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A Recent Decision in France Applies "International Double Jeopardy" Principles to U.S. DPAs

Multi-national corporations – and the individuals who work for them – increasingly confront criminal investigations by authorities in two (or even more) countries at once for essentially the same acts. A very recent decision in France rules, for the first time, that companies that signed Deferred Prosecution Agreements ("DPAs") in the United States cannot be further prosecuted in France. The practical effect of the decision may for the moment be limited to multinational investigations involving France (and since it is subject to appeal, it may not definitively state the current status of the law even there). But the issue of "international jeopardy" is of increasing concern and importance, and this decision may well have an impact in the development of the law.

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The Problem

There are several scenarios that could lead to multiple (or parallel) prosecutions: often the acts constituting a criminal offense may have occurred in several different countries, thereby making each country potentially competent to investigate the entire crime of which the acts that took place on its territory were a part; most countries' criminal laws provide that the government can prosecute its own nationals for criminal acts committed outside the national territory, which may overlap with "territorial" jurisdiction in other countries; and some countries – notably the United States – are expansive in determining their own power to prosecute, and may base a criminal investigation, for example, on the mere fact that a target used U.S. dollars to consummate an activity that otherwise took place entirely abroad. Generally speaking, a company or person in this situation faces a difficult (and often critical) strategic challenge of how to manage the various threats. One obvious risk is that if a target enters into any agreed-upon outcome – such as a guilty plea, a Deferred Prosecution Agreement or Non-Prosecution Agreement ("NPA") – or even if he/she/it enters into discussions with authorities in one country in the hope of persuading them not to prosecute, the authorities in another country may learn of the underlying issues – either independently or because of publicity of the outcome of the first set of negotiations – and begin a new investigation seeking further penalties.

Most countries recognize that it is unfair to subject the same person or company to multiple prosecutions for the same acts. This principle is enshrined in the U.S. Constitution in the well-known Double Jeopardy Clause appearing in the Bill of Rights; in Europe and elsewhere the principle is generally known under the Latin phrase "*ne bis in idem*." While such domestic constitutional provisions or laws are quite similar, there does not exist a universally accepted international norm, and the protection afforded by the laws in one country may offer no protection in another. As a result, targets of multiple investigations and their counsel generally rely more on their strategic negotiating skills than on a research of legal rights to avoid (or minimize) the risk of multiple prosecutions across borders.[1] As multi-national investigations increase, however, the issue is receiving renewed attention in academia,[2] in colloquia,[3] and in "blog" discussions of the subject.[4]

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1. For a general discussion of managing defense strategy in a multi-country prosecution, see Davis, Goodman & Kirry, Multi-Jurisdictional Criminal Investigations Pose Many Challenges, http://www.debevoise.com/insights/publications/2013/11/multijurisdictional-criminal-investigations-pose__.
2. J. Lelieur, *'Transnationalising' Ne Bis In Idem: How the Rule of Ne Bis In Idem Reveals the Principle of Personal Legal Certainty*, available at http://www.utrechtlawreview.org/index.php/ulr/article/view/250.
3. *See, e.g.*, https://www.law.georgetown.edu/continuing-legal-education/programs/cle/multinational-corporations/.
4. *See, e.g.*, http://www.fcpablog.com/blog/2013/11/11/oecd-should-protect-against-multi-country-enforcement.html.

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Corporate counsel often inveigh against the threat of multiple prosecutions, and call for reform.[5]

A very recent decision of the Criminal Court in Paris has taken a bold step in advancing this debate: In a decision announced on June 18, 2015,[6] but explained in a written decision released only in September 2015, the Court acquitted four French corporations that were facing trial under French anti-corruption laws on the ground that they (or their corporate parents) had already signed DPAs with the United States Department of Justice ("DoJ") and thus could not, consistently with French international obligations, be prosecuted a second time for what the Court found to be the same facts. The significance of this ruling remains to be seen: as a non-common law country, France does not consider such decisions to be "precedent," and in any event the Public Prosecutor is appealing this acquittal (which French criminal procedures permit him to do) and the Paris Court of Appeals may reach a different conclusion when it rules on the matter, presumably in 2016. At a minimum, however, the decision provides an interesting and useful perspective on a matter of increasing importance.

"[I]n September 2015, the [Criminal] Court [in Paris] acquitted four French corporations that were facing trial under French anti-corruption laws on the ground that they (or their corporate parents) had already signed DPAs with the United States Department of Justice ('DoJ') and thus could not, consistently with French international obligations, be prosecuted a second time for what the Court found to be the same facts."

The Basic Framework

Multiple prosecutions are not new, and can occur under a wide variety of criminal laws; the current prosecution and continuing investigation of senior officials of the international soccer organization FIFA for alleged fraud and corruption is perhaps the most noteworthy recent example. In terms of numbers, however, the surge of multiple prosecutions dates to international efforts to fight overseas corruption, and in particular to the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, adopted by the Organization for Economic

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5. *See, e.g.*, Herbel et al., http://www.legalweek.com/legal-week/analysis/2126979/double-jeopardy-finding-balance-enforcement-actions-companies.

6. http://www.lemonde.fr/police-justice/article/2015/06/18/nouvelle-relaxe-generale-dans-le-deuxieme-proces-petrole-contre-nourriture_4657307_1653578.html.

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Co-Operation and Development ("OECD") in 1997, which has been signed by all the major countries of Europe as well as many others, and which led to the transposition into domestic laws of signatory nations of criminal prohibitions generally similar to the U.S. Foreign Corrupt Practices Act ("FCPA"). A person or company engaging in overseas corruption anywhere in the world now faces the risk of prosecution in any signatory country where he/she/it may have sufficient contacts, either by citizenship or place of incorporation, or as a place where relevant acts took place.

The OECD Convention clearly contemplated the likelihood of multiple or parallel investigations. Article 4.1 of the Convention obligates each signatory country to "take such measures as may be necessary to establish its jurisdiction over the bribery of a foreign public official when the offense is committed in whole or in part in its territory" (emphasis added), and in Article 4.2 contemplates that each signatory country may have jurisdiction "to prosecute its nationals for offenses committed abroad . . . ."

Having recognized the conditions that create a risk of multiple investigations, the Convention then provided for no legally enforceable ban on multiple prosecutions, but rather stated (in Article 4.3) as follows:

> When more than one Party [*i.e.*, signatory country] has jurisdiction over an alleged offence described in this Convention, the Parties involved shall, at the request of one of them, consult with a view to determining the most appropriate jurisdiction for prosecution.

