Going global: defending clients in the 2020 world of multijurisdictional prosecutions and investigations

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Like many other things in life, the world of prosecutions and investigations has become an increasingly global one. A century ago, criminal prosecutions in the US were almost entirely local. The prosecutor's power was generally restricted to a city, county or state, police usually investigated cases alone in their home jurisdictions, and the evidence and witnesses were largely confined within the physical space of the prosecuting jurisdiction. Those days are long over, however, especially in white-collar cases involving allegations of corruption, money laundering or violations of economic sanctions. We are now living in a world where multiple countries and government agencies are empowered to investigate and prosecute conduct that takes place half-way around the world, turning the defence of such cases into a complex, multi-faceted endeavour. And

we are increasingly living in a world where multiple international law enforcement agencies are coordinating their efforts against companies and individuals alike. We describe this trend below and identify some new challenges this coordination presents for counsel defending these cases.

The rise in multiple enforcement actions in corruption, money laundering and economic sanctions cases

Over the past few years, massive global enforcement actions, coordinated among multiple US and non-US government agencies, have been on the rise. Prior to the last few years, even in cases involving cross-border conduct, coordination among enforcers in different countries was relatively rare. But more recently, it is easy to come up with examples of actions where the US coordinates with other enforcement authorities on corruption, money laundering and sanctions investigations. For example, in 2018-2019, the French financial institution, *Societe Generale* (SocGen) faced widespread criminal and civil allegations including bribery of the family of the former Libyan leader, manipulation of the widely-used interest rate benchmark known as the London Inter-Bank Offered Rate (LIBOR) and violations of US sanctions. In 2018, SocGen resolved the bribery and LIBOR manipulation allegations with US and French criminal authorities by entering a settlement for more than $1bn. About a year later, in 2019, SocGen resolved the US sanctions charges by entering into a settlement with multiple US regulators, including the US Department of the Treasury's Office of Foreign Assets Control (OFAC), the US Department of Justice (DOJ), the United States Federal Reserve Bank and the District Attorney's Office of New York (DANY). In total, SocGen paid more than $2bn in penalties.

At around the same time, the British financial institution, Standard Chartered, faced a host of US sanctions and money laundering charges, arising out of banking transactions involving Cuba, Iran, Sudan, Syria, Myanmar and Zimbabwe. The prosecution was coordinated between US regulators, including the DOJ, OFAC, the Fed and DANY, as well as the UK's Financial Conduct Authority (FCA). Standard Chartered was ultimately ordered to pay more than $1bn in criminal and civil penalties, with US authorities imposing the bulk of the fines, but UK authorities also imposed a fine of just over

£100m for control failures that violated UK money laundering requirements.

These are just a few recent examples of international coordination by prosecutors on these sorts of issues, but they are hardly isolated ones. In the past few years, the DOJ has coordinated with Dutch officials in a large anti-corruption prosecution, and with Brazilian and other Latin American enforcement agencies in multiple corruption prosecutions in the oil & gas sector. From a defence perspective, counsel handling corruption, money laundering and US sanctions cases must assume that law enforcement agencies from around the world are talking to each other, because, with increasing frequency, they are doing exactly that.

New paradigm, new issues

This new paradigm has given rise to a host of new legal and investigative challenges for all participants in the criminal and civil justice systems. The first of these is jurisdiction. US authorities have long held aggressive positions about the scope of US jurisdiction to investigate conduct with a tenuous connection to the US. This view is sometimes so broad that a minor US 'touchpoint' – such as converting a dollar transaction into a different currency as an otherwise purely foreign transaction transits New York – is seen as enough to create jurisdiction in the US. These sorts of aggressive jurisdictional theories have not even been fully tested in US courts, but one of the consequences of the increased coordination among multinational prosecutors is that these sorts of aggressive jurisdictional theories will spread. In the UK, Canada, France and other jurisdictions, we are now seeing much more expansive theories of extraterritorial jurisdiction being asserted than occurred even a few years ago. Going forward, defence counsel in the US and elsewhere will need to determine how to navigate and potentially challenge these ever-increasing exercises of extraterritorial jurisdiction by enforcement authorities.

Another related issue arises from the existence of conflicting substantive criminal and civil laws among the various coordinating jurisdictions. What do coordinating authorities do when their law conflicts with US law with respect to the conduct being investigated? Both the SocGen and the Standard Chartered cases, for example, involved US sanctions allegations. Most countries, however, have

very different and often much narrower sanctions laws than the US. Moreover, the European Union (EU) and many Member States have 'blocking' laws that purport to prohibit their citizens from honouring some US sanctions provisions. Given these conflicting sanctions laws, on what basis, if at all, did the French and UK enforcement authorities coordinate in the enforcement of US sanctions laws? In the SocGen matter, the answer appears to be 'not at all'. Even though they coordinated on the corruption and LIBOR prosecutions, where US and French laws were very similar, the French authorities appear not to have participated in the US sanctions enforcement action with regard to the economic sanctions charges. In *Standard Bank*, by contrast, the UK authorities viewed the US sanctions allegations through a UK money laundering lens, which is why the UK charges asserted that Standard Bank's failure to comply with US sanctions demonstrated an absence of requisite financial controls under pertinent UK anti-money laundering laws. The bottom line is that these sorts of conflicts of laws will present potential challenges to coordination and potential areas of disagreement among international enforcers.

Apart from giving rise to the increased need to navigate substantive law conflicts, the new coordination paradigm can create increasingly complex challenges related to the collection of evidence and interviews of individuals during defence investigations. As to the collection of evidence, the increasing number and scope of data privacy laws have often presented challenges in defence investigations, but because the primary regulator was usually located in a single country, counsel could safely assume that, for example, the DOJ's policy on how to navigate these provisions would apply in a US-based investigation. But what if the DOJ is now coordinating with French authorities? Can US counsel assume that the DOJ's views on data privacy will be shared by French authorities and conduct the investigation accordingly? Will investigative counsel need to attempt to reach consensus beforehand? These sorts of evidence collection issues will need to be navigated much more carefully given the increasing audience of relevant regulatory authorities.

A related set of challenges involves the protection of attorney-client and investigation privileges during witness interviews and the preparation of reports about the investigation. Even if the enforcement authorities are limited to a single country or

jurisdiction, the application of these laws to a cross-border investigation can still be very challenging – even more so when counsel is seeking to satisfy a multinational group of enforcers, who will often have very different views on the scope of the attorney-client and investigative privileges. Do these privileges turn on which laws are being investigated and potentially defended against? Will the analysis be different for each witness? Will the communications privilege apply differently than the investigative privilege? Will the involvement of in-house counsel change the analysis?

These are just some of the new and developing issues presented by the new world of multijurisdictional prosecutions. More frequently, defence counsel in corruption, money laundering and sanctions prosecutions must be prepared to address them.

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