (SMCR) to all regulated firms.[13] The implementation period for solo-regulated firms, however, was delayed until March 2021 in light of the coronavirus pandemic.

The SMCR in the United Kingdom goes further than previous regulatory initiatives directed towards individual accountability. It gives the FCA and the Prudential Regulation Authority (PRA) powers to take action against a much broader population of individuals within firms. It also requires firms to document the specific responsibilities of their most senior executives, thus providing the FCA and PRA with clear road maps that may be used to hold those individuals accountable for breaches of regulatory requirements by firms. The FCA is now routinely using the SMCR for this purpose during enforcement investigations. Although enforcement authorities around Europe have been watching to see how the FCA and PRA seek to use these mechanisms to drive up standards of behaviour within the financial services industry, it remains to be seen whether other European regulators will follow the SMCR approach. By contrast, other common law jurisdictions, such as Singapore, Hong Kong and Australia,[14] have enacted regimes similar to the SMCR in recent years.

In July 2018, the Central Bank of Ireland released a report, produced in conjunction with the Dutch Central Bank, based on behaviour and culture reviews of five retail banks based in Ireland.[15] The report's recommendations mirror many of those made by the UK Parliamentary Commission on Banking Standards, from which the SMCR ultimately flowed. They include the introduction of new Conduct Standards and a Senior Executive Accountability Regime,

12 UK: See FCA, 'Enforcement annual performance report 2018/19', at https://www.fca.org.uk/publication/corporate/annual-report-2018-19-enforcement-performance.pdf.

13 UK: See FCA press release, at https://www.fca.org.uk/news/press-releases/fca-sets-out-its-priorities-2019-20.

14 Singapore: Individual Accountability and Conduct Regime; Hong Kong: Manager-in-Charge Regime; Australia: Banking Executive Accountability Regime.

15 Ireland: See Central Bank of Ireland report, Behaviour and Culture of Irish Retail Banks, July 2018, at https://www.centralbank.ie/docs/default-source/publications/corporate-reports/behaviour-and-culture-of-the-irish-retail-banks.pdf?sfvrsn=2.

both of which would be similar in most respects to the SMCR. At the time of writing, the Irish parliament was in the process of passing legislation to this effect.

Even in countries where enforcement authorities have not explicitly named culture as an enforcement priority, boards are increasingly concerned to demonstrate their commitment to culture. Cases across Europe have shown the substantial reputational damage that can result from allegations of poor cultural practices and the speed at which allegations can cross borders (including into jurisdictions where enforcement authorities are active in this area).

Data protection

The General Data Protection Regulation (GDPR) is now more than two years old, and several themes are emerging. The most significant trend is the willingness of European data protection authorities to enforce the GDPR aggressively. Between July 2018 and June 2020, a total of 293 fines were issued, or declared, for a cumulative total of €471,265,982.[16] The largest fines have also been significant. British Airways Plc may be fined up to €204 million by the UK data protection authority (the fine is yet to be formally levied), and Google Inc was fined €50 million by the French data protection authority in 2019.

However, this enforcement action has not kept up with the level of private complaints being made to data protection authorities. Ireland, for example, received 7,215 complaints in 2019, representing a 75 per cent increase on the total number of complaints in 2018.[17] In the United Kingdom, the number of complaints almost doubled between reporting years 2017–2018 and 2018–2019, from 21,019 to 41,661.[18] These numbers suggest that there is an increased awareness of data protection issues and the powers that data protection authorities now have under the GDPR.

Further evidence of an increased demand for redress in respect to data protection concerns can be seen in the increasing rise in collective litigation. Corporates should be aware that oversight of their data protection practices may be undertaken by private citizens, via the courts, and not just regulators.

In any event, investigators must now keep issues relating to data protection in mind when tackling a cross-border investigation. In particular, issues relating to the international transfer of personal data are becoming increasingly difficult globally, not just in Europe.

Information sharing and multi-jurisdictional investigations

European investigation and enforcement authorities continue to collaborate actively with one another and with their counterparts globally, using mutual legal assistance and less formal arrangements. There have been particularly noticeable increases in efforts to collaborate across borders in jurisdictions where anti-bribery and corruption legislation has recently

16 This figure includes notices of an intention to fine, and so may be subject to change.

17 Ireland: See Data Protection Commission, Annual Report for 2019, at https://www.dataprotection.ie/sites/default/files/uploads/2020-02/DPC%20Annual%20Report%202019.pdf.

18 UK: See 'Information Commissioner's Annual Report and Financial Statements 2018-19', at https://ico.org.uk/media/about-the-ico/documents/2615262/annual-report-201819.pdf.

been overhauled, and where authorities have acquired the ability to enter into global settlements involving overseas enforcement authorities.[19]

Across Europe, traditional boundaries between enforcement authorities' remits are becoming increasingly blurred. Enforcement authorities are having to take an increasingly flexible view of what they are responsible for investigating, which authority should take the lead and how they should most effectively collaborate. Overlaps between the remits of antitrust, data protection and financial services enforcement authorities are becoming increasingly apparent.