This provision clearly envisioned that each offender should ideally face no more than one prosecution, since it directs the multiple nations that may have had "jurisdiction over an alleged offense" to consult "with a view to determining the most appropriate jurisdiction for prosecution." (Emphasis added) What the drafters apparently hoped was that, through such consultations, one, but only one, country would actually prosecute. While this provision has been cited for the proposition that a unitary prosecution should be a goal, arguments that it requires a single prosecution by prohibiting multiple ones have been routinely rejected, as illustrated by *United States v. Jeong,* 624 F.3d 706 (5th Cir. 2010), a case in which a businessman already convicted of corruption in Korea claimed that Article 4.3 of the OECD Convention preluded further prosecution in the United States for the same facts. The Court rejected this argument, noting:

> [W]e conclude that the plain language of Article 4.3 does not prohibit two signatory countries from prosecuting the same offense. Rather, the provision merely establishes when two signatories must consult on jurisdiction.

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As a result, multiple prosecutions for the same acts have in fact occurred with some regularity. One of the earliest under an OECD Convention-compliant national prosecution involved the Norwegian state oil giant, StatOil. As is well known, StatOil was prosecuted by Norwegian authorities and ultimately paid a significant penalty there. Apparently to its shock – and to the surprise of the Norwegian prosecutors – the United States Department of Justice thereupon commenced an independent investigation, which resulted in StatOil agreeing to additional fines for what apparently was the same set of facts that had been involved in the Norway case.[7]

The Approach in the United States

The Double Jeopardy Clause found in the Fifth Amendment to the United States Constitution provides that no person shall be "subject for the same offense to be twice put in jeopardy of life or limb . . . ." This provision, however, has been subject to two interpretive limitations that restrict its scope.

First, it has always been the law in the United States that the Clause applies only to prosecutions by the "same sovereign" – that is, it prohibits the federal government, or any individual state, from twice prosecuting someone for the same facts, but does not prohibit the federal government from prosecuting a person convicted or acquitted by a state, or vice versa, or one state from prosecuting a person convicted or acquitted by another.[8]

And, second, U.S. laws provide very few restrictions on the ability of the government to pursue simultaneous (and cumulative) criminal and administrative remedies for the same conduct, even if the latter results in painful financial penalties that are difficult to distinguish from criminal ones. In *United States v. Hudson,* 522 U.S. 93 (1997), the Supreme Court held that separate administrative sanctions can follow criminal conviction or acquittal, unless there is the "clearest proof" that the legislature intended the administrative sanction to be penal in nature (which is virtually never the case) or if the sanctions are "so punitive" as to render them, in essence, criminal. As one commentator has written, after *Hudson*, "double jeopardy protection from civil sanctions will attach now only in the rarest of circumstances."[9] As a result, it is very common for a company to face simultaneous, or even successive, investigations by the DoJ and the SEC for the same conduct.

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7. *See* http://www.justice.gov/criminal-fraud/case/united-states-v-statoil-asa-court-docket-number-06-cr-960.
8. *See Heath v. Alabama,* 474 U.S. 82 (1985).
9. L. Melenyzer, *Double Jeopardy Protection from Civil Sanctions after Hudson v. United States*, http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=7010&context=jclc.

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The absence of legally-enforceable protections noted here is tempered to some degree by self-imposed – but not legally binding – "guidelines" or "principles" announced by the Department of Justice. The most important of these is the so-called "Petite Policy," known more formally as the "Dual and Successive Prosecution Policy," which provides that a prosecution in a state will generally bar a federal prosecution, absent some unusual circumstances such as indications that the state result was affected by incompetence or fraud, or in cases where there is an important federal interest.[10] These principles are real in the sense that the federal government rarely engages in double prosecution domestically, but they nonetheless do not state rights that can be enforced in court.

Internationally, the DoJ admits of no legal requirement that it give any legal standing or significance to a prosecution elsewhere in the world. With respect to corporations, the announced general policy of the Department of Justice – when faced with a situation that has already resulted in a criminal prosecution elsewhere – is that the Department of Justice, in those situations where it considers that it has jurisdiction to do so and sees any U.S. interest, will determine whether the foreign outcome was "adequate"; further, as a matter of both announced principle and observed practice, the Department of Justice gives credit for fines actually paid outside the United States by deducting them from its calculation of a fine or other payment that would be due under U.S. laws. As a result, counsel advising parties involved in potentially multiple investigations can prepare for negotiations with the U.S. Department of Justice and argue that a non-U.S. outcome should bar any U.S. proceedings at all, or, at a minimum, should limit a U.S. prosecution to those areas not already addressed elsewhere. Recently, the former argument – that the U.S. government should do nothing at all – appears to have been successful in the case of SBM Offshore, where the Department of Justice announced that it would drop its two-year investigation after the target, a Dutch oil services company, announced an agreed-upon outcome in the Netherlands, where it paid a significant fine.[11] Many other cases result in joint or coordinated negotiations where the prosecuting authorities have agreed on the charges to be admitted, and the respective payments made, by the investigated corporation; a "credit" is then given for payments made

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10. The Petite Policy is found at the U.S. Attorney's Manual, § 9-2.031.

11. For discussion of the SBM case, see *Small Country, Big Punch: The Netherlands' Anti-Bribery Prosecution of SBM Offshore*, http://www.debevoise.com/insights/publications/2014/12/small-country-big-punch-the-netherlands.

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in each country.[12] But these negotiations are based entirely on the discretion of the American prosecutor; in the absence of judicially enforceable rules, and heeding the adage that "adequacy" may well be "in the eye of the beholder," it is often problematic to start a defense or negotiations in another country if there is a likelihood that the U.S. government may consider itself jurisdictionally competent to proceed and will later get involved.

"Traditionally, European countries have recognized some form of the 'dual sovereignty' principle which, as in the United States, permits multiple prosecutions. In France, via legislation going back to the 19th century, this approach has been amended to distinguish between cases in which prosecutions in France are based on a 'territorial' application of its criminal laws to acts committed in France, on the one hand, and, on the other, 'extra-territorial' applications of them[.]"

