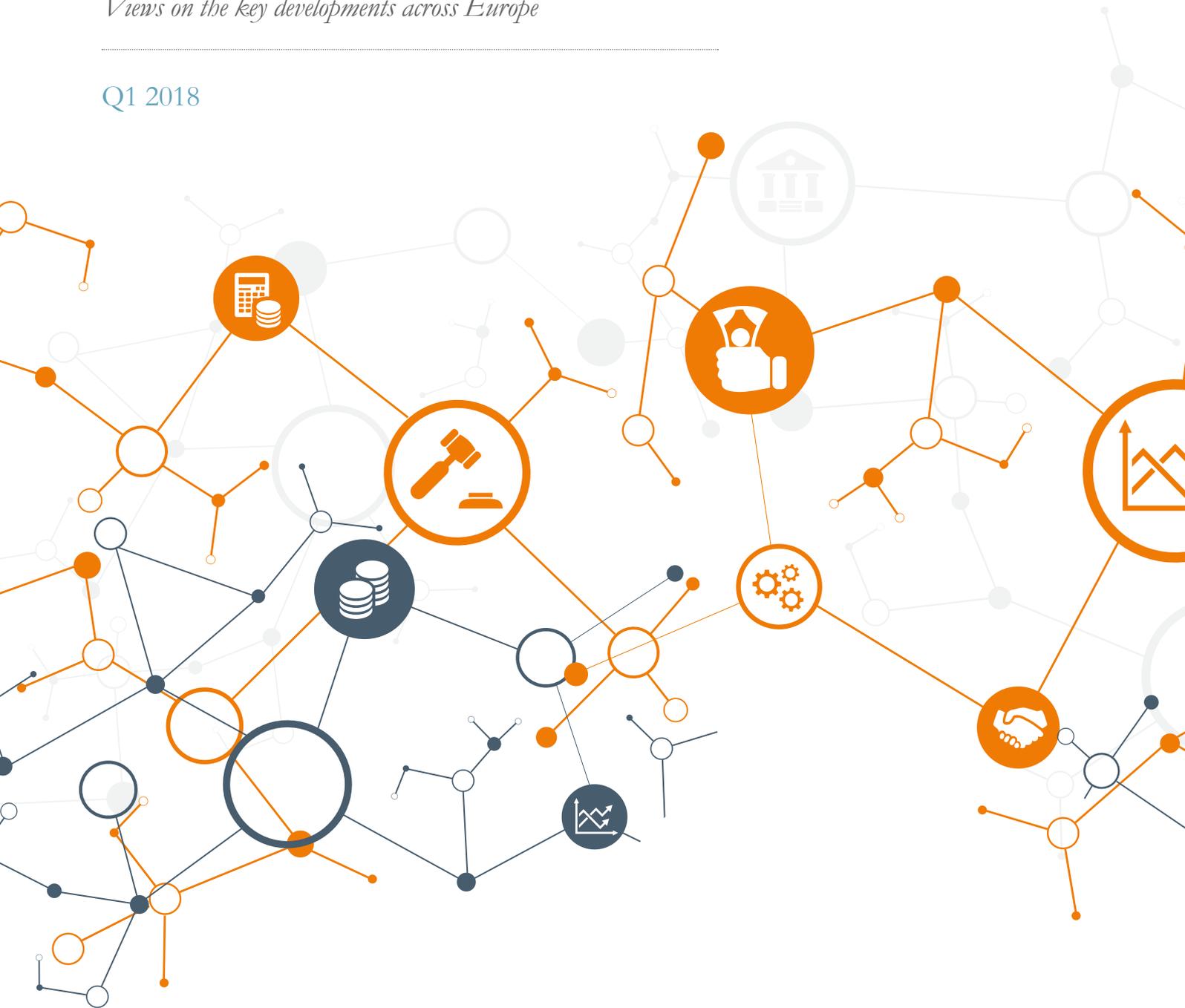


ALLEN & OVERY

European White Collar Crime Report

Views on the key developments across Europe

Q1 2018



Europe at a glance

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Overview

In this quarter's White Collar Crime Report, we identify an increasing trend by national courts across a number of jurisdictions, particularly France and Italy, to apply extraterritorial jurisdiction to a number of criminal offences committed by corporates.

This Report also examines the increasing use of Deferred Prosecution Agreements and similar tools – most notably in France but now potentially in Germany, which is considering introducing similar instruments under a number of possible reforms to its economic crime regime.

In the UK, we cover the long awaited first contested trial for corporate failure to prevent bribery which provides important lessons for firms seeking to defend themselves by claiming they had adequate procedures in place to prevent criminal activity.

As flagged in last quarter's Report, progress on the Fifth Money Laundering Directive continues apace (even while 4MLD continues to be implemented in a small number of jurisdictions). We also summarise a raft of new anti-money laundering guidance, policies and legislation issued by national regulators across Europe.

In Romania we highlight Allen & Overy and its local partner firm RTPR's success in acting to reinstate the country's best known anti-corruption magistrate.

Finally, this quarter Allen & Overy welcomes the appointment of two new white-collar crime partners in Europe: Hippolyte Marquetty in Paris and Eve Giles in London.

