DEBEVOISE & PLIMPTON LLP

ICID Review

International Corporate Investigations and Defense Group

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Cooperation with Investigation Authorities from a Comparative Transnational Perspective

IN THE US

Cooperation with US Investigation Authorities

Regulatory authorities in the United States have long taken cooperation and voluntary disclosures into consideration when making charging decisions in criminal or civil investigations. The US Department of Justice ("DOJ") periodically publishes guidelines on corporate prosecutions in a memorandum entitled "Principles of Federal Prosecution of Business Organizations," which aims to advance consistent and uniform procedures by federal prosecutors. These guidelines, first promulgated in 1999 and revised three times since then, include instructions on how to evaluate and credit a company's cooperation with the criminal investigation.[1]

Continues on page 3 click here

IN THE UK

Cooperation with UK Investigation Authorities

Companies cooperating with investigating authorities and cutting plea deals with prosecuting authorities have become an increasingly common feature of UK criminal investigations. The self-reporting of possible legal violations to the UK Serious Fraud Office (the "SFO") and the UK Financial Services Authority (the "FSA") is the most significant development in this field. However, it must be noted that the practice of UK authorities with regard to cooperation is still in its infancy, and following the sentencing remarks of Lord Justice Thomas in the recent Innospec case, the SFO is likely to review the way in which it deals with self-reporting.[1]

Continues on page 6 click here

IN FRANCE

Cooperation with French Investigation Authorities

A corporation in the United States (particularly a publicly traded one) that finds itself the target of a serious criminal investigation faces compelling incentives to negotiate a criminal plea on the basis of an internal investigation of its conduct, disclosure to the government authorities, and cooperation with the investigators. The Serious Fraud Office in the United Kingdom, among other prosecuting authorities there, likewise invites "collaboration" with corporations that discover evidence of criminal behavior, and offers to negotiate a disposition of the potential criminal liability of corporations based upon such cooperation with greatly reduced exposure. A company facing a serious criminal investigation in France faces very different incentives.

Continues on page 8 click here

IN GERMANY

Cooperation with German Investigation Authorities

Historically, companies and individuals have generally been hesitant to cooperate extensively with German investigation authorities. This stance has recently been changing, however, with companies and individuals seeking to reap rewards for their cooperation in the form of more lenient charging decisions and fines, in particular under EU and German competition laws.

Continues on page 10 click here

Introduction

by Mary Jo White
Lord Goldsmith QC
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As explained in the inaugural "Winter" issue of our ICID (International Corporate Investigations and Defense) Review, the ICID Review focuses on the field of regulation, white collar crime, internal investigations and defense in our firm's four key ICID jurisdictions: the US, the UK, France and Germany. In that issue, we provided an overview – from the perspectives of these four countries – of some of the key topics and issues in connection with regulatory and internal investigations, each topic to be discussed and explored more thoroughly in future ICID Review issues.

In this second, "Spring" ICID Review, we focus on cooperation with regulatory investigations and the different approaches taken – and rapidly evolving – in each of our four ICID jurisdictions. When facing governmental investigations, in particular simultaneous actions by prosecutors and regulators across borders, it is imperative for both corporations and individuals to consider what strategy is best for them under the circumstances they face – to contest the authorities, to await the outcome of the authorities' investigations, or to cooperate with their probes. In this issue, we explore some of the issues

CONTINUED ON PAGE 2

Introduction Continued from page 1

surrounding whether and how to cooperate in each jurisdiction.

US authorities for more than a decade have accepted – and today typically expect – cooperation with their investigations, at least by public companies. Their counterparts in the United Kingdom, France and Germany have historically provided both individuals and companies fewer incentives to cooperate due to distinctive legal concepts and traditions. Although significant differences across the four jurisdictions continue to persist, it is apparent that European regulators increasingly are warming to the notion of providing incentives to cooperate. Companies and individuals under investigation are well-served to stay informed on the rapidly changing landscape and dynamics of the concept of cooperation in different jurisdictions around the world, in particular to understand the evolving relative benefits and risks of cooperating in those jurisdictions.

We hope that this edition of our ICID Review will provide you with interesting and useful information from a comparative transnational perspective in our four key ICID jurisdictions. ■

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IN THE US Continued from page 1

In what is referred to as the "Seaboard Report," the Securities and Exchange Commission ("SEC") announced in 2001 certain criteria that inform whether and how the SEC brings enforcement actions against companies. The SEC's Enforcement Manual of January 2010, in turn, for the first time provides a formal mechanism for ensuring that cooperation by individuals, as well as companies, is recognized and encouraged through the prospect of avoided enforcement actions or reduced sanctions.