The Developing Law in Europe and France

The legislatures and courts in Europe have, over time, engaged in a number of efforts to provide some semblance of coherence with respect to prosecutions in that continent. Traditionally, European countries have recognized some form of the "dual sovereignty" principle which, as in the United States, permits multiple prosecutions. In France, via legislation going back to the 19th century, this approach has been amended to distinguish between cases in which prosecutions in France are based on a "territorial" application of its criminal laws to acts committed in France, on the one hand, and, on the other, "extra-territorial" applications of them – such as occurs if conduct taking place abroad is committed by a French person or corporation, or where a French person or corporation is a victim.[13] In the latter case, Article 692 of the French Code of Criminal Procedure provides that "no prosecution can take place with respect to a person who has been definitively convicted in another country for the same facts, and, in case of conviction, where the penalty has been performed or suspended." However, for all "territorial" prosecutions, domestic French law does not provide any *ne bis in idem* protection for prosecutions overseas.

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12. In 2011, for example, both the DoJ and the United Kingdom's Serious Fraud Office investigated the U.S. company Johnson & Johnson with respect to alleged improper payments made by its subsidiaries in Greece and eastern Europe; the press announcements issued by the two prosecuting authorities reflect the coordinated outcome and the "credit" each gave to the other. See http://www.justice.gov/opa/pr/johnson-johnson-agrees-pay-214-million-criminal-penalty-resolve-foreign-corrupt-practices-act and http://www.sfo.gov.uk/press-room/press-release-archive/press-releases-2011/depuy-international-limited-ordered-to-pay-4829-million-in-civil-recovery-order.aspx.

13. French authorities are considered competent to pursue these, and a few other "extraterritorial" events, under Articles 113-3 to 113-9 of the Penal Code.

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A number of European treaties have contributed to the debate regarding this issue. Protocol Number 7 of the Convention for the Protection of Human Rights and Fundamental Freedoms, adopted in 1984 by the Council of Europe and signed by most but not all of its members, provides in its Article 4 that "no-one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offense for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State." While by its terms – and specifically the mention of "the same State" – this provision did not purport to "internationalize" the principle of *ne bis in idem*, its appearance in this Convention may have contributed to a heightened perception of the importance of the rule. The Council of Europe also took a step towards recognizing – and in fact internationalizing – the principle of *ne bis in idem* when in 1975 it modified its procedures for trans-European arrest warrants set forth in the European Convention on Extradition of 1957 by providing, in the First Additional Protocol, that a requested country need not extradite a person to a requesting country if that person had already been convicted or acquitted in a third country.[14] This principle was also recognized in Article 4(5) of the Council Framework Decision of 13 June 2002 on the European Arrest Warrant,[15] which was transposed into French law in Article 695-22(2) of the French Code of Criminal Procedure. Separately, in 1996, France's highest administrative court, the Council of State, reviewed, at the request of the Prime Minister, the then-working version of what became Article 20 of the Treaty of Rome (which provides that the International Criminal Court cannot prosecute individuals convicted or acquitted in national courts – nor vice versa – absent a showing that the prior judgment was not conducted "independently and impartially.") Noting that the issue was of an important and constitutional dimension, the Council expressed the view that "international law" recognized as an exception to the principle of *ne bis in idem* only circumstances involving a situation in which a prior judgment was based on fraud.[16]

As of 2009, when the Charter of Fundamental Rights of the European Union entered into full legal effect, citizens in the European Union are now protected, under Article 50 of the Charter, by the provision that states:

> No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law.[17]

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14. http://conventions.coe.int/Treaty/EN/Treaties/Html/086.htm.
15. https://www.gov.uk/government/publications/framework-decision-on-the-european-arrest-warrant.
16. Conseil d'Etat (section de l'Intérieur) avis No. 358-597 (February 29, 1996).
17. http://ec.europa.eu/justice/fundamental-rights/charter/index_en.htm.

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In 1966, the United States, France and a number of other countries signed the International Covenant on Civil and Political Rights ("ICCPR"); the ICCPR, which was central to the recent French decision, will be explored in greater detail in the next section.

Thus, the situation in France and in Europe generally has been that the principle of *ne bis in idem* has achieved increasingly important status and widespread acceptance. This evolution in approach has accompanied changes in European laws with respect to the vulnerability of companies to be pursued for both criminal and administrative sanctions, the issue that was largely resolved in the United States in favor of permitting multiple actions by the *Hudson* decision mentioned above. In 2014, the European Court for Human Rights ruled in the *Grande Stevens* decision that administrative penalties obtained by the Italian Companies and Stock Exchange Commission precluded a criminal prosecution for the same acts by the same company,[18] a decision echoed in 2015 in France by a decision of the Constitutional Court, which barred an imminent criminal trial of a number of individuals and companies accused of insider trading of shares in EADS on the ground that the same defendants had already been absolved of responsibility after an administrative investigation by the French Autorité des Marchés Financiers, the rough equivalent of the SEC.[19]

The Recent French Decision

In 2007, French authorities commenced an investigation into approximately 20 French companies suspected of having violated the terms and conditions of the so-called "Oil for Food" program administered by the United Nations that provided for strictly limited and supervised humanitarian transactions with the Iraq regime headed by Saddam Hussein. Four of those companies had – either directly or through agreements negotiated by their corporate parents – already entered into Deferred Prosecution Agreements with the Department of Justice and, in some instances, into similar agreements with the Securities and Exchange Commission, whereby they had paid significant fines. Under the terms of the various DPAs, the period during which the Department of Justice could reopen the investigations had expired, and thus through the DPAs the respective companies

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18. *Grande Stevens v. Italy*, http://hudoc.echr.coe.int/eng?i=001-141370#{%22itemid%22:[%22001-141370%22]} (ECtHR, March 14, 2014).

19. *Conseil Constitutionnel*, March 18, 2015 Decision No. 2014-453/454. For a discussion of these decisions and their impact on investigations in France, see Davis & Kirry, "France," in *The International Investigations Review* (2015) at 134-35, available at http://www.debevoise.com/insights/publications/2015/09/the-international; Kirry & Wetzel, *Evolution of French Constitutional Law and European Human Rights Law Related to the non bis in idem Principle*, 4 EUR. HUM. RTS. L. REV. 382 (2015); Kirry, Wetzel & Castro, *Reform of French Law on Insider Trading Mandated by French Conseil Constitutionnel, Westlaw Journal White-Collar Crime (August 2015).*

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benefitted from the commitment that they would not be prosecuted for the matters set forth therein. During the course of the investigation in France, these four companies all asked that the investigation be dismissed as to them on the basis of *ne bis in idem*, which was denied, and as a result the four of them, together with the others, all proceeded to be tried on the merits. In a decision publically announced on June 18, 2015, but not fully explained until the written judgment was released some months later, the Court acquitted all of the defendants. With respect to the four that had signed DPAs, the Court concluded that the principle of *ne bis in idem* precluded prosecution in France; the other corporations were acquitted on the basis of the factual insufficiency of the proof against them.

