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The Use of Foreign Compelled Testimony in Cross-Border Investigations – The Impact of the Second Circuit's *Allen* Decision

Debevoise & Plimpton LLP

Sean Hecker

Karolos Seeger

I Cross-Border Investigations

A recent appellate decision in the United States is likely to impact a wide range of cross-border investigations by restricting the ability of U.S. prosecutors to use testimony compelled in other jurisdictions.

On July 19, 2017, in *United States v. Allen*, the U.S. Court of Appeals for the Second Circuit reversed the fraud convictions of two defendants arising out of their attempts to manipulate the London Interbank Offered Rate (the "LIBOR").[1] Judge José Cabranes, writing for a unanimous panel, held that the Fifth Amendment's prohibition on the use of compelled testimony in criminal proceedings applies even when a foreign sovereign has compelled the testimony. This article provides guidance on what the *Allen* decision may mean for future cross-border investigations.

II The Second Circuit's *Allen* Decision

A. Background

Anthony Allen and Anthony Conti, citizens and residents of the United Kingdom, worked at the London office of Coöperatieve Centrale Raiffeisen-Boerenleenbank B.A. ("Rabobank") in the 2000s.[2] They were responsible for the bank's U.S. dollar LIBOR submissions.[3] By 2013, UK and U.S. enforcement agencies were investigating Allen and Conti for their roles in suspected manipulation of LIBOR.[4]

The UK Financial Conduct Authority ("FCA") interviewed Allen and Conti using powers of compulsion under Section 171 of the Financial Services and Markets Act 2000 ("FSMA").[5] The FCA also compelled testimony from one of Allen and Conti's co-workers, Paul Robson, who had been primarily responsible for Rabobank's Japanese Yen LIBOR submissions.[6] Under Section 177 of the FSMA, failure to testify could result in imprisonment,[7] and Section 174 of the FSMA only provides compelled interviewees "direct use" – but not "derivative use" – immunity.[8] If a government grants a person direct use immunity in relation to an interview, it cannot introduce interview statements made by the witness against him/her at a trial, but could use it against other defendants, or as leads to develop other evidence for use against the interviewee as defendant.[9] With derivative use immunity, however, all "fruits" of the interview – including those indirectly obtained using the interview as a source of leads – are barred from use at trial against the interviewee; to proceed against a defendant who had testified under derivative use immunity, the government is required to show that all information used at trial is untainted by information obtained at the interview, and is based on sources wholly independent of it.[10]

In November 2013, the FCA initiated a regulatory enforcement action against Robson, who had denied any improper conduct during his testimony.[11] Following its standard procedures, the FCA disclosed to Robson the relevant evidence against him, including Allen and Conti's compelled testimony.[12] Robson closely reviewed transcripts of that testimony, annotating certain passages and taking copious handwritten notes.[13]

Shortly thereafter, in early December 2013, the FCA stayed its case against Robson at the request of the UK's Serious Fraud Office ("SFO").[14] The SFO presumably acted at the request of the United States Department of Justice (the "DOJ"), because in mid-January 2014, the DOJ charged Robson.[15] In the summer of 2014, Robson pleaded guilty and became an important cooperator, substantially assisting the DOJ with developing its case against other suspects.[16]

In October 2014, Allen and Conti were charged with one count of conspiring to commit wire fraud and bank fraud, in violation of 18 U.S.C. § 1349, as well as several counts of wire fraud, in violation of 18 U.S.C. § 1343.[17] Robson served as the sole source of certain material information supplied to the grand jury that indicted Allen and Conti.[18] In particular, an FBI Special Agent relayed to the grand jury the information derived from Robson. Prior to trial, Allen and Conti moved under *United States v. Kastigar*[19] to dismiss the indictment or suppress Robson's testimony;[20] the district court, however, declined to address any *Kastigar* issues before trial.[21]

The government then called Robson to the witness stand during Allen and Conti's three-week trial commencing in October 2015.[22] Robson provided significant testimony inculpating them.[23] The jury ultimately convicted Allen and Conti on all counts, finding that they had illegally adjusted their LIBOR submissions to benefit the trading positions of Rabobank derivatives traders during the period of roughly 2006 through 2008.[24]