DOJ's Principles of Federal Prosecution of Business Organizations

The DOJ's prosecution principles direct federal prosecutors to consider numerous factors when deciding whether to charge a corporation. These primarily pertain to the nature and seriousness of the offense and the pervasiveness and history of the wrongdoing, but they also focus on the extent of a company's cooperation and voluntary disclosure of relevant facts, as well as remedial actions taken.[2]

Given the complexities of the corporate form and the size and breadth of large companies, cooperation is often "critical in identifying potentially relevant actors and evidence."[3] Internal investigations and resulting factual disclosures to government authorities can be an effective way for companies to receive cooperation credit from prosecutors.[4] While refusal to cooperate may not be taken as evidence of misconduct, a company's willingness to cooperate often has a significant mitigating impact upon the DOJ's charging decisions.[5] A company's cooperation, however, does not entitle it to immunity from prosecution or guarantee a favorable outcome.[6]

The DOJ has equipped federal prosecutors with a range of options to consider when indicting a corporation or otherwise resolving a criminal investigation. Prosecutors are advised generally to pursue the most serious, readily provable offense charge in plea agreements. Taking into account such factors as a company's remedial measures and the potential collateral effects of a guilty plea, however, prosecutors may also make use of deferred-prosecution agreements or non-prosecution agreements.[7]

SEC Seaboard Report and 2010 Enforcement Manual

Quite similar to the DOJ's considerations, the SEC's Seaboard factors examine numerous issues to determine whether and to what extent companies should receive credit for "self-policing, self-reporting, remediation, and cooperation."[8] Among the factors are the nature, circumstances, and duration of the misconduct and the amount of harm imposed upon investors and others.

CONTINUED ON PAGE 4

Links to related information:

FCPA Update

- December 2009 (click here)
- January 2010 (click here)
- February 2010 (click here)
- March 2010 (click here)
- April 2010 (click here)

Client Update

- The SEC's Enforcement Cooperation Initiatives (click here)

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1 Each memorandum is known by the name of its respective author – the Deputy Attorney General in office at the time. The first such memorandum was authored by then Deputy Attorney General Eric Holder in 1999, followed by memoranda of his successors Larry Thompson (2003), Paul McNulty (2006) and Mark Filip (2008).

2 U.S.A.M. §§ 9-28.000-28.1300, *available at* http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/28mcrm.htm.

3 *Id.* at 9-28.700.

4 *See* David M. Brodsky et al., *Recommended Practices for Companies and Their Counsel in Conducting Internal Investigations*, 46 Am. Crim. L. Rev. 73, 73 (2009) (since 2001, more than 2,500 public corporations have hired outside counsel to conduct internal investigations into potential wrongdoing by their employees and officers).

5 *See* U.S.A.M. § 9-28.700.

6 *Id.* at 9-28.740.

7 *See* U.S.A.M. § 9-28.1000. ("[A] deferred prosecution or non-prosecution agreement can help restore the integrity of a company's operations and preserve the financial viability of a corporation that has engaged in criminal conduct, while preserving the government's ability to prosecute a recalcitrant corporation that materially breaches the agreement.").

8 *See* SEC Exchange Act Release No. 44969, *Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Act, 2001*.

IN THE US Continued from page 3

Further considerations relate, *inter alia*, to the company's willingness to cooperate; the speed and commitment of the investigation and disclosures; remedial steps taken to prevent future misconduct; and the quality of the communication of results and facts to the SEC.[9]

The 2010 SEC Enforcement Manual formally articulates criteria to measure an individual's level of cooperation, such as the nature and quality of the assistance provided; the importance of the underlying matter and the extent of actual or potential losses incurred by investors; society's interest in accountability; and the individual's risk profile.[10]

In the new Enforcement Manual, the SEC displays an approach similar to that of the DOJ in prosecuting or otherwise resolving investigations. To credit an individual's or a company's assistance, the SEC's enforcement staff may use three primary mechanisms: cooperation agreements, deferred prosecution agreements, or non-prosecution agreements. Cooperation agreements are formal written assurances that the SEC's enforcement staff will recommend credit if the cooperation substantially assists the SEC. Deferred prosecution agreements are formal written agreements pursuant to which the SEC foregoes an enforcement action in return for full cooperation and compliance with certain conditions during the deferred prosecution period. Non-prosecution agreements, which are to be used only in limited circumstances, are formal written agreements by the SEC not to pursue any enforcement action against a cooperating individual or company.[11]

Benefits of Cooperation

Companies have reaped substantial benefits from cooperating with the DOJ and the SEC. Two examples discussed here show the effects of cooperation with investigations in the FCPA context.