On the issue of protection against multiple prosecutions, the Court first rejected the argument that it was bound by Article 692 of the Code of Criminal Procedure, cited above, which applies to French prosecutions based upon its extraterritorial principles, noting that some of the acts alleged to have been committed took place on French territory, and thus this was a "territorial" prosecution and did not benefit, under French domestic law, from the principle of *ne bis in idem* because judgments of foreign criminal tribunals have no *res judicata* effect when they concern facts committed on French territory. The Court was, however, convinced that it was bound by Article 14(7) of the ICCPR which provides as follows:

> No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

The Court concluded that this text is not limited to guard against multiple prosecutions by the same state, but rather by its open-ended terms appeared to protect against multiple prosecutions wherever the events had taken place. And noting that France had not only signed but implemented the ICCPR, the Court felt constrained to apply it in the case before it.

In order to apply this reasoning to the specific facts, the Court then took two steps. First, with respect to each defendant, it compared the facts recited in its respective DPA and concluded that they appeared to be the same general facts as those appearing in the accusations in France. And second, the Court concluded that the DPAs had the essential qualities of a "judgment," thereby qualifying the companies for *ne bis in idem* protection. The Court's reasoning on this second issue is a bit unclear. It notably does not refer to any specific act by a U.S. court as having been the basis for the prior act, but rather referred to the DPA as "a decision

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from the Department of Justice [in French: *Ministère Public*]." In so concluding, the Court noted that it was relying on an expert opinion submitted by a well-known international criminal legal specialist and professor of law in Paris, Didier Rebut. Its apparent reasoning is that the combination of a significant payment together with a protection against further prosecution had all the hallmarks of a prior "judgment."

This decision is noteworthy in at least two respects: First, it may be the first time that a European court has turned to the ICCPR and relied on it to reject an otherwise procedurally appropriate prosecution on the basis of a prior prosecution in the United States. And second, the Court took a large step forward in interpreting an executed (and completed)[20] DPA as a "judgment" worthy of *ne bis in idem* / double jeopardy application. Particularly since neither French criminal procedure nor its traditions and culture recognize DPAs as a means of addressing criminal investigations,[21] and given the "asymmetry" noted below (because the United States will not recognize a French criminal judgment as preclusive under the ICCPR), this leg of the Court's reasoning may be subject to scrutiny on appeal.

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20. DPAs typically have a term (often three years) during which the DoJ retains discretion to revoke them (permitting the prosecution to proceed to trial) if it deems that the signer has not respected its obligations. Because of their age, it appears that all of private parties' obligations under the DPAs involved in this case had been completed, and thus the undertaking of the prosecutor not to prosecute had become binding. A different situation may occur if a company seeks *ne bis in idem* protection on the basis of a DPA that has not yet completed its stated term, and thus may be revoked. Although there is no public writing to confirm this, the contributors to this article understand that in another case involving a prosecution in France for overseas corruption where one of the defendants had signed a DPA that was not yet completed, that defendant persuaded the court to postpone the trial in the French case until the DPA was completed, at which point it will presumably ask that the case be dismissed under the principles discussed here.

21. For a discussion of French procedures in this regard, see Davis, Corporate Criminal Responsibility in France, Is It Out of Step?, http://www.ethic-intelligence.com/experts/8344-corporate-criminal-responsibility/.

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The Implications of the Decision

The Oil-for-Food decision is likely to have short-term and longer-term impacts.

In the short term, the Public Prosecutor has appealed the decision. In France, an appeal is in essence a new trial, and the Prosecutor can appeal an acquittal, even if based on insufficiency of evidence; thus, it is possible that both the acquittal of four companies on the basis of *ne bis in idem* but also of the other companies may be reviewed. Further review of the *ne bis in idem* decision may well occur in France's Supreme Court *(Cour de Cassation)*, which reviews only questions of law.

The decision will certainly affect defensive strategies for companies involved in multi-national investigations that involve or may involve France. With respect to any actual or threatened prosecutions in France in which companies have already signed a DPA (or equivalent agreement) in the United States and any other country,[22] or will do so in the future, counsel will certainly urge acceptance of the Court's reasoning.

The more intriguing implications, however, are longer term.

First, the decision may inadvertently increase the predominance of U.S. investigations relative to the efforts in other countries: if it is established that U.S. negotiated outcomes preclude prosecutions elsewhere, it would become especially useful to reach such an agreement. This is particularly true because the French Court's decision will not be "symmetrical" in the sense of contemplating that U.S. courts would give similar recognition to French judgments of any sort (let alone negotiated outcomes): the United States signed the ICCPR (the cornerstone of the French decision) but expressly stated upon signature that it did not create any enforceable rights in the United States, and the legislature did not implement it by adopting conforming legislation. As a result, all efforts in the United States to rely on it in the courts have routinely failed on the ground that the treaty is not "self-executing," and as such may have "moral authority" but does not provide a right or defense in U. S. courts.[23] Thus, the decision may in fact encourage a "race to the courthouse" in countries that offer attractive outcomes, of the very sort that some commentators have predicted as an unwelcome side-effect of any effort to adopt an "international double jeopardy" regime.[24]

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22. Since February 2014, the criminal laws in the United Kingdom permit a form of negotiated outcomes for companies that are similar to DPAs. *See* http://www.debevoise.com/insights/publications/2013/06/dpas-explained.

23. *See Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004); *see also United States v. Duarte-Acero*, 296 F.3d 1277, 1283 (11th Cir. 2002) ("[T]he ICCPR does not create judicially-enforceable individual rights.").

24. *See, e.g.*, J. Moran, *Why International Double Jeopardy Is a Bad Idea*, http://globalanticorruptionblog.com/2015/03/09/why-international-double-jeopardy-is-a-bad-idea/.

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Second, the decision reflects a situation that cries out for international collaboration. Ideally, the signatories to the OECD Convention might contemplate a more procedurally comprehensive, and binding, version of Article 4.3 that would allocate responsibilities for pursuits of corruption that spread across borders. More practically, the principal countries involved should, and undoubtedly will, engage in more effective and transparent cooperation. Officials in the United States, as by far the most active, aggressive and effective enforcers, should in particular be more clear in articulating the standards for the "adequacy" of non-U.S. prosecutions that they would find sufficient, which would have the salutary effect of encouraging non-U.S. outcomes like that in the SBM Offshore case.