BELGIUM

National Bank of Belgium publishes guidance to the new AML Act for financial and credit institutions; Belgium reforms its legislation on the freezing and confiscation of criminal property; Belgium reforms its Asset Management and Recovery Office (*Organe Central pour la Saisie et la Confiscation* (OCSC)/*Centraal Orgaan voor de Inbeslagneming en de Verbeurdverklaring* (COIV)); Belgian Supreme Court provides definition of the offence of influence peddling; Partial annulment of the Pot-Pourri II Act of 5 February 2016 by the Belgian Constitutional Court; The Belgian House of Representatives approves a reform of the criminal settlement process.

FRANCE

New decision in French carbon tax scam litigation; Severe sentencing standards in French tax-related offences; No protection from the '*ne bis in idem*' principle for tax criminals; NGOs fighting against corruption face strict legal requirements; French-style DPAs: What next?; France issues a European Arrest Warrant to British authorities; Victims of a major 'Ponzi scheme' criticise French banks' lack of due diligence; French Supreme Court requires the reasoning for criminal fines imposed on corporate entities.

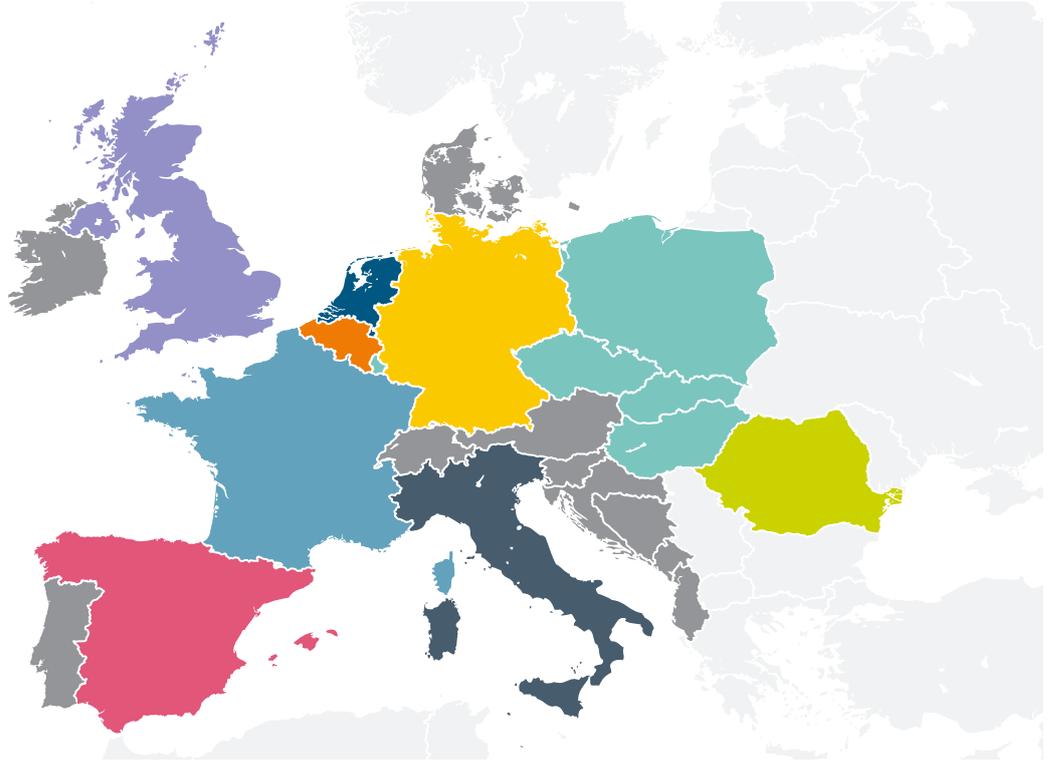
GERMANY

German FIU reportedly faces administrative challenges following reorganisation; 'Cum-ex' transactions result in approx. EUR5.3bn of lost taxes; Investigation into suspected airport accounting fraud discontinued; Investigation into major aeronautical manufacturer discontinued; Investigation opened into ex-manager of car manufacturer; European chemical company investigates employees for potential fraud; German prosecutor calls for custodial sentences for ex-bankers; Expansion of operations concerning asset confiscation; Premises of major German car manufacturer raided in relation to diesel emissions scandal; Proposed German Coalition Agreement signals overhaul to sanctions regime and new rules applicable to internal investigations.

ITALY

Bank of Italy and UIF issue guidance on Politically Exposed Persons (PEPs), Suspicious Activity Reporting and the regulatory regime pending entry into force of 4MLD reforms; Recent Italian Constitutional Court and Supreme Court decisions confirm the legitimacy of the dual track system for administrative and criminal tax offences; Proposed changes to criminal and administrative sanctions for market abuse; *Ne bis in idem*: new scenarios in Italy after the recent judgments of the ECJ; Liability for crimes committed by employees extends to foreign companies merely operating in Italy; Italian government sanctions the use of more invasive technology in criminal investigations; Further enhancements to Italy's whistleblowing legislation.

Europe at a glance



NETHERLANDS

Dutch Financial Supervision Office publishes policy regarding the imposition of money laundering fines; Netherlands extends ability to use wire-taps to the Dutch Fiscal Intelligence and Investigation Service.

ROMANIA

Reporting suspicions of money laundering? There's an app for that; Romania continues its battle against corruption, says European Commission; Success for RTPR and Allen & Overy in reinstating esteemed magistrate to office; Romania tackles bribery within football and the judiciary; Call to dismiss Romania's chief anti-corruption prosecutor sparks country-wide protests; Romania's DNA closes recorded number of corruption cases; Romanian government proposes changes to the presumption of innocence and the right to be present at a criminal trial.