Siemens AG, facing charges of alleged bribery practices across the globe, reached settlements with the DOJ and the SEC only two years after commencement of their investigations. The DOJ did not charge Siemens AG under the FCPA's anti-bribery provisions and assessed a criminal fine two-thirds below the bottom of the contemplated federal sentencing guideline range and significantly lower than the amount of alleged improper payments. The DOJ characterized Siemens AG's cooperation and remedial efforts as "extraordinary and [having] set a high standard for multi-national companies to follow."[12]

Very recently, Daimler AG settled a long-running corruption probe by the DOJ and the SEC, receiving recognition in sentencing for its "excellent" cooperation and remedial efforts that included disciplinary actions, such as the termination of 45 employees.[13] Daimler AG entered into a deferred prosecution agreement with the DOJ – thereby avoiding a guilty plea altogether – and paid a criminal fine approximately 20% below the bottom of the sentencing guidelines range.[14]

The Impact of Cooperation on the Attorney-Client and Work Product Privileges

A hot-button issue in connection with the DOJ's corporate prosecution guidelines has been whether a company's willingness to waive legal privileges should constitute a factor in assessing cooperation. This issue has triggered repeated modifications of the DOJ's policy over time since first raised in the Holder Memo in 1999.[15]

The Holder Memo proclaimed that a corporation's willingness to waive the attorney-client and work product privileges could be used as one among

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9 *Id.*

10 *See* SEC Press Release, *SEC Announces Initiative to Encourage Individuals and Companies to Cooperate and Assist in Investigations*, Jan. 13, 2010, http://www.sec.gov/news/press/2010/2010-6.htm.

11 For a more detailed discussion of the SEC's new enforcement guidelines, *see* Debevoise & Plimpton LLP Client Update, *The SEC's Enforcement Cooperation Initiatives*, February 17, 2010, http://www.debevoise.com/newseventspubs/publications/detail.aspx?id=7a215b34-e795-4b0c-a71c-00cd5e4bf548.

12 *See* Sentencing Memorandum, *U.S. v. Siemens Aktiengesellschaft, Siemens S.A. (Argentina), Siemens Bangladesh Ltd. and Siemens S.A. (Venezuela)*, No. 1:08-cr-00367-RJL-1 (D.D.C., Dec. 12, 2008), at 24. Debevoise represented the compliance committee of Siemens AG.

13 *See* Sentencing Memorandum, *United States v. Daimler AG*, Case 1:10-cr-00063 (D.D.C. March 24, 2010) at 15.

14 *See* Deferred Prosecution Agreement, *United States v. Daimler AG*, Case 1:10-cr-00063 (D.D.C. March 24, 2010). Two subsidiaries of Daimler AG pleaded guilty to violations of the FCPA.

15 U.S. Dep't of Justice, Memorandum from Deputy Att'y Gen. Eric H. Holder, Jr. to All Component Heads and U.S. Attorneys, Bringing Criminal Charges Against Corporations (June 16, 1999), available at http://www.justice.gov/criminal/fraud/documents/reports/1999/charging-corps.PDF.

IN THE US Continued from page 4

many factors in evaluating cooperation.[16] Prosecutors were permitted to request privilege waivers in appropriate circumstances, for example in order to obtain relevant statements or to evaluate the completeness of a corporation's disclosures. The Thompson Memo, written in 2003, instructed prosecutors to consider enumerated factors when making charging decisions, including a corporation's willingness to waive privilege.[17]

Reactions to the Thompson Memo and its perceived initiation of a "culture of waiver" and erosion of basic legal protections were overwhelmingly negative.[18] Against the backdrop of widespread criticism and potential Congressional action, the DOJ revised its prosecution guidance in 2006 by way of the McNulty Memo.[19] Although the new guidance allowed prosecutors to seek privileged materials only in cases of a "legitimate need" and forbade prosecutors from taking into account a company's refusal to waive privilege when assessing cooperation, the McNulty Memo was widely viewed as inadequate.[20]

In 2008, in an effort to prevent imminent passage of Congressional legislation that would have barred prosecutors from seeking privilege waivers, *inter alia*, the DOJ put out yet another version of its prosecution principles.[21] Still in effect today, the Filip Memo largely breaks with the previous guidance and prohibits federal prosecutors from requesting documents reflecting legal advice from counsel or "core" attorney work product that denotes mental impressions or legal theories of counsel.[22] The Filip Memo emphasizes that the key measure for evaluating a company's cooperation is whether it has disclosed relevant facts about putative misconduct, not whether it has disclosed attorney-client or work product materials.[23] Prosecutors are still permitted, however, to request factual information gained during a law firm's or law department's internal investigation. For example, prosecutors are directed not to request memoranda of witness interviews conducted by counsel, but they may ask for underlying factual information gained during those interviews.[24] ■

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16 *Id.* at § VI.