Following trial, the district court held a two-day hearing on *Kastigar* issues, during which Robson and the same FBI Special Agent who testified before the grand jury testified.[25] Notably, Robson agreed at the hearing that the testimony that he gave to the FCA – prior to his exposure to Allen and Conti's compelled testimony – differed markedly from his trial testimony.[26] Indeed, Robson's indirect grand jury and direct trial testimony contradicted material parts of his compelled FCA testimony.[27]

Nonetheless, the district court held that Robson's review of the defendants' compelled testimony did not taint the evidence he later provided.[28] The government, explained the district court, had shown an independent source for such evidence: Robson's "personal experience and observations".[29] Ultimately, the district court sentenced Allen to two years' imprisonment and Conti to a year-and-a-day's imprisonment.[30]

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B. Appeal

On appeal, the defendants contended, among other arguments, that the government violated their Fifth Amendments rights when it used their own compelled testimony against them.[31] They further argued that: (1) the district court applied the wrong legal standard in determining whether the evidence provided by Robson was infected;[32] (2) the government could not satisfy its burden of showing that Robson's evidence was untainted; and (3) the use of the tainted evidence was not harmless beyond a reasonable doubt.[33]

The government, in response, claimed that testimony compelled by a foreign sovereign and used in a U.S. criminal proceeding did not implicate the Fifth Amendment.[34] In the alternative, the government argued that the district court employed the proper legal standard in determining that Robson's evidence was untainted,[35] and, in any event, that the use of the tainted evidence was harmless.[36]

During oral argument, the Second Circuit panel began by expressing scepticism over the underlying theory of the case and the DOJ's interest in it – particularly after the United Kingdom had passed upon prosecuting the defendants.[37] The panel noted the "unusual and complicated" nature of this case, which involved young and relatively low-level UK employees who had worked in London for a Dutch bank.[38] Moreover, the panel remarked upon the fact that the DOJ's Fraud Section pursued the case, not the U.S. Attorney's Office for the Southern District of New York (the "SDNY").[39] It invited defence counsel to provide a "description of the human and prosecutorial context" and explain what "what was going on here".[40]

Defence counsel replied that he did not have "the slightest idea".[41] He noted that there were extremely active British prosecutions and investigations being undertaken concerning exactly the same LIBOR-related conduct.[42] And thanks in part to testimony from the LIBOR Secretary from the British Bankers Association, some of the British cases had resulted in acquittals.[43] Counsel submitted that the Secretary – whose deposition testimony the district court had precluded – would certainly have testified on Allen and Conti's behalf had they been tried in the United Kingdom.[44] Moreover, in response to the panel's queries, defence counsel confirmed that the DOJ's Fraud Section – but not the SDNY – has brought other LIBOR-related prosecutions since this case.[45]

The panel grilled the government, too, about the history of this particular prosecution, as well as the status of other pending LIBOR cases.[46] The panel commented on the fact that the DOJ already has "a deferred prosecution [agreement] with Rabobank, and yet [it is] pursuing these two employees of Rabobank".[47] Furthermore, the panel pressed the government to explain "the fraud that was perpetrated" here.[48] And at one point, the panel even inquired whether the DOJ had "more cases that [it was] going to bring based on the fact that, I guess, everyone was a crook in doing this".[49] The government confirmed that the LIBOR-related investigations and prosecutions continue.[50]

Finally, the panel noted the risks inherent in permitting the use of testimony from a cooperator – who changes tune after having been exposed to immunised testimony – based on the district court's judgment of the witness's credibility.[51] The panel explained that this would "open[ ] an enormous door for the government to make use of immunized testimony", as "nothing . . . really prevents a prosecutor from giving a witness the transcript because" all the witness has to say is that his "recollection was independently refreshed by something else".[52]

C. Second Circuit's Holding

Six months after hearing argument, the Second Circuit reversed the defendants' convictions and dismissed the indictment.[53] First, the Court held that the Fifth Amendment's prohibition on the use of a defendant's compelled testimony in U.S. criminal proceedings applies even when a foreign power has compelled the testimony.[54]