SPAIN

The proceeds of tobacco smuggling are deemed not illicit; Spain proposes new law on trade secrets.

UNITED KINGDOM

The UK's Treasury Select Committee launches enquiry into economic crime; Senior trader pleads guilty to rigging EURIBOR; SFO criticised over choice of expert witness; SFO brings additional charges against Barclays; SFO retrial of Tesco employees after heart attack; Proposed amendments to the FCA's Financial Crime Guide; Guilty verdict returned in first contested case for failure to prevent bribery, highlighting the limitations of self-reporting; SFO launches investigation into defence company; SFO eyes DPAs for tax evasion; Information Commissioner's office launches dawn raid into Cambridge Analytica; Unexplained Wealth Orders and the remainder of the Criminal Finances Act 2017 comes into force; first Unexplained Wealth Orders issued by UK courts; JMLSG publishes further updates to its guidance.

EU-WIDE

Fifth EU Money Laundering Directive (5MLD) to be adopted in Spring 2018; EU Commission to propose amendments to the OLAF Regulation following adoption of the EPPO Regulation; Wolfsberg Group publishes updated AML guidance and useful documents.



Anti-money laundering and proceeds of crime

BELGIUM

New AML guidance for financial and credit institutions published by National Bank of Belgium

The NBB has issued new AML guidance for entities falling under its supervision under the AML Act of 18 September 2017. All the new guidance can be found on the NBB's website (www.nbb.be). This includes the Regulation of 21 November 2017 on the prevention of money laundering and terrorism financing, Circular NBB_2018_01 on the periodic questionnaire on combating money laundering and terrorist financing, Circular NBB_2018_02 on the overall assessment of money laundering and terrorist financing risks, and an online rulebook collecting all relevant (supra)national legislation and guidance as well as NBB guidance on AML to help financial and credit institutions comply with their legal and regulatory obligations.

Belgium reforms its legislation on the freezing and confiscation of criminal property

On 8 March 2018, the Belgian legislator adopted an Act amending various criminal law provisions, including provisions on the freezing and confiscation of criminal property. The Act implements, without any gold plating, Directive 2014/42/EU on the freezing and confiscation of the proceeds of crime into

Belgian law (which was due by October 2016), by expanding the scope of offences allowing for extended confiscation of the proceeds of crime and by allowing the freezing and confiscation of property of equivalent value to the proceeds of crime. In addition, and in order to comply with the Belgian Constitutional Court's judgment no. 12/2017 of 9 February 2017, the Act makes the confiscation of the proceeds of crime mandatory except where such confiscation would amount to an unreasonably heavy penalty. The Act also reforms the procedure of the financial investigation for the execution of confiscation orders, which was partially annulled by Constitutional Court judgment no. 178/2015 of 17 December 2015, to strengthen the rights of persons subject to such investigation (including their right to access the investigation file).

Belgian Asset Management and Recovery Office reformed

Belgium's Asset Management and Recovery Office has been reformed to improve effectiveness, and also to be able to deal with virtual currencies (such as bitcoins) that are subject to a freezing order. As a result we may see an increase in its activities in the coming months.

FRANCE

Extra-territorial reach of French AML laws in French carbon tax scam litigation

A recent French court ruling confirms the current trend followed by French criminal judges to expand their extra-territorial jurisdiction over acts committed abroad, including by foreign individuals. Such acts may be considered indivisible from those committed on French territory, irrespective of whether they are committed by the same perpetrators.

Carbon credits were quotas established by the European Union to combat carbon emissions and ultimately, climate change. The scheme enabled companies who had not reached their quotas to sell their surplus to other companies who had exceeded their thresholds.

Unlike other countries, the French government decided to tax the carbon credits. In order to avoid the tax, fraudsters purchased credits in other European countries (where VAT was not applicable), sold them in France (with VAT on top) and then declined to account to the French government for the VAT charged.

The scam (dubbed the "fraud of the century") has led to a number of prosecutions and convictions in the French criminal courts,

including numerous convictions for those involved in laundering the proceeds of the tax evasion. (In the *Q3 2017 edition of our European White Collar Crime Report* we reported on the convictions of the scam's principal architects and in the *Q4 2017 edition of our European White Collar Crime Report*, we reported on the conviction of Turkeyie Garanti Bankasi for laundering the proceeds).

On 22 February 2018, the Paris Criminal Court issued yet another judgment in the long-running saga. Certain defendants accused of laundering the proceeds of the fraud (which included a foreign lawyer located and practicing abroad) raised a jurisdictional challenge, arguing that no money laundering had been committed in France.

Despite the funds having been laundered abroad, the French judges held that they had jurisdiction to try the case on the basis that: (i) the victims were of French nationality; and (ii) the fraud (committed in France) was indivisible from the money laundering offences (committed abroad) and they should therefore be dealt with together. This was the case even though some of the defendants were not in fact perpetrators themselves of the underlying fraud; only one defendant was convicted of both fraud and money laundering.