17 U.S. Dep't of Justice, Memorandum from Deputy Att'y Gen. Larry D. Thompson to Heads of Department Components and U.S. Attorneys, Principles of Federal Prosecution of Business Organizations (January 20, 2003), available at http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm.

18 David M. Brodsky et al., *Recommended Practices for Companies and Their Counsel in Conducting Internal Investigations*, 46 Am. Crim. L. Rev. 73, 79 (2009).

19 U.S. Dep't of Justice, Memorandum from Deputy Att'y Gen. Paul J. McNulty to Heads of Dep't Components and U.S. Attorneys (Dec. 12, 2006), available at http://www.usdoj.gov/dag/speeches/2006/mcnulty_memo.pdf.

20 John T. Boese et al., *Healthcare Behind Bars: The Use of Criminal Prosecutions in Forcing Corporate Compliance*, Vol. 3, No. 1, J. Health & Life Sci. L., Pg. 91 (2009).

21 U.S. Dep't of Justice, Memorandum from Deputy Att'y Gen. Mark R. Filip to Heads of Dep't Components and U.S. Attorneys (Aug. 28, 2008), available at http://www.usdoj.gov/opa/documents/corp-charging-guidelines.pdf.

22 U.S.A.M. § 9-28.720.

23 *Id.*

24 *Id.* at n 3.

IN THE UK Continued from page 1

We anticipate that cooperation with the UK authorities will very firmly remain on the agenda for companies and individuals, given its substantial potential advantages. Determining the best course of action in each case, however, remains a matter of careful judgment.

Self-reporting and cooperation by companies

There have been several reported instances of self-reporting over the last few years. Most notably, in September 2009, the SFO secured its first corporate conviction for overseas corruption, following the self-reporting and subsequent guilty plea to overseas corruption and breach of UN sanctions by the bridge-building company Mabey & Johnson Ltd, for which the company was ordered to pay £6.6 million in fines, confiscation and reparations.[2]

There have also been numerous other instances of self-reporting by commercial organizations that did not result in the imposition of criminal sanctions. Instead, these cases were resolved by the use of Civil Recovery Orders, or by the company agreeing to the monitoring of its future conduct by an independent third party. For example, AMEC plc, an international engineering and project management firm, agreed to pay a Civil Recovery Order of almost £5 million, having self-reported to the SFO in March 2008. AMEC plc also agreed to the appointment of an independent monitor. Likewise, Balfour Beatty plc, the international engineering and construction company, self-reported to the SFO in March 2005 and agreed to pay a sum of £2.5 million in respect of a Civil Recovery Order.

The Mabey and Johnson case is also noteworthy for the expectations expressed by the SFO as to the extent to which a self-reporting company should cooperate. In its opening note in this case,[3] the SFO commented:

"Importantly, and in the spirit of exemplary and proper co-operation, the Company provided copies of privileged notes of internal interviews of certain directors and employees, conducted during the internal investigation. As an aside, the SFO regards this approach, namely conducting an internal investigation which is then fully disclosed to the SFO as meriting specific commendation. In cases where this is not the practice of the suspect company, the SFO will not regard the co-operation as a model of corporate transparency."[4]

While the question of producing privileged materials to the authorities and related questions of waiver have not yet been judicially scrutinized in the UK, it currently appears that the SFO at least expects companies to share substantial information if they want to get credit for "full cooperation."

Reasons why companies increasingly self-report

One major factor that incentivizes self-reporting is the new approach to investigation and prosecution of fraud and corruption cases by the SFO. The underlying theme of this model, similar to the practice of US authorities, is that a cooperating company will be treated more leniently than one that declines cooperation and instead fights authorities tooth and nail. In the context of overseas corruption the SFO published guidelines in 2009 specifying that a company that self-reported instances of corruption faced a much greater likelihood of a civil outcome, rather than a criminal one, while a company that opted not to self-report ran a correspondingly greater risk

CONTINUED ON PAGE 7

Links to related information:

Client Updates:

- Bribery Bill Update: Anti-Corruption Developments in the UK (Click here)
- The FSA Ramps Up Its Efforts to Crack Down on Insider Dealing (Click here)

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1 More details about the *Innospec* case can be found in the March edition of the Debevoise & Plimpton LLP FCPA update, which can be found at http://www.debevoise.com/newseventspubs/publications/detail.aspx?id=26147e63-cfb5-4dc3-b515-c72a3818ddbb.

2 The SFO press release in relation to the case can be found at http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2009/mabey—johnson-ltd-sentencing-.aspx.

3 *See* http://www.sfo.gov.uk/media/41953/sfo-annex2-statement-01-250909.pdf.

4 *Id.* at paragraph 26.