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China Amends Its Bribery Laws

On August 29, 2015, the Standing Committee of the National People's Congress of China passed the ninth set of amendments to the country's Criminal Law ("Amendment IX"), which will come into force on November 1, 2015.[1] Amendment IX makes significant changes to the existing Criminal Law, including with regard to bribery (encompassing commercial bribery,[2] bribery of a state functionary,[3] and bribery of an organization,[4] both in terms of bribe payers and bribe takers). As detailed below, Amendment IX appears to equalize the treatment of bribe payers and bribe takers, potentially signaling a future shift in the focus of the current anti-corruption campaign, which has largely focused on bribe takers.

Amendment IX explicitly criminalizes the giving of bribes to close relatives of state functionaries.[5] It also narrows the circumstances under which a bribe payer can seek leniency.[6] With regard to both bribe takers and bribe payers, Amendment IX expands the availability of criminal fines, which can be imposed concurrently with imprisonment on individuals.[7] Amendment IX also moves towards equalizing prohibitions and (in most cases) penalties for bribe payers and bribe takers.[8]

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1. National People's Congress of China, "Amendment to the Criminal Law of the People's Republic of China (IX)" [in Chinese: *Zhong Hua Ren Min Gong He Guo Xing Fa Xiu Zheng An (Jiu)*], *XinhuaNet* (Aug. 30, 2015), http://news.xinhuanet.com/legal/2015-08/30/c_1116414724.htm?t=123. Unofficial draft translation available at Westlaw China, http://app.westlawchina.com/maf/china/app/document?&src=nr&docguid=i000000000000014e6674ca111002816e&lang=en (unless otherwise indicated, quoted language from Amendment IX is derived from this translation). Criminal Law of the People's Republic of China as amended by Amendment IX is hereinafter referred to as "Criminal Law as Amended by Amendment IX."
2. "Criminal Law of the People's Republic of China" [in Chinese, *Zhong Hua Ren Min Gong He Guo Xing Fa*] ("Criminal Law before Amendment IX"), Arts. 163 and 164, criminalizing the paying or taking of a bribe to or by an employee of a company or an organization who does not qualify as a state functionary. A "state functionary" is defined as any person who performs public service in a state organ, including any person who performs public service in a state-owned company, enterprise, institution or a people's organization, or who is assigned by such entities to a non-state-owned company, enterprise or institution to perform public service according to law. *See* Criminal Law before Amendment IX, Art. 93.
3. Criminal Law before Amendment IX, Arts. 382, 383, 385, 386, 389 and 390, criminalizing official bribery, *i.e.*, the paying or taking of a bribe to or by a state functionary.
4. Criminal Law before Amendment IX, Arts. 387 and 393, criminalizing bribery of an organization, *i.e.*, the paying or taking of a bribe to or by an organization.
5. Amendment IX § 46.
6. Amendment IX § 45(2).
7. Amendment IX §§ 10, 44-49.
8. It remains the case, however, that only state functionaries who take bribes are eligible for the most severe penalties for bribery, including the death penalty. *See* Amendment IX § 44, expanding the possibility of capital punishment for state functionaries who accept "especially huge" bribes causing "especially serious loss to the interests of the state."

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In particular, Amendment IX broadens the language relating to penalties for state functionaries who accept bribes, replacing the monetary thresholds used to define severity for sentencing standards with a set of more general criteria, roughly parallel to the pre-existing language for bribe payers.[9] The new and vaguer language grants courts and prosecutors greater discretion, which may lead to more severe punishment, especially in cases involving smaller bribes.

Bribing Relatives of State Functionaries

Amendment IX adds a new Article 390(a) to the Criminal Law. The amendment provides that if any person, "for the purpose of securing illegitimate benefit, offers bribes to any of the close relatives of a state functionary or other persons closely related to a state functionary," or any ex-state functionary, or any of the close relatives of or other persons closely related to an ex-state functionary, the person commits a crime of bribery.[10] Article 390(a) does not expressly require a link between the illegitimate benefit and the state functionary/ex-state functionary's duties, but such a link is likely to be considered by a court, as is common in the context of commercial bribery.[11] The penalties for the offense include criminal fines, detention or imprisonment, as determined by the severity of the crime, qualified as "serious"[12] or "especially serious"[13] cases, or by the loss caused to state interests, whether a "heavy loss" or an "especially heavy loss."[14]

As with other bribery offenses under the Criminal Law, corporate entities or other organizations can also be indicted for committing this crime.[15] Punishment for

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9. *Compare* Amendment IX § 44 *with* Criminal Law before Amendment IX, Art. 390(1).
10. Amendment IX § 46.
11. *See, e.g.*, "Opinion of the Supreme People's Court and the Supreme People's Procuratorate on Certain Issues Concerning the Application of Law in Handling Criminal Cases of Commercial Bribery" (effective on Nov. 20, 2008), Art. 10, which states: "[b]ribery and donation shall be differentiated when handling criminal cases of commercial bribery. The following factors shall be mainly taken into consideration to make overall analysis and comprehensive judgment: . . . ; (3) the cause, time and manner of money or property transaction, whether the person offering money or property has brought forward official request towards the recipient or not; (4) whether the recipient secures benefits for the provider by taking advantage of his position or not."
12. "Interpretation of the Supreme People's Court and the Supreme People's Procuratorate on Certain Issues Concerning Detailed Application of Law in Handling Criminal Cases Involving Bribery" ("Bribery Interpretation," effective on Jan. 1, 2013), Art. 2, defining a "serious" case as involving a bribe amount of (i) RMB 200,000 up to RMB 1,000,000, or (ii) at least RMB 100, 000 and with other serious circumstances (*e.g.*, bribes are offered to several persons, or they involve officials governing food, drugs, work safety or environment protection issues).
13. *See* Bribery Interpretation, Art. 4, defining an "especially serious" case as involving a bribe amount of (i) not less than RMB 1,000,000, (ii) at least RMB 500,000 and with other serious circumstances, or (iii) at least RMB 500,000 and a direct economic loss of not less than RMB 5,000,000.
14. *See* Bribery Interpretation, Art. 3, defining "heavy losses to the interests of the State" to be a direct economic loss of not less than RMB 1,000,000.
15. Amendment IX § 46(2). This situation often occurs in the context of undisclosed rebates, which are specifically mentioned in Articles 387 and 393 of the Criminal Law.