GERMANY

'Panama Papers' leads to no evidence of money laundering, says BaFin

Back in 2016, a leak of data from offshore law firm Mossack Fonseca led to an unprecedented leak of 11.5m files. Following the leak, BaFin, Germany's financial services regulator, engaged an external service provider to evaluate 1.5 terabytes of data held by eleven German banks. According to BaFin, no evidence was found which indicated that any of the banks had violated anti-money laundering regulations.

German FIU reportedly faces administrative challenges following reorganisation

In 2017, the German Finance Minister, Wolfgang Schäuble, reorganised and expanded German's Financial Intelligence Unit (FIU), a body which investigates money laundering and terrorist financing. Post the reorganisation, the FIU now sits underneath the Federal Customs Service (*Bundeszollverwaltung*).

Recent press reports indicate that a number of challenges have become apparent following this reorganisation. It is understood that the FIU does not have full access to police databases. Furthermore, deficiencies identified by the Federal Office for Information Security (BSI) in software used by the FIU has led to the body ceasing to use the software. This has led to a backlog in processing the reports this software was intended to process.

NETHERLANDS

Policy on money laundering fines published by Dutch Supervision Office

The Dutch Financial Supervision Office (*Bureau Financieel Toezicht*, BFT) published in January 2018 its internal policy on fines for:

- (i) breach of the duty to report unusual transactions;
- and (ii) breach of customer due diligence obligations.

The publication of the policy provides some helpful guidance on the factors that are taken into account when determining the amount of a fine. Perhaps not surprisingly, the policy states that the amount of a fine depends on the level of seriousness,

duration and culpability of the breach. In total there are five categories of fines. The fines are calculated by reference to between 1% to 5% of the annual turnover of the offender or of 2% to 10% of the assets of the offender.

The policy is based on Article 28 of the Act on the Prevention of Money Laundering and Terrorist Financing (*Wet ter voorkoming van witwassen en financieren van terrorisme, Wvft*) and the Financial Sector Fines Decree (*Besluit bestuurlijke boetes financiële sector*).

ITALY

Bank of Italy and UIF issue guidance on Politically Exposed Persons (PEP), Suspicious Activity Reports (SARs) and the regulatory regime pending entry into force of 4MLD reforms

The Italian Parliament implemented 4MLD on 4 July 2017, significantly amending Italian AML legislation. As second level implementation by Supervisory Authorities is not expected for another four months, in early 2018 the Bank of Italy and UIF

(the Italian Financial Intelligence Unit) issued guidelines on submitting SARs and enhanced due diligence checks applicable to PEPs.

The Bank of Italy issued a communication on 9 February 2018 aimed at solving some interpretation issues which have arisen post enactment of the new legislation. In particular, the Bank clarified that the existing regulatory regime, formally in force until 31 March 2018, will still be applicable after that date to the extent that it is compatible with the reformed legislation.

ROMANIA

New app for reporting suspicions of money laundering

The National Union of Bar Associations (NUBA), the legal profession's regulatory body, has announced that it has prepared an IT programme which aims to help lawyers meet their reporting obligations under 4MLD.

Romanian lawyers will be able to log in to the application using their online account with NUBA and via the app, submit confidential reports of suspected money laundering.

The draft law transposing 4MLD into Romanian law was published in March 2018.

SPAIN

Proceeds of tobacco smuggling are deemed not illicit

A recent money laundering ruling by the Regional Court, upheld on appeal, found that tobacco smuggling was not criminal because where smuggling leads to profits of less than EUR150,000, such activities are deemed in Spain to be administratively illegal, not criminal.

In this particular case, the Regional Court held that as there was evidence of the funds in question originating from the smuggling of tobacco, a money laundering offence had been committed. The Spanish Supreme Court has historically held that for a money laundering offence to be committed, it is not necessary

to secure a conviction for the underlying activity which generated the illicit funds, but the activity must, on the basis of circumstantial evidence, still be criminal – not merely illegal – ie an administrative offence would not be sufficient. The decision of the Regional Court was appealed to the Supreme Court where it has been upheld on the basis that the underlying activity (the smuggling) was not criminal.

This finding has broader significance for companies assessing whether money laundering offences may have occurred where the underlying conduct is an administrative, not criminal breach.

UNITED KINGDOM

JMLSG publishes updated guidance for asset finance and syndicated lending

The Joint Money Laundering Steering Group (JMLSG), made up of the leading UK Trade Associations in the Financial Services Industry, published on 30 March 2018 proposed revisions to the 'Asset Finance' and 'Syndicated lending' parts of its

Guidance on the prevention of money laundering and terrorist financing for the UK financial services industry. The amendments are not substantial but aim to update the descriptions of how the sectors work, whilst clarifying how to assess risks in the sector and identify who the customers are.

EU-WIDE

Fifth EU Money Laundering Directive (5MLD) to be adopted in Spring 2018

Political agreement has been reached on the text of the final compromise for a 5MLD (see *Q4 2017 edition of our European White Collar Crime Report*, p. 5). The EU Parliament and Council are now called on to adopt the proposed directive at first reading, which is expected to take place in May 2018.

It is anticipated that the 5MLD will be published in the Official Journal of the EU in mid-2018. The 5MLD will enter into force 20 days after publication and will have to be implemented by Member States within 18 months of publication, ie by end of 2019.