The Court distinguished the Fifth Amendment's protection against self-incrimination from the Fourth Amendment's protections.[55] In contrast to the exclusionary rules, which were crafted as remedies to deter U.S. officers' unconstitutional actions on the field, the self-incrimination clause's prohibition on the use of compelled testimony arises from the text of the Constitution itself and directly addresses what occurs in American courtrooms.[56] In addition, the clause's proscription is not premised upon the misconduct or illegality of the agency that compelled the testimony, but upon the testimony's use in American courts.[57] Furthermore, the Court rejected the government's concerns that the prohibition on foreign compelled testimony's use could scuttle the U.S. prosecution of criminal conduct that traverses international borders.[58]

Next, the Court held that the district court had erred in finding that the government had satisfied its heavy *Kastigar* burden.[59] In *Kastigar*, the Supreme Court upheld the constitutionality of compelling testimony in exchange for "use and derivative use" immunity, finding that the scope of the protection afforded was "coextensive with the scope of the [Fifth Amendment] privilege".[60] The *Kastigar* Court highlighted the breadth of use and derivative use protection, observing that the "total prohibition on use provides a comprehensive safeguard".[61] *Kastigar* also provided teeth to enforce this protection; the government bears "the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony".[62]

Here, the district court had determined that the evidence Robson supplied was untainted based on Robson's assertion to this effect, as well as the existence of corroborating evidence for his trial testimony.[63] But this, the Second Circuit explained, did not satisfy *Kastigar*'s demands. Following in the D.C. Circuit's footsteps, the Second Circuit held that when the government uses a witness who has had substantial exposure to a defendant's compelled testimony, it is required to prove – at a minimum – that the witness's review of the testimony did not shape, alter, or affect the evidence used by the government.[64]

Moreover, the Court held that a bare, generalised denial of taint from a witness who has materially altered his testimony after being substantially exposed to defendant's testimony does not suffice to prove that the testimony was derived from a wholly independent source.[65] The government failed to meet its burden of proof here through Robson's conclusory denial responses to its leading questions during the *Kastigar* hearing.[66]

Lastly, the Second Circuit held that the impermissible use of the defendants' compelled testimony before the petit and grand juries was not harmless beyond a reasonable doubt.[67] After all, Robson, the sole LIBOR submitter to testify on behalf of the government at trial, was the unique source of particularly damning evidence.[68] The significance of Robson's testimony was underscored by the fact that the DOJ did not charge Allen and Conti until Robson became a cooperator.[69]

III Impact on Cross-Border Investigations

A. What Types of Cases Would Be Affected?

The *Allen* decision is likely to have a wide-ranging impact given how broadly the DOJ, the U.S. Securities and Exchange Commission (the "SEC") and the Commodities Futures Trading Commission ("CFTC") construe their jurisdiction. The same day the *Allen* decision was issued, Acting Assistant Attorney General

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Kenneth A. Blanco delivered a speech reaffirming that the DOJ's "biggest investigations are increasingly transnational, often involving multiple foreign jurisdictions".[70] As a result, Acting Assistant Attorney General Blanco explained that, from the DOJ's perspective, "we increasingly find ourselves looking across the globe to collect evidence and identify witnesses necessary to build cases, requiring greater and closer collaboration with our foreign counterparts".[71]

In *Allen*, the Second Circuit recognised the same trend, noting that cross-border prosecutions have become more common and that "[t]he rise in non-prosecution agreements and deferred prosecution agreements between the U.S. and foreign entities for misconduct occurring abroad attests to this new reality".[72] The Court highlighted three areas where U.S. law enforcement agencies frequently cooperate with their counterparts in other jurisdictions, including: (i) investigations into the manipulation of foreign exchange rates; (ii) investigations into U.S. tax evasion at Swiss banks; and (iii) Foreign Corrupt Practices Acts ("FCPA") enforcement actions.

First, the DOJ has focused on investigations into the manipulation of foreign exchange rates, seeking what then Attorney General Loretta Lynch described as "historic resolutions".[73] In May 2015, for example, five major banks agreed to parent-level guilty pleas in connection with manipulation of either the foreign exchange ("FX") spot market or the LIBOR and other benchmark interest rates.[74] In keeping with its prosecutorial policy of prosecuting individuals when there is a corresponding resolution with an institution,[75] the DOJ has particularly emphasised individual prosecutions in this area. From 2010 to March 2017, the DOJ's Antitrust Division prosecuted nearly three times as many individuals (426) as corporations (143).[76] In FX and LIBOR cases specifically, the Antitrust Division, at times in conjunction with the Criminal Division, prosecuted 21 individuals and 10 corporations.[77]