IN THE UK Continued from page 6

of a harsh criminal penalty.[5]

A number of other factors have also enticed companies to self-report, rather than to take their chances that improper conduct would stay below the radar of investigative authorities. First, there is the tough UK anti-money laundering legislation (found in the Proceeds of Crime Act 2002 and the Money Laundering Regulations 2007), which requires persons in the "regulated sector," on pain of criminal sanctions, to disclose suspicions of money laundering to the Serious Organised Crime Agency ("SOCA"). Those outside of the regulated sector who may be at risk of dealing with criminal property will frequently seek authorization and consent from an appropriate investigative body to afford them a defense to the principal money laundering offences.[6] Second, there is the willingness of the SFO to use its powers (found in section 240 et seq. of the Proceeds of Crime Act 2002) to apply for Civil Recovery Orders. These allow the SFO to obtain the fruits of unlawful conduct, without the company being found guilty of a criminal offence.[7]

A further factor in encouraging cooperation between investigating authorities and defendants has been the issuance by the Attorney General of guidelines on plea negotiations in cases of serious and complex fraud. These guidelines require the prosecutor and the defendant to enter into a written plea agreement, which informs the defendant of the contemplated charges and contains an agreed statement of facts. Crucially, however, such plea bargains do not bind the judge, who is still entitled to pass whatever sentence he or she thinks fit based on the evidence.

Self-reporting by individuals and immunity

Aside from the use of supergrass witnesses in the 1970s, UK law enforcement agencies have historically been reluctant to grant immunity from prosecution to individuals, in return for their provision of valuable information against others.

However, there are some signs of increasing self-reporting and cooperation by individuals. Indeed, cooperation is becoming a feature of UK fraud investigations to the extent that fraud investigators, including the SFO, are becoming much more willing to obtain evidence from individuals in exchange for granting them immunity from prosecution. The power to grant statutory immunity is now laid down in section 71 of the Serious Organised Crime and Police Act 2005 ("SOCPA"). Importantly, legislation recently came into force empowering the FSA, as well as the SFO, to grant statutory immunity in appropriate circumstances.[8]

Immunity agreements under section 71 are not without their potential pitfalls: immunity can be withdrawn (and the individual therefore face prosecution) if the prosecuting authority does not consider the individual to have satisfied the conditions of the immunity notice.

An interesting development, in addition to the increasing relevance of SOCPA immunity, has been the FSA's drive to seek self-reporting with the same vigor as the SFO. Mirroring the SFO's approach with respect to companies, the FSA has indicated that, in appropriate cases, a criminal investigation of an individual may be avoided if self-reporting and full cooperation are provided.[9]

Conclusion

In sum, cooperation is emerging as a key consideration in corporate and individual investigations by UK authorities. Whilst no one approach fits all cases, the topic should at least be on the agenda for those concerned with such investigations. ■

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5 *See Approach of the Serious Fraud Office to Dealing with Overseas Corruption*, http://www.sfo.gov.uk/bribery—corruption/self-reporting-corruption.aspx. *See also* Debevoise & Plimpton LLP Client Update, *UK Serious Fraud Office Releases Guidelines on Self-Reporting of Overseas Corruption*, Aug. 10, 2009, http://www.debevoise.com/newseventspubs/publications/detail.aspx?id=7ffd9fba-bb35-4f35-863f-d785ce1fca29.

6 An authorised disclosure may be made by those inside or outside the regulated sector under section 338 of the Proceeds of Crime Act 2002.

7 An example of the use of these powers is found in the Balfour Beatty settlemen. *See* http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2008/balfour-beatty-plc.aspx.

8 Coroners and Justice Act 2009, section 113.

9 An example of this is the investigation of the former UK diplomat Richard Ralph, where the FSA made it clear that it would take into account the extent of Ralph's cooperation in accordance with ENF 15.7.2G (EG12.8) when deciding whether to commence a criminal prosecution for market misconduct rather than to impose a mere sanction for market abuse. See http://www.fsa.gov.uk/pages/Library/Communication/PR/2008/133.shtml. A second example can be found in the case of three Turkish oil company executives, whose voluntary disclosure and early offer to disgorge profits were taken into account in determining the appropriate outcome in their case. See http://www.fsa.gov.uk/pages/Library/Communication/PR/2010/028.shtml.

IN FRANCE Continued from page 1

The principal procedural difference is that France has no tradition of negotiating corporate (or, for that matter, other) criminal pleas. A target of a criminal investigation thus has little incentive to self-investigate, to report, or to offer to cooperate with the authorities because there is no procedure to negotiate the ultimate result such a strategy would cause. While the relevant procedures may be changing to permit more flexibility in disposing of criminal investigations, legal and cultural traditions in France are likely to maintain a very different defensive strategic environment for some time.