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organizations convicted of bribery consists of fines and punishment of responsible individuals, including the employees who paid the bribes and their supervisors.[16]

The addition of a new crime of bribing a relative of state functionaries addresses the disparity in pre-existing Chinese law under which bribe takers were often punished more severely than bribe payers. The 2009 amendments to the Criminal Law prohibited the taking of bribes by state functionaries' close relatives or relations. Amendment IX extends roughly parallel penalties[17] to those who bribe the relatives of state functionaries.

"Under the existing Criminal Law, if a bribe payer voluntarily confesses their crime before being prosecuted, he or she could be fully exempted from punishment or receive mitigated penalties. Amendment IX narrows the circumstances in which such leniency is available."

Qualifications for a Bribe Payer Seeking Leniency

Under the existing Criminal Law, if a bribe payer voluntarily confesses their crime before being prosecuted, he or she could be fully exempted from punishment or receive mitigated penalties.[18] Amendment IX narrows the circumstances in which such leniency is available. Now, a bribe payer must not only voluntarily confess, he or she must also demonstrate at least one of the following in order to receive leniency: (i) that the offense was relatively minor, (ii) that the bribe payer has played a key role in leading to a successful investigation of a major case, or (iii) that the bribe payer has otherwise "performed significant meritorious service" in the case investigation.[19]

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16. Amendment IX § 46(2).
17. Comparing Criminal Law before Amendment IX, Art. 388(2) and Amendment IX § 46, both a bribe taker and a bribe payer in cases of bribing relatives will be punished according to a three-tier sentencing standard, *i.e.*, (i) in normal cases, criminal detention or imprisonment for up to 3 years, plus fines, (ii) in relatively serious cases, imprisonment for 3 to 7 years, plus fines, or (iii) in especially serious cases, imprisonment for more than 7 years (for bribe takers) /more than 7 years but not exceeding 10 (for bribe payers), plus fines.
18. Criminal Law before Amendment IX, Art. 390(2).
19. Amendment IX § 45.

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More Flexible Sentencing Standards for State Functionaries Taking Bribes

Before the enactment of Amendment IX, statutory penalties for a state functionary who accepted bribes were determined by monetary thresholds.[20] These monetary thresholds, which were first adopted in 1988,[21] are considered to be outdated and unsuitable for the current anti-bribery drive in China.[22]

Amendment IX abandons the monetary thresholds, and provides for criteria using more general descriptions to determine the statutory penalty for taking bribes. These are based on the size of the bribe, whether "relatively large," "huge," or "especially huge," or the circumstance of the crime, whether "relatively serious," "serious," or "especially serious," or the loss caused to state and public interest as the result of the bribery, including whether it is "especially heavy."[23] Although vague, these descriptions are roughly parallel to the language used in the statutory penalties set forth for those who bribe state functionaries, namely the circumstances and the extent of the loss of state interests.[24] Moreover, Amendment IX increases the potential statutory sentencing range for accepting bribes, especially in cases involving small bribes.[25] The statutory ceiling in less serious cases is raised from

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20. Criminal Law before Amendment IX, Art. 383.
21. "Supplementary Provision of the Standing Committee of the National People's Congress Concerning the Punishment of the Crimes of Embezzlement and Bribery" (effective on Jan. 21, 1988) § 2.
22. National People's Congress of China, "Explanation of Amendment to People's Republic of China (IX) (Draft)" [in Chinese: *Zhong Hua Ren Min Gong He Guo Xing Fa Xiu Zheng An (Jiu) (Cao'an) De Shuo Ming*], npc.gov.cn (Nov. 3, 2014), http://www.npc.gov.cn/npc/lfzt/rlys/2014-11/03/content_1885123.htm.
23. Amendment IX § 44.
24. Criminal Law before Amendment IX, Art. 390(1).
25. Amendment IX § 44.

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two years to three years of imprisonment.[26] In general, Amendment IX will give prosecutors and local courts greater discretion, which also serves the national goal of strengthening the enforcement of anti-bribery laws.

Additional Monetary Fines Applicable to Individuals

Amendment IX also broadens the range of situations in which monetary fines are likely to be imposed. Prior to Amendment IX, individual offenders would rarely face monetary fines. For example, while an organization could be fined for bribery, the law did not previously provide for such fines for senior managers or other responsible employees.[27] Prior to Amendment IX, only the following individual non-functionaries could be fined: (i) individuals who paid "huge" commercial bribes,[28] (ii) individuals who paid "huge" bribes to foreign officials,[29] and (iii) close relatives of state functionaries taking bribes in "serious circumstances"

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26. *Id.* Table I and Table II below compare the detailed sentencing standards set forth in Article 383 before and after Amendment IX.

Table I - Sentencing Standards Prior to Amendment IX

Monetary Thresholds (N: bribe value)	Penalties
N < RMB 5, 000	– Criminal detention or imprisonment for up to 2 years; or – In "minor" cases, no criminal penalties.
RMB 5,000 ≤ N < RMB 50, 000	– Imprisonment for not less than 1 year but not exceeding 7 years; or – In "serious" cases, imprisonment for not less than 7 year but not exceeding 10 years; or – If the bribe value is between RMB 5,000 to RMB 10, 000 and the bribe taker has a good attitude, the bribe taker may be exempted from criminal penalties or receive a mitigated punishment.
RMB 50,000 ≤ N < RMB 100, 000	– Imprisonment for not less than 5 years, possibly plus confiscation of property; or – In "especially serious" cases, life imprisonment plus confiscation of property.
RMB 100,000 ≤ N	– Imprisonment of not less than 10 years or life sentence, possibly plus confiscation of property; or – In "especially serious" cases, death penalty plus confiscation of property.

Table II - Sentencing Standards After Amendment IX

Criteria	Penalties
A "relatively large" amount or "relatively serious" circumstances	– Criminal detention or imprisonment for up to 3 years, plus a fine.
A "huge" amount or "serious" circumstances	– Imprisonment for not less than 3 years but not exceeding 10 years, plus a fine or confiscation of property.
A "especially huge" amount or "especially serious" circumstances	– Imprisonment for not less than 10 years or life imprisonment, plus a fine or confiscation of property;
A "especially huge" amount and "serious loss to the state and the people's interest"	– Life imprisonment or death penalty, plus confiscation of property.