One of the major changes introduced by the 5MLD is the obligation for each Member State to grant access, by any member of the general public, to its beneficial ownership register. The (publically accessible) registers will have to be set up at the latest 18 months after publication of the directive. The national beneficial ownership registers will also be interconnected, via a central European platform, by the beginning of 2021 to allow cross-border access to each Member State's register. The changes allow greater public scrutiny of information, including by the press or civil society organisations.

Wolfsberg Group publishes updated AML guidance and correspondent banking questionnaire

The Wolfsberg Group, an association of 13 global banks which aims to develop frameworks and guidance for the management of financial crime risks, particularly with respect to Know Your Customer, Anti-Money Laundering and Counter Terrorist Financing policies, published an updated Correspondent Banking Due Diligence Questionnaire (CBDDQ) and related guidance materials on 22 February 2018.

The questionnaire seeks to standardise the collection of information that a correspondent bank asks from other banks when opening and maintaining the relationship. This includes information in relation to their ownership, the products and services they offer, and their programmes for preventing money laundering and terrorist financing.

The Group believes this will allow the due diligence process for correspondent banks to be less costly and arduous. The publication of the CBDDQ was welcomed by various industry supervisory bodies.

ACTIONS



Belgium: financial and credit institutions should review the guidance published by the NBB, conduct and submit their overall risk assessment to the NBB by 15 July 2018, and take remedial actions including adapting their AML policies, procedures and internal controls by 1 July 2019 at the latest.

Italy: firms should review the new UIF and Bank of Italy guidance and ensure it is complied with when conducting enhanced due diligence checks on PEPs and when submitting a Suspicious Activity Report.

EU-wide: firms should begin to monitor the progress of the Fifth Money Laundering Directive so that they can prepare for any changes it introduces in good time, particularly if they are likely to be impacted by changes to overseas beneficial ownership registers or regulation of cryptocurrencies.

The below table summarises the status of 4MLD's implementation as at the end of Q1 2018 in various EU Members States:

	4MLD implementation status
Belgium	<p>Effective from 16 October 2017.</p> <p>The Belgian legislator has adopted the Act of 18 September 2017 on the prevention of money laundering and the financing of terrorism and on restricting the use of cash (<i>Wet van 18 september 2017 tot voorkoming van het witwassen van geld en de financiering van terrorisme en tot beperking van het gebruik van contanten; Loi du 18 septembre 2017 relative à la prévention du blanchiment de capitaux et du financement du terrorisme et à la limitation de l'utilisation des espèces</i>).</p> <p>Provisions regarding the functioning of the ultimate beneficial ownership register will be implemented in a separate royal decree.</p>
Czech Republic	<p>Effective from 1 January 2017.</p> <p>Amendment no. 368/2016 Coll. to the Act no. 253/2008 Coll., on Selected Measures against Legalisation of Proceeds from Crime and Financing of Terrorism.</p>
France	<p>Transposed into French law, although not yet fully implemented.</p> <p>Order No. 206-1635 of 1 December 2016 yet to be ratified by French Parliament.</p>
Germany	<p>Effective from 26 June 2017.</p> <p>Money Laundering Act (<i>Geldwäschegesetz</i>)</p>
Hungary	<p>Effective from 26 June 2017.</p> <p>Prevention and Combating of Money Laundering and Terrorist Financing Act.</p>
Italy	<p>Effective from 4 July 2017.</p> <p>Legislative Decree 90/2017, aimed at amending AML Legislative Decree 231/2007, entered into force on 4 July 2017. Second level regulations to be implemented by competent supervisory authorities within 12 months (ie 4 July 2018). Note also the recent interim guidance issued by the Bank of Italy and UIF.</p>
Netherlands	<p>Not yet implemented.</p> <p>On 13 October 2017, the Dutch Minister for Security and Justice introduced draft implementation legislation (the Act). The proposed Act amends the Act on the Prevention of Money Laundering and Terrorist Financing (<i>Wet ter voorkoming van witwassen en financiering van terrorisme</i>) (Wwft) to ensure compliance with the requirement of 4MLD. The Draft Implementation Act also introduces a sanctions system that is more closely connected to the Dutch Financial Supervision Act (<i>Wet op het financieel toezicht</i>) (Wft). The Act also raises the maximum fine for breaches of the Wwft (up to 10% of turnover for larger entities) and introduces the possibility of withdrawing an institution's license for breaches of the Wwft. Finally, the Act allows regulators to issue public statements or warnings to institutions when they are in breach of the Wft or the Wwft and obliges them to publish each decision on sanctions.</p> <p>The Second Chamber of Parliament adopted the Act on 6 March 2018. Please note that the Act is still before the First Chamber of Parliament, which will need to vote in favour of the Act for it to become final.</p> <p>Provisions regarding the ultimate beneficial ownership register will be implemented in a separate Act.</p>
Poland	<p>Not yet implemented.</p> <p>Ministry of Finance has presented a new draft Act on Counteracting the Introduction into Financial Circulation of Property Values Derived from Illegal or Undisclosed Sources and on Counteracting the Financing of Terrorism, which is due to replace the previous act of the same name. As reported in <i>Allen & Overy's Q2 2017 European White Collar Crime Report</i>, it could take several months of parliamentary work before it is enacted.</p>
Romania	<p>Not yet implemented.</p> <p>The draft law on prevention and combating money laundering and terrorism financing has been finalised by the Office for Prevention and Combating Money Laundering. As reported in <i>Allen & Overy's Q2 2017 European White Collar Crime Report</i>, it will now be sent to the competent authorities in order to obtain the necessary endorsements before sending it to the Parliament.</p>
Slovakia	<p>Not yet implemented.</p>
Spain	<p>Not yet implemented.</p> <p>The Ministry of Economy, Industry and Competitiveness recently issued a preliminary draft of a proposal to partially amend Law 10/2010, of 28 April, on the prevention of money laundering and terrorist financing and Royal Decree 304/2014, of 5 May, approving the Regulation of Law 10/2010 in order to implement 4MLD. Although the proposal is at an early stage and is still subject to extensive discussions and amendments, it does not contemplate creating a central register of beneficial ownership as required under Article 30 of 4MLD.</p>
UK	<p>Effective from 26 June 2017.</p> <p>Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017.</p>