Existing legal incentives to cooperate

"Personalization" of sentences

One major principle of French criminal law is that the court must "personalize" the imposition of a criminal sentence. This personalization applies whether the convicted party is a natural or a legal person. To achieve such personalization, the court is, among other things, invited to take into account the defendant's behavior. All other things being equal, a cooperative defendant will likely receive a more lenient sentence than a non-cooperative defendant.[1]

However, the court has no obligation to explain the factors it takes into account in establishing the sentence. In addition to cooperation, other factors include the prevention of new crimes, the protection of society and the interests of the victim.[2] Because of this multitude of factors, the lack of any actual obligation for the court to reduce a sentence because of cooperation, and the general lack of explanation for sentences, there is no guarantee that a defendant will benefit from cooperation with the authorities. Thus, the calculus of whether the benefits of cooperation (potential leniency) will outweigh the risks (potential increase in sanctions because the prosecution learns more adverse facts) is an uncertain one at best.

Plea bargaining

There is essentially no direct analog to plea bargaining as it exists in the United States, where the corporate target negotiates with the prosecuting authorities its ultimate criminal penalty (subject to court approval) in return for a guilty plea and cooperation. The closest French equivalent is the CRPC (*comparution sur reconnaissance préalable de culpabilité* or "appearance based on a prior acknowledgment of guilt"), which is available for criminal violations punished by fines or imprisonment of five years or less.[3] It could therefore theoretically apply to crimes such as money-laundering, influence peddling (absent aggravating circumstances) and private corruption (but not corruption of public officials). The availability of the CRPC procedure can in some circumstances constitute an incentive to cooperate, as well as a means of shortening the criminal investigation.

Successful use of this procedure, which necessarily implies pleading guilty to the offense charged by the Public Prosecutor, may result in a more lenient sentence and a faster resolution of the criminal prosecution.[4] However, in the end, only French prosecutors can decide whether this procedure should be used – even if the defendant wishes to admit its guilt.[5] According to binding guidelines for prosecutors, recourse to this procedure is normally available only for simple cases in which society would not benefit from a trial.[6] In practice, therefore, these prosecutorial guidelines tend to limit the use of plea bargaining in France to "victimless" misdemeanors – most often motor vehicle infractions in which there is no injured third party. Furthermore, in those cases where there are victims, current French procedural law may allow them to participate in the criminal proceedings as parties civiles, a status which gives them the right to make submissions about the sentence imposed on the defendant and, in many cases, to seek compensation from it. The presence of parties civiles significantly complicates criminal proceedings and makes the possibility of binary "negotiations" over a plea even more unlikely.

CONTINUED ON PAGE 9

1 *See* French Criminal Code, art. 132-24.

2 *See, e.g.*, Cass. Crim., Nov. 3 1955: Bull. Crim n°540.

3 French Criminal Procedure Code, art. 495-7. This procedure is not a "plea bargain" *per se* because the defendant acknowledging its guilt must plead guilty to the charged infraction. The defendant therefore does not "bargain" over the charges, but merely pleads guilty in exchange for certain perceived benefits.

4 *Id.*, art. 495-8.

5 *Id.*, art. 495-7.

6 *See* Circulaire CRIM 04-12 E8, Sept. 2, 2004.

IN FRANCE Continued from page 8

Competition law

Similarly to US antitrust law, French competition law provides that the first member of a cartel that fully cooperates with the French competition authority is entitled to the benefit of a leniency program. Under these provisions, either a full or a partial exemption of fines can be obtained.[7]

This competition law specific rule is currently the only leniency program that can successfully be used by companies.[8]

On the eve of a new paradigm?

The poor incentive structure for corporate defendants to cooperate with French authorities may soon be significantly revamped, as the French Government appears intent on passing a major reform of the country's criminal procedure law. In the aftermath of two reports submitted to the Government by prominent experts on French criminal procedure (Professor Serge Gunchard and General Public Prosecutor Philippe Léger), each suggesting a very significant extension of the CRPC procedure in order to accelerate criminal cases and to avoid costly trials,[9] the Government has issued a discussion draft of a bill revising the French Criminal Procedure Code.[10] Although it is yet to be determined what the final version of the current reform will encompass, the current legislative draft greatly expands the applicability of the CRPC procedure.[11] Should this modification be passed into law, cooperation with the investigation authorities in France will likely evolve in such a way that it will become a serious option for a corporate or individual defendant facing a criminal investigation – especially because the maximum sentences prosecutors can suggest if they accept the CRPC procedure remain unchanged from current law (notably with a maximum of one year of imprisonment).[12] Assuming that the prosecutorial guidelines are amended accordingly, which would seem likely if the proposed reform is to have any actual effect, an entirely new approach to white collar criminal investigations might develop. However, the traditions resisting negotiated pleas are so deep in France that it is likely that such procedures will, as a practical matter, only slowly evolve towards those that exist in the United States and the UK. ■

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7 French Commercial Code, art. L.464-2-IV.