The DOJ cooperates closely with international agencies on these cases, and may bring prosecutions that its partners have chosen not to pursue. On March 15, 2016, for example, the UK's SFO announced that it had closed its investigation into allegations of manipulation of the foreign exchange market, concluding that "there [was] insufficient evidence for a realistic prospect of conviction."[78] Though the SFO couched its decision in these terms, there was, in fact, no UK statute equivalent to the Sherman Antitrust Act to successfully bring charges under. The SFO continued to liaise with the DOJ and, following this announcement, the DOJ brought charges against three individuals arising from the global probe.[79]

Second, the DOJ aggressively pursues tax evasion cases where the assets are located outside the United States.[80] Under the DOJ Tax Division's Swiss Bank Program, announced in August 2013, eligible Swiss banks are required to advise the department if they have reason to believe that they have committed tax-related criminal offences in connection with undeclared U.S.-related accounts in order to resolve potential criminal liabilities in the United States.[81] The DOJ set a deadline of December 31, 2013, after which any banks that did not submit a timely letter of intent to participate in the program risk becoming targets of a formal criminal investigation.[82] Under the Swiss Bank Program, 78 non-prosecution agreements have been executed so far.[83]

Finally, FCPA enforcement actions have skyrocketed in recent years. The DOJ has brought a total of 298 FCPA-related enforcement actions and the SEC has brought 202,[84] with 25 and 29 enforcement actions, respectively, in 2016 alone.[85] The two U.S. agencies have imposed nearly $10 billion in fines thus far, including $2.48 billion in 2016, the biggest enforcement year in FCPA history.[86] In April 2016, the DOJ Fraud Section began a Pilot Program providing guidance about voluntarily self-disclosing misconduct, cooperation, and remediation in FCPA cases.[87] In 2016, the FCPA Unit announced five declinations under the Pilot Program.[88]

As the DOJ and SEC's FCPA enforcement efforts have increased, so have the number of multi-jurisdictional prosecutions of criminal conduct. As Acting Assistant Attorney General Blanco has noted, "[i]n light of the increasingly international scope of the Criminal Division's white collar enforcement efforts", and the efforts by countries around the world to strengthen anti-bribery laws, the DOJ is more frequently cooperating with international partners in investigations and in reaching global resolutions.[89] While this cooperation helps to ensure that corporations are not unfairly penalised for the same conduct by multiple law enforcement agencies,[90] it presents challenges when the various jurisdictions involved in an investigation are subject to different rules.

B. What Foreign Jurisdictions Would Be Affected?

The *Allen* decision may apply to U.S. prosecutions linked to investigations by authorities in jurisdictions where various forms of compelled testimony can be obtained under local laws and regulations.

In the United Kingdom, the statutory limitations on the use of compelled testimony are derived from the seminal case of *Saunders v. UK*,[91] where the failure by the UK legislator to provide for direct use immunity led to the United Kingdom's conviction by the European Court of Human Rights for violating the fair trial provisions of Article 6 of the European Convention on Human Rights.

Following *Saunders*, the UK statutory model is that investigating authorities are empowered to compel testimony, but in exchange for direct use immunity. In that vein, the SFO has extensive powers to obtain evidence for the purposes of investigating serious or complex fraud. Section 2 of the Criminal Justice Act 1987 (the "CJA") confers on the SFO the power to compel any individual or entity to attend an interview with SFO staff to answer questions and produce documents understood to be relevant to a matter under investigation. A court order is not required for these purposes, and the SFO can exercise its powers at the request of an overseas authority.

The SFO's powers are known as "compulsory powers" as compelled witnesses are generally deprived of their right to silence, including if their answers would be self-incriminatory, and despite a duty of confidence owed to third parties. However, one significant safeguard available to witnesses against self-incrimination is that answers provided during section 2 interviews cannot be used in a subsequent prosecution of the witness for the offence under investigation. In this respect, police interviews of suspects under caution (governed by the Police and Criminal Evidence Act 1984) differ from section 2 interviews as a suspect interviewed under caution is not compelled to answer, but adverse inferences may be drawn from a failure to reply, and anything said may be used as evidence against the witness in a subsequent prosecution.