Taxation

FRANCE

Double jeopardy for tax evaders

The legal principle of *ne bis in idem* restricts the possibility of a defendant being prosecuted repeatedly on the basis of the same facts. On 6 December 2017, however, the French Supreme Court reiterated that this principle does not provide protection from the pursuit of parallel administrative and criminal penalties arising from the same facts where the administrative penalties are being pursued for conduct relating to tax offences.

While the decision complies with the French reservation to Article 4 of Protocol 7 to the European Convention on Human Rights (pursuant to which individuals tried by a Criminal Court can also be tried for the same conduct by an administrative authority), the ECHR invalidated an identical reservation made by Italy in the 2014 Grande Stevens case. Consequently, the French Supreme Court's decision continues to create uncertainty and may well be examined by the ECHR.

Severe sentencing standards in French tax-related offences

Harsh penalties in cases concerning tax evasion and laundering the proceeds of such tax evasion have been imposed by the Paris

Criminal Court. In the first case, the 32nd Chamber found a former Budget Minister guilty of tax evasion and the laundering of tax evasion proceeds in relation to undeclared accounts he held abroad including while in public office, and in 2016, sentenced the individual to three years' imprisonment plus five years of professional ineligibility for the said offences (a decision that is deemed to be exemplary and that the Public Prosecutor has requested the Court of Appeal to confirm). The discovery of such tax evasion spurred public outrage and led to the creation of the National Financial Prosecutor's Office (*Parquet national financier*).

More recently, the 11th Chamber found a French city councillor guilty of filing a false wealth declaration and laundering tax evasion proceeds in relation to undeclared bank accounts in Switzerland and associated unpaid inheritance and interest tax and sentenced the individual to 12 months' imprisonment (suspended sentence), three years of professional ineligibility and a fine of EUR1.45m.

The penalties involved in these prosecutions stress the Criminal Court's new severe sentencing standards regarding the punishment of tax-related offences.

GERMANY

'Cum-ex' transactions result in approx. EUR5.3bn of lost taxes

'Cum-ex' trades, a pattern of share transfers between different taxpayers, continues to attract attention in Germany (see 'Closer Look' section of *our Q3 2017 European White Collar Crime Report* and the 'Taxation' section of *our Q4 2017 European White Collar Crime Report*). According to recent press reports,

the German Ministry of Finance has estimated the total amount of tax avoided through 'cum-ex' transactions at EUR5.3bn in lost tax revenue. This is based on 417 suspected cases, a number which has risen sharply from 259 in October 2017. So far, EUR2.4bn has been successfully reclaimed. The public prosecutor's office of Cologne has called on financial institutions to assist in rectifying the issue.

ITALY

Recent Italian Constitutional Court and Supreme Court decisions confirming the legitimacy of the dual track system with respect to administrative and criminal tax offences

In two recent judgements both the Italian Constitutional Court and the Supreme Court gave a similar interpretation of the principles expressed by the ECHR in *A and B v. Norway* on 15 November 2016. Both courts not only approved the dual track system for administrative and criminal tax violations, but also allowed a double conviction for the same conduct, provided certain conditions are met. In particular, individuals may be

subject to two sets of proceedings and be sanctioned twice for the same behaviour provided there is a "material and temporal link" between the two sets of proceedings. Nonetheless, the Constitutional Court also pointed out the need for the legislature to intervene in setting out the boundaries of the dual track system. This position might change following the ECJ decisions on 20 March 2018 (See 'Closer Look' in Market Offences section below).

This development, combined with the French Supreme Court decision mentioned above, highlights a growing possibility across Europe of multiple proceedings arising out of the same conduct.



Market offences

ITALY

Proposed changes to criminal and administrative sanctions for market abuse

The Italian Parliament has been discussing changes to the current market abuse criminal and administrative regimes, following entry into force of MAR (EU Reg. 596/2014) and the expiration of the deadline for implementing MAD II (EU Directive 57/2014/EU). In particular, the current draft legislation requires the Italian Companies and Stock Exchange Commission (CONSOB) (which is capable of imposing administrative sanctions for market abuse) and the criminal authorities to take

into account any sanctions already imposed by the other when determining what sanction they themselves wish to impose. Whichever authority imposes their sanction last will be limited to recovering the monetary difference between the two sanctions. In addition, the current draft also envisages limiting the confiscation regime to just the profits derived from any relevant market abuse violations.