Enforcement authorities, conscious of the potential for duplication and delay, are anticipating these overlaps, both within and between jurisdictions. For example, in the United Kingdom, the FCA and the Information Commissioner's Office have in place a detailed memorandum of understanding (most recently updated in February 2019) setting out how they will work together following incidents in which they both have an interest.[20] Although convictions and other enforcement outcomes in one jurisdiction will commonly be the product of extensive information sharing between authorities, there are as yet few significant concluded examples of enforcement authorities simultaneously pursuing enforcement cases against the same targets in multiple European jurisdictions.

EU institutions as enforcement authorities

Historically, there have been relatively few examples of supranational European authorities (other than the European Commission (EC) in its role as an antitrust enforcement authority) taking overarching enforcement action. That said, there is a clear movement to facilitate greater co-operation and coordination with respect to enforcement activity at a European level. This is both as a response to past incidents in which regulatory arrangements have been found to have been lacking and in an effort to counter perceived growing threats.

In particular, the European Union has stepped up its focus on a pan-European approach to AML enforcement following AML failings in various European states. In early 2020, the EC sent letters of notice to eight European states for failing to implement the Fifth AML Directive adequately. In addition, the European Banking Authority (EBA) was given additional powers following several well-publicised AML failings and an inability to review the conduct in question adequately. Until now, AML legislation encouraging closer collaboration between national investigation and enforcement authorities has taken the form of successive AML Directives (which, as they are not directly effective instruments and require transposition by Member States into their national laws, have been implemented in different ways and to different extents).

19 For example, in France, the National Finance Office [PNF] made 103 requests for mutual legal assistance and extradition to overseas agencies in 2018 (after the introduction of Sapin II) compared with 14 such requests in 2014 – Bilan et Activité 2018 du Parquet National Financier (January 2019), at https://www.tribunal-de-paris.justice.fr/sites/default/files/2019-01/PNF_synthese%202018.pdf.

20 UK: See 'Memorandum of Understanding between the Information Commissioner and the Financial Conduct Authority', at https://ico.org.uk/media/about-the-ico/documents/2614342/financial-conduct-authority-ico-mou.pdf.

From 1 January 2020, the EBA has been:

- tasked with coordinating national authorities' supervisory responsibilities of AML activity;
- empowered to lead on the establishment of AML policies by national authorities; and
- required to monitor the implementation of AML standards within Europe.[21]

The EBA published its first report highlighting the approach that national authorities are taking to reform their supervision of AML in February 2020.[22]

The European Union has also introduced an extraterritorial approach to AML supervision. Technical guidance was published in September 2019 clarifying the EU's approach to the level of AML compliance required for non-EU branches of EU domiciled banks.[23] In addition, the European Union identified 23 countries on 13 February 2019 that, when connected to a transaction, require additional due diligence as they pose a heightened AML risk because of their weak approach to the problem.[24]

In some instances, bilateral and multinational arrangements are in place, helping authorities to deploy their resources as effectively and efficiently as possible in cross-border AML investigations. The most recent example, which is also a response to the concerns about previous enforcement arrangements already mentioned, is a formal mechanism to enable Baltic and Nordic AML regulators to exchange information and coordinate enforcement action. There are also increasingly sophisticated mechanisms in place in some jurisdictions to enable information sharing between private sector organisations, and with enforcement authorities.[25] In July 2020, the Netherlands Bankers' Association announced that the country's three largest banks and two smaller lenders would create a purely private joint transaction monitoring body,[26] designed to flag concerning activity that would not necessarily be identified as suspicious by a single institution's compliance department.

However, arrangements are far from uniform across Europe. The extent to which the requirements set out in successive Money Laundering Directives have been effectively transposed, and other provisions relating to cross-border collaboration and resourcing of national authorities have been implemented, varies widely between jurisdictions.

Away from AML enforcement, the EC remains active as an antitrust enforcement authority. Some long-standing themes continue to feature in European antitrust investigations. There are exceptions to rules relating to legal professional privilege (in jurisdictions where it is part of the legal landscape). Leniency provisions often do not dovetail neatly with other regulatory mandatory reporting obligations. There are significant variations in the approaches taken by the EC and national competition authorities. There would also appear to be a different focus on sectors of enforcement. The EC appears to be concentrating on

21 Regulation (EU) 2019/2175.

22 See European Banking Authority press release, at https://eba.europa.eu/eba-acts-improve-amlcft-supervision-europe.

23 Regulation (EU) 2019/758.

24 See European Commission press release, at https://ec.europa.eu/commission/presscorner/detail/en/IP_19_781.

25 In the UK, with effect from October 2017, previously voluntary arrangements enabling information sharing within the private sector and between private sector organisations and enforcement authorities were placed on a statutory footing – Criminal Finances Act 2017, section 11 (which amended the Proceeds of Crime Act 2002).