27. Criminal Law before Amendment IX, Arts. 391 and 393.

28. *Id.*, Art. 164(1).

29. *Id.*, Art. 164(2).

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or in "relatively large" amount.[30] Once Amendment IX comes into effect, any bribe payer or bribe taker is subject to a fine (whether for commercial bribery or public bribery),[31] as are individuals who introduce to a state functionary an opportunity to receive a bribe equal to or greater than RMB 20,000.[32] Monetary fines are also extended to persons in charge of or directly responsible for an organization's bribery, a form of vicarious liability for employees directly responsible for a bribe as well as their superiors for the organizations' violation of the Criminal Law.[33] The Criminal Law and relevant judicial opinions grant local courts and prosecutors great discretion in determining the amounts of fines.[34]

Conclusion

In enacting these additional reforms, the Chinese government has signaled the possibility of enhanced risks for companies and individuals operating in the Chinese market. While the U.S. Department of Justice's and Securities and Exchange Commission's dockets continue to reflect a disproportionate share of FCPA cases with a China connection, these changes in Chinese law warrant careful review and, potentially, increased attention to anti-bribery compliance by multinational firms.

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30. *Id.*, Art. 388(2).
31. Criminal Law as amended by Amendments IX, Arts. 164, 383, 390, 390(a) and 391.
32. Criminal Law as amended by Amendments IX, Art. 392. *See also* "Provision of the Supreme People's Procuratorate on the Criteria on Initiating Cases Eligible for Direct Acceptance and Investigation by People's Procuratorate (Trial)" (effective on Sep. 16, 1999) § 7.
33. Amendment IX §§ 46 and 49.
34. Criminal Law as amended by Amendments IX, Art. 52; "Regulations of the Supreme People's Court on Several Questions Concerning the Application of Property-Oriented Penalty" (effective on Dec. 13, 2000) § 2.

Russia: Recent Developments Bearing Upon Counterparty Selection Process and Data Domestication

As previously reported,[1] last year was marked by two legal developments that threatened to pose serious compliance challenges to companies operating in Russia. First, in the *Novo Nordisk, Baxter,* and *Teva Pharmaceuticals* cases, the Russian Federal Antimonopoly Service ("FAS"), backed by the Russian courts, appears to have presented some multinational companies with a Catch-22 choice between compliance with foreign anticorruption laws and compliance with Russian antitrust laws.[2] Under those FAS rulings, the three pharmaceutical companies, each of which was deemed to hold a dominant position in the market for particular drugs,[3] were found to have acted arbitrarily and contrary to antitrust laws by refusing to contract with potential distributors on the basis of the distributors' alleged non-compliance with anti-corruption provisions included in distributor agreements. Second, the Russian Duma adopted a law requiring all companies to store and process personal data of Russian citizens in the territory of Russia ("data domestication requirement"). Despite the controversy that surrounded the law and objections from the business community, the Duma accelerated its entry into force by one year, to September 1, 2015.[4]

Both developments raised concerns among market players, who applied to the Russian authorities for clarification. In addition, with respect to the data domestication requirement, some market participants sought liberalization of the data domestication requirement, including postponement of its entry into force.[5] Although the Russian authorities did not back away from their decisions, they recently have taken steps to address the legal uncertainty that ensued.

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1. *See* Alyona N. Kucher, Bruce E. Yannett, Jane Shvets, Anna V. Maximenko, Elena M. Klutchareva, "Evolution and Revolution in Anti-Corruption Regulation in Russia," *FCPA Update*, Vol. 6, No. 11 (June 2015), www.debevoise.com/~/media/files/insights/publications/2015/06/fcpa_update_june_2015.pdf.
2. *See* Sean Hecker, Alyona N. Kucher, Jane Shvets, Anna V. Maximenko, Alisa Melekhina, "Between a Rock and a Hard Place: Anti-Corruption Compliance and Antitrust Law in Russia," *FCPA Update*, Vol. 6, No. 8 (March 2015), http://www.debevoise.com/~/media/files/insights/publications/2015/03/fcpa_update_march_2015.pdf.
3. Under Article 5 of the Federal Law No. 135-FZ on Protection of Competition, dated July 26, 2006, an entity is considered dominant if its market position allows it to determine the general terms of circulation of goods or eliminate other competitors from the market or obstruct their access to the market.
4. *See* Alan V. Kartashkin, Andrew M. Levine, Dmitri V. Nikiforov, Anna V. Maximenko, Jane Shvets, "Bringing Money and Data Back to Russia," *FCPA Update*, Vol. 5, No. 12 (July 2014), http://www.debevoise.com/~/media/files/insights/publications/2014/07/fcpa%20update/files/view%20fcpa%20update/fileattachment/fcpa_update_july2014.pdf.
5. *See, e.g.*, Roman Rozhkov & Ivan Safronov, "Perenesites s ponimaniem," *Kommersant,* July 13, 2015, http://www.kommersant.ru/doc/2767107.

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Specifically, the FAS issued recommendations on counterparty selection by dominant pharmaceutical and medical device companies, which flowed from, and built upon, the Novo Nordisk, Baxter, and Teva rulings. Separately, the Ministry of Communications and Mass Media ("Minkomsvyaz"), which is responsible for the enforcement of the data domestication requirement, issued guidelines on its application. Although these clarifications do not create binding obligations, they do signal the likely approach of the Russian authorities to these issues in the context of enforcement actions. In addition, they provide a useful guide for companies seeking to comply with Russian antitrust and data protection laws and at the same time to protect their interests in foreign jurisdictions.

FAS Recommendations on Counterparty Selection

The FAS Recommendations for the Development and Application of Commercial Policies by Entities Dominant in the Pharmaceutical and Medical Devices Market ("FAS Recommendations"), issued on June 30, 2015, essentially summarize in one place FAS's findings in the *Novo Nordisk*, *Baxter*, and *Teva cases*. In line with these decisions, the FAS Recommendations prescribe transparency and neutrality at all stages of cooperation between dominant entities and their counterparties, including distributors.

Under the FAS's guidance, dominant entities should set out all procedures and requirements for the selection of and interaction with counterparties in one document, which the FAS refers to as a "commercial policy." The commercial policy, as well as the model distributor contract and an offer of potential cooperation, should be published on the company's website. This is the initial element of a comprehensive documentation requirement for interaction with counterparties that the FAS considers crucial for any future justification of the counterparty selection process.