Failure to attend a section 2 interview without reasonable excuse, or providing false or misleading information, is a criminal offence, punishable by up to two years' imprisonment and/or a fine of up to £5,000 (section 2(14) CJA).

Given the safeguards in place against self-incrimination, the SFO tends to restrict the exercise of its section 2 powers to compel answers from individuals not considered to be suspects in the matter under investigation. As a practical consequence, therefore, the very use of a compelled interview effectively means that the interviewee is merely a witness whom the authorities do not, at the time of the interview, plan to prosecute (the individual's status can of course change over the course of an investigation).

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Another authority in the UK with the power to compel witness testimony, and as described in the *Allen* decision, is the FCA.[92] Specifically, the Financial Services and Markets Act 2000 (the "FSMA") provides that FCA-appointed investigators may compel testimony or the production of documents from a witness,[93] and section 169 of the FSMA permits the FCA to appoint an investigator to look into certain matters in support of an overseas regulator, with the power to compel testimony.[94] Refusal to comply with any of these demands may result in imprisonment for up to two years.[95] As with the SFO, any evidence gathered by the FCA under compelled testimony may not be used in criminal proceedings against the interviewee (unless the proceedings relate to perjury and false statement-related offences) due to the suspect's right to silence. English procedural rules also provide for the summonsing of witnesses to testify in civil,[96] and criminal trials,[97] under threat of arrest and being held in contempt. Although a summonsed witness can refuse to provide evidence that might incriminate her or him in the United Kingdom, the protection is less absolute if the risk of prosecution is abroad. U.S. prosecutors may therefore find themselves put to their *Kastigar* burden if they want to prosecute an individual who is formerly a reluctant witness in English court proceedings.

The *Allen* case may have presented an unusual situation in that it involved UK procedures that were to some degree comparable to U.S. ones: they recognised a right to be protected from compelled self-incrimination and provided a procedure to deal with the situation – namely a form of immunity that, the *Allen* court ultimately found, failed to provide sufficient protection to an interviewed witness who is ultimately prosecuted in the United States. As a result, the case squarely presented the question of the use a U.S. prosecutor can make of testimony compelled abroad under a statute which removes the right against self-incrimination in exchange for direct use immunity. It will be interesting to see variants on this situation that may arise from jurisdictions where the procedures are less clearly parallel to U.S. ones.

For example, in French criminal investigations, a witness can be summoned to appear for a formal interview with either a police officer or an investigating magistrate ("*juge d'instruction*") in a proceeding known as a "*garde à vue*". At such an interview, at least in any circumstances where the witness may be subject to criminal liability, he/she has a right to silence (as well, since 2011, to the presence of an attorney), and to be told of this right.[98] Further, there is no equivalent to a U.S. immunity procedure that would permit the investigating authority to force the witness to testify over the invocation of the right to silence. At trial, the presence of a defendant is generally required, and (unlike under U.S. procedures) the court can (and frequently does) ask the defendant to respond to evidence against him/her, to which the defendant can decline to respond based upon the right to silence. In both instances, however – that is, during the investigative phase and at trial – there is as a practical matter a strong inference that authorities (or the court) will draw from the invocation of silence, and the invocation of the right to remain silent is for this reason relatively rare. It is thus possible that a witness whose testimony in France is used against him/her in the United States (either directly or indirectly) will claim that it was "compelled" because of pressure caused by the foreseeably severe consequences of an adverse inference.

More likely to meet the *Allen* test for compulsion are situations that can arise in administrative proceedings, such as those commenced by the French *Autorité des Marchés Financiers* ("AMF"), the rough equivalent of the SEC, or the *Agence Française Anticorruption* (the Anti-Corruption Agency). Such agencies are empowered to impose significant penalties for "obstructing" their investigations, and may interpret failure to cooperate with the agency.[99]

In addition to France, it remains to be seen how testimony from other jurisdictions – such as Singapore, Brazil, Russia, and India – will be affected. The question of whether the "compulsion" in such jurisdictions passes muster under *Kastigar* is far more nuanced than in the United Kingdom.