26 Netherlands: See Netherlands Bankers' Association press release, at https://www.nvb.nl/english/transaction-monitoring-netherlands-a-unique-step-in-the-fight-against-money-laundering-and-the-financing-of-terrorism/.

technology companies, as opposed to perhaps the more traditional financial crime targets of financial institutions and extractive industries. These, and other themes, mean that European antitrust investigations have to be handled differently from those pursued by other regulators.

In other areas, authorities with a pan-European remit have been active. The European Anti-Fraud Office (known as OLAF), the division of the EC responsible for investigating fraud against the EU budget, and corruption and serious misconduct within EU institutions, has been particularly active in conducting investigations. OLAF's most recent available statistics indicate that it concluded 167 investigations and commenced 219 investigations during 2018 and recommended that national authorities take action to recover more than €370 million in 2018.[27]

In addition, Europol has conducted extensive work to seek to coordinate national responses and lay the foundations for possible future multilateral criminal enforcement action in a number of areas, including notably in relation to large-scale cyberattacks.[28]

It seems likely that levels of coordinated pan-European criminal enforcement action will increase in future. Despite potential tensions raised by the selection of the Maltese representative, a new European Public Prosecutor's Office (EPPO) is due to become operational in November 2020. In the 22 Member States that have signed up to the arrangements establishing it,[29] the EPPO will have powers to investigate and prosecute crimes against the EU budget, such as fraud, corruption and tax fraud valued at over €10 million. It will not replace OLAF or other existing investigating and prosecuting authorities (or national enforcement authorities) but will pool experience, adopt a consistent prosecution policy, and be able to use streamlined procedures for the exchange of information across borders. In September 2019, Laura Codruța Kövesi, who formerly headed Romania's National Anticorruption Directorate and served as the Romanian prosecutor general, was confirmed as the head of EPPO and Europe's new chief prosecutor. She has indicated a willingness to use EPPO's powers extensively when the agency becomes operational.[30]

Brexit uncertainty

At the time of writing, significant questions remain unanswered as to what the effect of Brexit will be on the mechanisms by which UK authorities work with their counterparts in mainland Europe, especially if no deal is agreed. Until 31 December 2020, the existing arrangements between the European Union and the United Kingdom will continue. As regards the position after this transition period, a German report leaked in April 2020 claimed that the United Kingdom wanted to 'approximate the position of a member state as closely as possible'[31] with respect to the security arrangements it enjoyed as an EU Member State. However,

27 See European Anti-Fraud Office, 'The OLAF Report 2018', at https://ec.europa.eu/anti-fraud/sites/antifraud/files/olaf_report_2018_en.pdf.

28 See Europol press release, 18 March 2019, at https://www.europol.europa.eu/newsroom/news/law-enforcement-agencies-across-eu-prepare-for-major-cross-border-cyber-attacks.

29 Sweden, Hungary, Denmark, Ireland and Poland having opted out.

30 See further details in relation to the European Public Prosecutor's Office, at https://europa.eu/rapid/press-release_MEMO-17-1551_en.htm, and the appointment of the European Chief Prosecutor, at www.europarl.europa.eu/news/en/press-room/20190923IPR61749/kovesi-to-become-eu-chief-prosecutor.

31 See media coverage of a leaked German government report, at https://www.theguardian.com/world/2020/apr/23/uk-making-impossible-demands-over-europol-database-in-eu-talks.

it appears that without some form of agreement, the United Kingdom will be unable to engage effectively with many of the frameworks and initiatives to which it previously had access. This includes, but is not limited to, the following European agencies, organisations or systems:

- Europol (but not INTERPOL) and the Europol Intelligence System;
- Eurojust;
- European Arrest Warrant System;
- Schengen Information System;
- European Investigation Orders; and
- European Criminal Records Information System.

A no-deal situation would mean that authorities would have to fall back on a tangled web of specific agreements. Delays would inevitably follow and practical issues could conceivably flow from the operation of blocking statutes in some jurisdictions (most notably in France and Switzerland).

Appendix 1

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Robert Dalling is a partner in Jenner & Block's investigations, compliance and defence practice. Formerly a trial advocate with 10 years' courtroom experience, he has represented global financial institutions, multinational corporates and individuals in high-profile and high-value internal and external investigations involving a wide range of financial crime and other regulatory issues.

Rob has advised some of the world's largest financial institutions on financial sanctions, often in connection with complex and sophisticated financial products and transactions. He has experience in applying for licences from sanctions authorities in the UK. He advises companies on the development of internal policies (including on anti-bribery, anti-fraud, anti-money laundering and terrorist financing, conflicts of interest, gifts and hospitality, and supply chain and modern slavery issues) and associated procedures, controls and training. He has assisted several clients with complex anti-money laundering issues and has dealt with the National Crime Agency on a large number of consent applications.

Prior to moving into private practice, Rob spent several years practising as a barrister in white collar criminal litigation. Market commentators for *Chambers and Partners* 2020 describe him as an 'excellent' lawyer who is 'incredibly clever and very tactical'.

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In 2018, Kelly was named in *Global Data Review*'s inaugural '40 under 40' list of up-and-coming professionals working in the field of data law.

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