Double jeopardy: new scenarios in Italy after the recent judgments of the CJEU (see 'Closer Look' section)

UNITED KINGDOM

Trader pleads guilty to rigging EURIBOR

On 2 March 2018, a former trader, Christian Bittar, pleaded guilty to conspiracy to defraud in connection with the SFO's investigation into the manipulation of EURIBOR.

The SFO charged Mr Bittar in November 2015 with conspiring to "procure or make submissions" to manipulate the rate between 2005 and 2009. The scheme was investigated as part of a wider inquiry into the rigging of benchmark rates, in which Deutsche Bank was required to pay USD2.5bn in fines.

In addition to his criminal charge, Mr Bittar was issued a penalty notice by the UK's Financial Conduct Authority (FCA) with a record proposed fine of GBP10m and a prohibition from working in the industry again. This notice was put on hold due to the SFO's criminal investigation.

The trial of the five remaining defendants began at Southwark Crown Court on 9 April 2018.

SFO criticised over expert witness

On 13 March 2018, the Court of Appeal dismissed an appeal by Alex Pabon, a former trader convicted of fixing the LIBOR rate. In June 2016, Mr Pabon was given a 14-year prison sentence after being found guilty of conspiracy to defraud following an SFO investigation.

Mr Pabon's appeal was based on the conduct of an expert witness (Mr Rowe) used at trial by the SFO, who was accused of lacking the necessary expertise. The court heard that the expert had communicated with other traders during the trial, asking them for help in understanding technical banking terminology.

Upholding Mr Pabon's conviction, Lord Justice Gross stated that the importance of Mr Rowe's testimony "could only have been of the most limited kind". The court acknowledged, however, that he had "signally failed to comply with his basic duties as an expert". In a postscript to the ruling, the court described Mr Rowe's instruction as "an embarrassing debacle for the SFO".

SFO seeks retrial of Tesco employees

The SFO wrote to the Court to seek a retrial of three former Tesco employees – Carl Rogberg, Christopher Bush and John Scouler – all of whom held senior management positions at the retailer. The original trial was halted on 5 February 2018 after Mr Rogberg suffered a heart attack.

The case relates to the GBP246m accounting scandal at Tesco between February and September 2014. Each defendant is charged with fraud by abuse of position, contrary to sections 1 and 4 of the Fraud Act 2006, and False Accounting, contrary to section 17 of the Theft Act 1968. All deny the charges against them.

Amendments to the FCA's financial crime guide

The FCA published a consultation paper on proposed updates to its Financial Crime Guide on 27 March 2018. It proposes including a new chapter on insider dealing and market manipulation. This will outline the FCA's observations of good (and bad) market practices to detect and prevent insider dealing and criminal market manipulation. The guidance also contains proposed amendments to other chapters in the Guide which mainly reflect recent legislative developments such as the Money Laundering Regulations 2017.

Of significance to practitioners, the FCA specifically highlights risks for firms who maintain a surveillance function separate from their anti-financial crime or MLRO functions and emphasises the importance of a joined up internal approach where this is the case. The proposed guidance also contains a number of useful pointers on maintaining effective systems and controls. For example, it suggests practical steps to deal with a client who may be trading suspiciously short of terminating the client relationship, such as limiting their ability to trade certain instruments or in particular markets, restricting direct market access or reducing the amount of leverage offered to the client.





A closer look: Italy

Double jeopardy: new scenarios in Italy after the recent judgments of the ECJ

Speed Read

With three decisions on 20 March 2018 (C-537/16, C-596/16 e C-597/16), the Court of Justice of the European Union (CJEU) decided on the compatibility of the dual track sanctioning system – envisaged by the Italian legal system between administrative sanctions and criminal sanctions – with respect to the EU legislation on double jeopardy (*ne bis in idem*). The CJEU limited the possibility for someone to be sanctioned twice for the same conduct, when the first sanction is adequate, proportionate and dissuasive to address the violation. Such evaluation will rest on the Judge of the second proceedings.

Background

In a considerable change to its previous view as expressed in 2014 in the Grande Stevens case, two years later, in 2016, the European Court of Human Rights (ECHR), in the A & B v Norway case, gave a more cumbersome interpretation. The Court set certain ‘conditions’ on the basis of which the dual track system was to be considered fully legitimate. The conditions were that the two sets of proceedings could be said to be directed to a unitary, foreseeable and non-disproportionate sanction.

Following the decision, some local Italian courts took a view in favour of the compatibility of the so-called ‘dual track system’, admitting the possibility for an individual to simultaneously be subject to CONSOB sanctioning proceedings and criminal proceedings. This resulted in risk of a consequent potential double sanction.

This interpretation was also scrutinised by the CJEU, which was asked to decide on three different referrals concerning the compatibility of the Italian dual track system with the *ne bis in idem* principle contained in Article 50 of the Charter of Fundamental Rights of the European Union.

Two of these referrals involved the relationship between CONSOB sanctioning proceedings and criminal proceedings for the same conduct of market abuse and insider trading; the third one involved tax proceedings for omitted VAT payments and criminal proceedings for the same conduct.

The CJEU’s position on the referrals reflected an interpretation which seems more protective of the interests of the defendant than that expressed by the ECHR in the case of A & B v Norway, but still relies heavily on judicial discretion in each case.