In Singapore, for instance, the Corrupt Practices Investigation Bureau (the "CPIB") may compel any person who appears to be acquainted with the facts and circumstances of a case to assist in its investigation.[100] As part of this process, a witness may be compelled to appear at an interview, and a warrant of arrest can be issued to secure attendance.[101] While there is a qualified right against self-incrimination under the Criminal Procedure Code (the "CPC") for such interviews,[102] the CPC does not require that a witness be informed of this right.

Moreover, while Article 9(3) of the Singaporean Constitution provides for a right to legal counsel, under the doctrine of legitimate restriction, this right must be granted within a "reasonable" amount of time from the arrest.[103] In the seminal decision on the issue, *Jasbir Singh v. Public Prosecutor*, the Court of Appeal held that it was reasonable that the accused not be afforded his right to counsel until two weeks after his arrest, even though a compelled statement was taken during that time.[104] Even after an accused consults with an attorney, the Singaporean authorities may impose further restrictions; for example, the Court of Appeal has determined that "there is no legal rule requiring the police to let counsel be present during subsequent interviews with the accused while investigations are being carried out".[105]

In Brazil, various provisions the Code of Criminal Procedure (the "BCCP") and other Brazilian statutes contemplate the so-called "coercive conduction", a practice through which local authorities can seek to compel individuals to testify by taking them into temporary custody or detention. For instance, article 201, paragraph 1 of the BCCP provides that "[i]f a properly summoned witness fails to appear [before court] for no justified reason", the judge can request that police or court officials bring the witness to court. Similarly, article 260 of the BCCP states that "[i]f the accused party fails to comply with a summons for an interrogatory, recognition or any other act that cannot be performed without his or her presence, the authority may order that he or she be brought to his presence". Coercive conductions gained substantial publicity in Brazil within the context of the Car Wash Operation, where it was employed 210 times.[106] The coercive conduction of former president Luiz Inacio Lula da Silva in March 2016,[107] in particular, sparked a public debate about the parameters for the use of this tool by local authorities, including whether it can be used during a criminal investigation.[108]

In Russia, in turn, witnesses and victims of crimes may be compelled to testify under the penalty of criminal liability in the course of an investigation or if ordered by the court.[109] The investigators are also required to question a suspect within 24 hours of the suspect's arrest or the initiation of a criminal case,[110] and an accused "immediately after the charges are presented to him".[111] Unlike witnesses and victims, however, the suspect or accused is not warned of criminal liability for refusing to testify or testifying falsely, and is warned about the right against self-incrimination.[112]

Finally, in India, a police office may interview "any person supposed to be acquainted with the facts and circumstances of the case".[113] The witness is "bound to answer truly all questions relating to such case", unless the answers would expose them to potential criminal liability.[114] Article 20(3) of the Constitution of India further provides that no person accused of any offence shall be compelled to be a witness against himself or herself.

Future U.S. prosecutions involving direct or indirect use of evidence first obtained overseas will thus present variants of the

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Allen situation where the outcome is difficult to predict. Among the variables is whether the overseas testimony was "compelled", and in particular whether a U.S. court will consider evidence given under pressure of a formal or practical adverse inference as barring use of that evidence. Further, in the absence in many countries of any sort of mechanism for a witness to refuse to answer based on a right to be protected against self-incrimination and then be forced to do so by an immunity order, there may well be situations where an interviewee will have waived any right to contest the use of the interview.

IV Next Steps in Future Cases

A. What Does This Mean for U.S. Law Enforcement?

Following the *Allen* decision, the DOJ will likely need to further tighten its procedures in cross-border investigations and prosecutions.

In the investigation leading to the *Allen* case, the DOJ followed standard procedures and "took care to conduct their interviews wholly independently of the FCA's interviews and their fruits".[115] Specifically, the FCA and DOJ agreed to procedures to maintain a "wall" between their investigations, including by instituting a "day one/day two" interview procedure in which the DOJ interviewed witnesses prior to the FCA.[116]

Following the *Allen* decision, the DOJ now has a greater interest in co-ordinating closely with foreign authorities on who takes the lead in relation to enforcement action against particular individuals. A key issue in *Allen* was that the FCA commenced enforcement action against Robson prior to the DOJ bringing criminal charges against him, which meant that he received disclosure of Allen and Conti's compelled evidence as part of the case against him.[117] The *Allen* Court determined that Robson's post-exposure testimony was materially different than his pre-exposure testimony to the FCA, demonstrating that his testimony was infected by his review of the compelled statements.[118] If the DOJ had coordinated earlier with the FCA so that the FCA did not commence enforcement action against those the DOJ wished to charge, the DOJ would have avoided them being exposed to the compelled testimony of other suspects.