In addition, the FAS recommends documenting any steps and decisions taken during the consideration of requests for cooperation and storing all materials gathered during the selection process for five years. Though these requirements may sound formalistic and require deployment of significant resources, such detailed documentation may indeed stand companies in good stead as evidence of transparency and antitrust compliance for both the FAS and the courts.

The FAS Recommendations also require that dominant entities set forth clear, decisive, and exhaustive criteria for both selection of counterparties and termination of cooperation. Such criteria may cover legal, financial, and commercial aspects of

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potential partners' activities. Although the FAS Recommendations do not purport to set forth an exhaustive list of permissible selection or termination criteria, the examples that are listed are quite formalistic (*e.g.*, the counterparty's registration as a legal entity) and do not allow for in-depth analysis of the counterparty's suitability. Unfortunately, the FAS Recommendations do not reveal the FAS's detailed position regarding specific criteria for counterparty selection, such as anticorruption and sanctions screening.

The FAS Recommendations do address at a general level the relationship between anticorruption and antitrust legislation. Above all, the FAS confirmed that it does not consider counterparty selection requirements prompted by FCPA or UKBA compliance requirements as *per se* problematic. The FAS Recommendations state that anticorruption compliance is generally consistent with Russian antitrust legislation, which prohibits the purchase of market preferences from governmental bodies and officials.

"Above all, the FAS confirmed that it does not consider counterparty selection requirements prompted by FCPA or UKBA compliance requirements as per se problematic. The FAS Recommendations state that anticorruption compliance is generally consistent with Russian antitrust legislation, which prohibits the purchase of market preferences from governmental bodies and officials."

However, the FAS set forth two significant reservations to this position. First, any elements of dominant entities' interactions with counterparties that are based on the FCPA or UKBA requirements must not contradict Russian legislation. The FAS Recommendations do not elaborate on this issue, but suggest that to comply with Russian legislation FCPA- and UKBA-based requirements or criteria should meet the above-mentioned transparency and neutrality requirements – that is, they should be exhaustive, and yet both concise and nondiscriminatory.

Second, the FAS Recommendations stress the importance of timely reporting of any suspicion of corruption. To be justified in the eyes of the FAS, a refusal to cooperate or termination of cooperation with a counterparty that is premised on that counterparty's corrupt actions should be based on the official determinations of Russian authorities. If a dominant entity refuses to cooperate with a counterparty,

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or suspends or terminates cooperation, on the basis of unofficial information such as media reports or due diligence conducted by private entities, the FAS is likely to deem those actions unreasonable and in violation of Russian antitrust law.

The emphasis that the FAS Recommendations place on the importance of reporting corruption to the authorities and acting only on the basis of the authorities' determination can present significant challenges to multinational companies. Those companies may be accustomed to what has become a "standard" FCPA/UKBA due diligence process, involving private law firms, investigative firms, or similar service providers. Companies that are subject to the FAS's oversight as dominant entities may wish to reconsider their approach to Russian authorities, as their ability to reject certain counterparties may require proactively engaging with, and reporting to, those authorities.

Despite the fact that some FAS Recommendations may present challenges for multinational companies that are considered dominant entities under Russian antitrust law, the fact that the FAS issued these recommendations and sought to clarify its prior rulings is a positive development. Further, the FAS has suggested that pharmaceutical companies operating in Russia develop a self-regulating Code of Pharmaceutical Manufacturers, aimed, above all, at harmonizing the counterparty selection process. The document is currently being drafted, and the FAS plans to introduce the final text at the BRICS Summit in November 2015.

Data Domestication Clarifications

As previously reported,[6] the data domestication requirement, as written, threatened significantly to complicate the ability of multinational companies operating in Russia to conduct internal investigations and otherwise make Russian data available abroad, including to non-Russian regulators. The situation was exacerbated by the aggressive enforcement plan of the relevant regulator, the Federal Service for Oversight of Communications, Informational Technologies, and Mass Media (the "FSO"). The FSO scheduled inspections of 317 companies on the subject of compliance with the data domestication requirement by the end of 2015. In order to meet the needs of the market and infuse some substance into the sparse text of the law, Minkomsvyaz unveiled on its website an FAQ section on data domestication.[7] The section is interactive and all interested parties may direct additional questions to the regulator.

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6. *See* Kartashkin et al., note 3, *supra*.

7. "Processing and Storage of Personal Data," Ministry of Communications and Mass Media General Information, Aug. 12, 2015, http://www.minsvyaz.ru/ru/personaldata.

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First, Minkomsvyaz explained that the data domestication requirement applies to Russian processors of personal data and those foreign processors who carry out activities "targeting" Russia. The activities of a foreign data processor are deemed to be targeting Russia if, *inter alia,* (i) its website uses a Russian domain name (*e.g.*, .ru, .Þœ), and/or (ii) there is a local, Russian version of the website. Foreign companies that do not fall under the "targeting Russia" definition – for example, a non-Russian travel reservation service that does not have a dedicated Russian website but may nonetheless have Russian users – will not be subject to the data domestication requirement.

Second, Minkomsvyaz clarified the temporal boundaries of the data domestication requirement. Minkomsvyaz explained that the requirement will not have a retroactive effect and will be applicable to personal data processing starting on September 1, 2015. This means that companies that had collected or transferred personal data of Russian citizens to databases located abroad before September 1, 2015 would not be liable for those collections or transfers and will not have to "repatriate" the data to Russia.

For multinational companies subject to the data domestication requirement, Minkomsvyaz also clarified that the requirement does not affect or rescind the existing rules on cross-border transfer of personal data. Thus, companies are not prohibited from creating and maintaining a copy of a database containing personal data of Russian citizens in a foreign jurisdiction (provided that they comply with the pre-existing Russian personal data protection law). Such a foreign database must be "secondary" to a Russian database: the foreign database cannot contain any data that is not also stored in Russia and thus cannot exceed the Russian database in the quantity of data stored. The data domestication requirement means that companies may need to go to the additional expense of maintaining Russian servers and databases as the main means of personal data processing. However, the requirement, as recently interpreted, should not affect companies' ability to transfer data abroad for the purposes of internal investigations or responding to inquiries from foreign regulators (provided that those transfers comply with other Russian data protection requirements).

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The new recommendations and clarifications, despite certain limitations, are a welcome development, both substantively and as a sign that the Russian authorities are willing to adjust to the needs of the business community and provide greater transparency in their approach. The antitrust and data domestication requirements imposed by Russian authorities nevertheless will require ongoing vigilance by those doing business in Russia.

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