8 For a recent example, see the decision handed down on Dec. 16, 2008 by the French anti-trust authority, available online at: http://www.autoritedelaconcurrence.fr/user/avisdec.php?numero=08D32 (last visited on March 9, 2010).

9 *"L'ambition raisonnée d'une justice apaisée,"* report transmitted to the French Ministry of Justice on June 30, 2008, and *"Rapport du comité de réflexion sur la justice pénale,"* report transmitted to the French President of the Republic on Sept. 1, 2009.

10 "Avant-projet du futur Code de procédure pénale," March 1, 2010.

11 *Id.*, art. 334-38 (extending the CRPC procedure to virtually all "délits," including public corruption).

12 *Id.*, art. 334-41.

IN GERMANY Continued from page 1

One mechanism increasingly used by German companies to put themselves in a position to cooperate actively is to conduct internal investigations into the alleged wrongdoing. Moreover, individuals can now benefit from their cooperation with investigating authorities. In the past, individuals in Germany have had little reason to cooperate because they had no assurances from German investigating authorities that their cooperation would be reflected in reduced sentences or fines. A revision of the German criminal procedure law in 2009 now expressly permits the practice of "plea bargains" in criminal cases, which should provide greater incentives for individual defendants to cooperate.

German Criminal Investigations

Areas of Investigation

Under the German criminal code, liability of individuals within a commercial entity may attach on various grounds, including breach of trust,[1] fraud,[2] bribery of public officials,[3] and bribery of company employees in commercial transactions.[4] Investigations are conducted not only by the public prosecutor, but also by a range of regulatory bodies, such as tax authorities, the European Commission, the Federal Cartel Office, as well as regulators of the stock market or the financial services industry. Among these, the competition authorities traditionally have carried out the most significant corporate investigations.[5]

Subjects of Criminal Investigations

The concept of corporate criminal liability does not exist under German law; only individuals are legally capable of committing crimes. As a result, criminal law investigations (as opposed to regulatory investigations) are primarily directed against individual employees of a company, not against the company itself. Companies may be involved in investigations by criminal authorities in a secondary way, as a witness or a (third party) entity harboring evidence.

In addition, a company may be a direct target of a regulatory investigation on the basis of alleged administrative misdemeanors (*Ordnungswidrigkeiten*). A company can be fined for actions of its employees who breach particular duties or act on behalf of the company in illegal ways.[6] In this context, governmental investigations into antitrust law violations or bribery violations have triggered particularly severe fines.[7]

Individuals have the constitutional right to remain silent without prejudice in all German criminal and administrative fine proceedings. The accused is thus not obliged to cooperate with authorities, nor can the accused be compelled to be heard as a witness in his or her own case.

Recent Developments in Germany

Internal Corporate Investigations

Pursuant to German criminal procedure law, prosecutors are generally obliged to investigate and pursue criminal violations of the law and underlying relevant facts, irrespective of a company's willingness to cooperate.[8] Public prosecutors are consequently not permitted under German law to reduce their efforts or to fail to conduct a criminal prosecution because of a company's extensive cooperation. German criminal authorities are permitted, however, to take into account a company's own efforts, such as cooperation through an internal investigation and improvements of its system of internal controls, which reduce the need for prosecution and fines.

One of the few publicized internal

CONTINUED ON PAGE 11

1 Sec. 266 StGB of the German Criminal Code (StGB, *Strafgesetzbuch*).

2 Sec. 263 StGB.

3 Sec. 334 StGB.

4 Sec. 299 StGB.

5 *See, e.g.*, Federal Cartel Office confirms search of 15 retailers and manufacturers of branded goods on suspicion of their colluding on end consumer prices. Press release of Jan. 14, 2010, http://www.bundeskartellamt.de/wEnglisch/News/press/2010_01_14.php.

6 Sec. 30, 130 of the German Administrative Offences Act (OWiG, *Ordnungswidrigkeitengesetz*).

7 *See, e.g.*, Compliance-Magazin, *Korruption bei MAN: Ermittlungen abgeschlossen*, Dec. 14, 2009, http://www.compliancemagazin.de/printable/markt/unternehmen/man1412009.html.; Press release of Nov. 30, 2007, 216 million Euros fine imposed on RTL and Pro7Sat.1 advertising time marketing companies, http://www.bundeskartellamt.de/wEnglisch/News/Archiv/ArchivNews2007/2007_11_30.php.