These changes may also require a larger shift in the DOJ's approach to these cases. In *Allen*, the Second Circuit appeared critical of the DOJ's tack, specifically questioning its prosecution of lower-level individuals like Allen and Conti whom the UK authorities had decided not to pursue, and its use of a cooperating witness as the sole source of certain material information in the case. The DOJ's approach of pursuing cases against individuals who were already investigated, subject to enforcement actions, or faced criminal charges in foreign jurisdictions – or relying on cooperating witnesses who were in the same position – increases the chances that those individuals have already given or reviewed compelled testimony. Relying heavily on those cooperating witnesses compounds that damage; if their testimony is considered tainted and is excluded, it may prove fatal to the entire case. Given the potential pitfalls, if the DOJ is not able to take the lead on these cases from the beginning, it may opt not to pursue them at all.

B. What Does This Mean for Individual and Corporate Defendants?

Individuals and corporations which are the subjects of cross-border investigations and prosecutions will have to navigate an increasingly complicated legal landscape. While *Allen* simplifies matters for defendants by ensuring that their compelled testimony cannot be used against them in U.S. proceedings, a defendant who wishes to cooperate with the DOJ risks being unable to cooperate if he or she reviews compelled testimony in a foreign jurisdiction. Therefore, individuals caught in the cross-hairs of cross-border investigations may in certain circumstances be faced with a dilemma: whether to steer clear of accessing compelled testimony to leave open the door to cooperating with U.S. authorities; or whether to review that testimony in the hopes of gaining some benefit in their home jurisdictions.

Defendants may also be unsure about what constitutes compelled testimony. *Allen* specified that, unlike private employers who may question employees under threat of discharge without Fifth Amendment consequences, a sovereign power's threat to deprive a person of their liberty would constitute coercion.[119] The Court did not, however, address jurisdictions other than the United Kingdom where witnesses and defendants may be subject to varying degrees of compulsion that do not rise to the level of producing compelled testimony. Moreover, even in jurisdictions which permit compelled testimony, the Court noted that the testimony must be the product of a genuine threat to liberty as part of a *bona fide* investigation; "should the circumstances in a particular case indicate that a foreign defendant had faced no real threat of sanctions by his foreign government for not testifying, then that defendant's testimony might well not be considered involuntary".[120]

Allen also presents a potential challenge for corporations operating in multiple jurisdictions in circumstances where they have received disclosure of compelled testimony in one or more of those jurisdictions. Inadvertently sharing such testimony with employees, for example in the context of an internal investigation, could clearly affect the corporation's perceived cooperation with the U.S. authorities. Corporations should therefore keep careful watch over any compelled testimony they may receive by way of disclosure in any jurisdiction in which they operate.

V Conclusion

The *Allen* decision may have far-reaching consequences for cross-border investigations and prosecutions, particularly given how broadly the DOJ construes its jurisdiction and how many jurisdictions accept compelled testimony. To respond to these changes, the DOJ may alter its procedures or approach to these cases. Defendants, in turn, will have to be careful as to how they navigate the complex and uncharted waters of cross-border investigations in the wake of *Allen*.

Endnotes

1. United States v. Allen, No. 16 Cr. 898, 2017 WL 3040201, (2d Cir. July 19, 2017).
2. *Id*. at *1.
3. *Id*. at *1, 5.
4. *Id*. at *8.
5. *Id*. at *1, 9. The FCA replaced the UK's Financial Services Authority in April 2013.
6. *Id*. at *5.
7. *Id*. at *1, 9.
8. *Id*. at *1, 9.
9. *Id*. at *1 n.3.
10. *Id*.
11. *Id*. at *8, 9.