8 Sec. 152 of the German Criminal Procedure Act (StPO, *Strafprozessordnung*).

IN GERMANY Continued from page 10

investigations in Germany to date was carried out by Siemens AG in response to criminal probes into widespread allegations of bribery and corruption. In the Siemens matter, the company decided to cooperate not only with the US regulators, but also with the Munich prosecutors in an unprecedented way. Combined with Siemens's huge efforts to ameliorate its compliance organization, the cooperation contributed to the conclusion of the regulators' investigations in both countries within only two years. Similarly, as press articles have reported, the recently concluded investigation by the Munich prosecutor's office into corruption allegations against MAN SE was aided by the company's cooperation. As a result of its internal investigation, MAN identified approximately 80 suspicious payments, which it communicated to the Munich prosecutor, and dismissed twenty of its employees.[9]

Especially in criminal investigations conducted simultaneously by multiple authorities – which increasingly collaborate and share information with each other – companies are well advised to undertake their own investigative efforts in order to meet the expectations of the various pertinent local and foreign prosecutors.

Sharing of information

Cooperation with authorities in Germany may entail sharing information that is of interest to the local governmental investigators.[10] First, the company must decide whether to cooperate by sharing information. If so, the type of information shared will depend on the interests expressed by the prosecutor. This may range from particular details to more general results of inquiries learned by the company.

In cases where criminal proceedings are not yet underway against individual employees, but the prosecutor is already conducting investigations within the company, the company's duty of care to its employees affects the degree to which it may share information that may compromise employees.[11] Thus, the company needs to undertake a balancing decision that takes into account the principle that employees are protected to the extent possible. Such balancing is not needed in cases where the prosecutor has already launched criminal proceedings against employees; although the careless communication of additional facts not central to the prosecutor's focus should be avoided.

When sharing personal data with governmental authorities (in particular foreign entities), a company must be careful to protect personal data to the extent required by German and EU law.[12] In sharing personal information, the company may want to consider obtaining a written agreement with the prosecutor that ensures the appropriate level of data protection.

Competition law

The Federal Cartel Office and the European Commission have significantly increased their enforcement activities against cartels over the recent years. Leniency programs encourage companies to report their infringements and provide the authorities with evidence. Applications for leniency generally require close cooperation with the antitrust authority. Internal investigations are a frequently used tool to support such cooperation. In return, a company may obtain a reduction or even a complete avoidance of fines that the competition authority may have otherwise imposed.

Plea Bargains

Until recently, individual defendants who decided to cooperate with German prosecutors incurred significant risks, because they could not be certain that their cooperation would be rewarded with leniency. In September 2009, however, an amendment to the Criminal Procedure Act codified a previous ruling by Germany's high court (BGH), expressly permitting the practice of plea bargains in criminal cases.[13] The concept of plea bargains – often referred to in Germany as "deals" – had been widely discussed within the German legal community in the 1990s. In 1997, the BGH had ruled that arrangements in criminal proceedings, pursuant to which the defendant accepts the public

CONTINUED ON PAGE 12

9 Compliance-Magazin, *Korruption bei MAN: Ermittlungen abgeschlossen*, Dec. 14, 2009, http://www.compliancemagazin.de/printable/markt/unternehmen/man1412009.html.

10 *Schürrle*, Compliance Verantwortung in der Aktiengesellschft, 2009, page 75 et seq.; *Schürrle/Olbers*, CCZ 2010.

11 *Schürrle/Olbers*, CCZ 2010.

12 *Schürrle*, Compliance Verantwortung in der Aktiengesellschft, 2009, page 63 et seq.

13 Sec. 257c StPO.

IN GERMANY Continued from page 11

prosecutor's allegations and the judge then accepts the deal, were not prohibited by German law, subject to certain prerequisites.[14]

The recent codification of the legality of plea bargains, while to a certain degree merely confirming a practice already in force, has the potential of bringing about an increase in prosecutorial deal-making and leading to greater cooperation and voluntary disclosures by defendants and, indirectly, their employers.

Conclusion

As German prosecutors are gaining familiarity and comfort with a company's cooperation, internal investigations may develop into a more common feature in the German legal landscape and thereby become an accepted mechanism to achieve more lenient fines. Similarly, individual defendants who cooperate with prosecutors or who enter into plea agreements may increasingly expect to receive credit for their cooperation. It remains to be seen, however, whether the traditionally foreign concept of cooperation will become the standard response to German governmental investigations.[15] ■

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14 BGH, NJW 1998, page 86 et seq.

15 Cf. also *Breßler/Kuhnke/Schulz/Stein*, NZG 2009, page 721 et seq.; *Behrens*, RIW 2009, page 27.