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12. *Id*. at *9.
13. *Id*.
14. *Id*. at *1, 9.
15. *Id*.; *see also* FCA Final Notice against Paul Robson, February 27, 2015. In its Final Notice, the FCA prohibits Robson from undertaking any regulated activity (effectively banning him from the financial sector) as a result of his U.S. conviction (Final Notice available at https://www.fca.org.uk/publication/final-notices/paul-robson.pdf).
16. *Id*. at *9–10.
17. *Id*. at *10.
18. *Id*. at *8, 10.
19. Kastigar v. United States, 406 U.S. 441 (1972).
20. *Allen*, 2017 WL 3040201, at *10.
21. *Id*.
22. *Id*.
23. *Id*. at *8.
24. *Id*. at *10.
25. *Id*.
26. *Id*. at *21.
27. *Id*.
28. *Id*. at *11.
29. *Id*.
30. *Id*. at *2.
31. *Id*. at *11.
32. *Id*.
33. *Id*.
34. *Id*.
35. *Id*.
36. *Id*.
37. Transcript of Oral Argument at 2–6, *Allen*, 2017 WL 3040201 (2d Cir. Jan. 26, 2017).
38. *Id*. at 2.
39. *Id*.
40. *Id*. at 2–3.
41. *Id*. at 3.
42. *Id*. at 4.
43. *Id*. at 5–6.
44. *Id*. at 5, 16–17, 19–21.
45. *Id*. at 4–5.
46. *Id*. at 31–33.
47. *Id*. at 32–33; *see also id*. at 67–68.
48. *Id*. at 39; *see also id*. at 40, 44–45.
49. *Id*. at 47.
50. *Id*. at 47.
51. *Id*. at 53–54.
52. *Id*. at 54.
53. *Allen*, 2017 WL 3040201, *1, 27.
54. *Id*. at *13.
55. *Id*. at *12–13.
56. *Id*. at *13.
57. *Id*.
58. *Id*. at *16–17.
59. *Id*. at *21.
60. *Kastigar*, 406 U.S. at 453.
61. *Allen*, 2017 WL 3040201, *20 (quoting *Kastigar*, 406 U.S. at 60).
62. *Id*.
63. *Allen*, 2017 WL 3040201, *21.
64. *Id*.
65. *Id*. at *24.
66. *Id*. at *23, 27.
67. *Id*. at *24.
68. *Id*.
69. *Id*. at *27.
70. Kenneth A. Blanco, Acting Assistant Attorney General, U.S. Department of Justice, Speaks at the Atlantic Council Inter-American Dialogue Event on Lessons From Brazil: Crisis, Corruption and Global Cooperation, Washington, DC (July 19, 2017), https://www.justice.gov/opa/speech/acting-assistant-attorney-general-kenneth-blanco-speaks-atlantic-council-inter-american-1.
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72. *Allen*, 2017 WL 3040201 at *52 n. 112.
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76. U.S. Department of Justice, Individual Accountability in the Financial Services Industry: Division Update Spring 2017 (March 27, 2017), https://www.justice.gov/atr/division-operations/division-update-spring-2017/individual-accountability-financial-services-industry.
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88. *Id*.

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90. *Id.*
91. Saunders v. United Kingdom, 43/1994/490/572, European Court of Human Rights, Grand Chamber judgment of December 17, 1996.
92. *Allen*, 2017 WL 3040201 at *5.
93. FSMA section 165, *et seq*.
94. *Id.* section 169.
95. *Id.* section 177.
96. Senior Courts Act 1981, section 36.
97. Criminal Procedure (Attendance of Witnesses) Act 1965, section 2.
98. Code De Procédure Pénale [C. Pr. Pén] [Code of Criminal Procedure] art. 63-1 (Fr.).
99. Code De Commerce [C. Com.][Commercial Code] arts. L. 642-2 & L. 621-15, II, f (Fr.); Loi Sapin II, 2016-1691 art. 4 du 9 Décembre 2016 [Law 2016-1691 art. 4 of December 9, 2016].
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101. *Id.*, Chapter 68, Section 21(2) ("If that person fails to attend as required, the police officer may report the matter to a Magistrate who may then, in his discretion, issue a warrant ordering the person to attend.").
102. *Id.*, Chapter 68, Section 22(2) ("The person examined shall be bound to state truly what he knows of the facts and circumstances of the case, except that he need not say anything that might expose him to a criminal charge, penalty or forfeiture.").
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111. *Id.*, art. 173(1).
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114. *Id*., Section 161(2).
115. *Allen*, 2017 WL 3040201 at *9.
116. *Id*.
117. *Id*.
118. *Id*. at *26–27.
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