Ne bis in idem and Market Abuse

With particular reference to case C-537/16 on market abuse, involving the well-known case of the real estate tycoon Stefano Ricucci, the Court considered the issue of the nature of CONSOB administrative sanctions, in order to evaluate whether they could be deemed equivalent to criminal sanctions. The Court, considering the principles already expressed by the ECHR in the 1976 Engel case, stated that, for that purpose, three elements should be taken into account:

- the legal qualification of the violation under national law;
- the nature of the violation; and
- the seriousness of the sanctions.

Analysing Article 187 *ter* of the Italian Consolidated Law on Finance regarding the administrative market abuse violation, it appears that such violation might entail very high sanctions of potentially several million Euros, that could be increased by three times or up to the highest amount of ten times the profit deriving from the violation. In addition, it is possible for the judge to order the confiscation of the profit itself.

The Court stated that the sanctions following CONSOB administrative proceedings had a sanctioning and repressive function and, therefore, had a substantially criminal nature.

In light of the above, the Court stated that the *ne bis in idem* principle could be restricted. Any restrictions however, need to be proportionate to the sanctioning requirements of the particular case. Such proportionality in the case of Stefano Ricucci, did not exist as a result of the sanctioning and repressive nature already contained in the definitive sanction issued by the Criminal Judge.

Conclusions

The decision opens up the possibility of new scenarios, also in light of the direct enforceability of the principles expressed by the ECJ. The Italian judges and CONSOB will have to concretely determine, on a case-by-case basis, the appropriateness and proportionality of the different sanctions. If the sanctions of the criminal judge are considered adequate to address the violation in a proportionate and dissuasive way, then the administrative sanction might not be issued, thereby applying the *ne bis in idem* principles.

Matteo Fanton, Trainee, Milan



Bribery and corruption

BELGIUM

Belgian Supreme Court provides definition of the offence of influence peddling

The Belgian Supreme Court has further clarified the notion of influence peddling, a form of public corruption prohibited by Article 247 §4 of the Belgian Criminal Code. In its decision of

14 June 2017 (P.17.0361.F), the Supreme Court defined the offence as “a form of corruption which is not aimed at the fulfilment of an act or an omission, but at the exercise by the corrupt individual of his influence in order to obtain an act from a public authority of administration or the omission of such act”.

FRANCE

NGOs fighting against corruption face strict legal requirements

Following the growing influence of anti-corruption NGOs in France, on 31 January 2018 the French Supreme Court specified the conditions applicable to NGOs when launching and joining criminal proceedings. Article 2-23 of the French Criminal Procedure Code allows NGOs that have been established for at least five years to launch and join criminal proceedings specifically targeting corruption or certain related offences. In the case before the French Supreme Court, the NGO Anticor attempted to join a criminal investigation opened for the offences of forgery, abuse of trust, attempted fraud and receiving the proceeds of such offences in relation to the financing of a French political party prior to the 2012 presidential elections. It was held that the proceedings in question did not target the ‘correct’ offences. As a result, the NGO’s action was held to be inadmissible on the grounds that it failed to demonstrate that it had suffered personal harm as a direct result of the offence under investigation.

In principle, any alleged victims must demonstrate that they have suffered personal harm as a direct result of a criminal offence. By way of exception, the French Criminal Procedure Code sets out a list of circumstances and offences for which NGOs are authorized to launch and join criminal proceedings.

In this case the Supreme Court seems to have adopted a very restrictive interpretation of the scope of Article 2-23 of the French Criminal Procedure Code applicable in corruption cases and required the NGO to fulfil the same condition relating to ‘personal harm’ as that imposed on an alleged victim who seeks to launch and/or join criminal proceedings.

French Supreme Court restricts the definition of influence-peddling

On 25 October 2017, in a case related to a major political and financial scandal known as the ‘Clearstream case’, the Supreme Court clarified the definition of influence-peddling. Under Article 433-2 of the French Criminal Code, the offence is characterised as the act of offering advantages to a decision maker, so that he/she unduly uses his ‘effective or supposed’ influence in order to obtain a ‘favourable decision’ from a public authority.

The Supreme Court adopted a narrow interpretation of the phrase ‘favourable decision’ by holding that the provision of

information or documents by a public official does not constitute a ‘favourable decision’. This marks a new development with regard to the Supreme Court’s precedents and the Court’s wider interpretation of the concept of influence peddling.

Foreign DPAs may not bind French courts

Accused of actively bribing a foreign public official between 2001 and 2004, a French telecommunications equipment provider argued that having entered into a DPA with the U.S. Department of Justice, the decision was final and therefore not capable of being re-examined.

In August 2017, the Paris Criminal Court held that the French public prosecution was not extinguished by the DPA given that the factual basis for the French and American proceedings were different, highlighting the limits of a foreign DPA on French prosecutions.

The Court however acquitted the company on the grounds that, pursuant to Article 121-2 of the French Criminal Code, the identity of the officer or representative having allegedly committed the offence was not established.

‘Oil-for-Food’ case: the French Supreme Court clarifies the *ne bis in idem* principle

In a case concerning the French prosecution following the U.N. ‘Oil-for-Food’ investigations, an oil company, among others, was convicted for bribing foreign public officials. While the Paris Criminal Court held that the plea bargain between the company and the U.S. authorities extinguished the French public prosecution, the Court of Appeal rejected the application of double jeopardy (the *ne bis in idem* principle) on the basis of the discrepancy between the American and French legal qualifications of the facts in question.

The Supreme Court ruled that the Court of Appeal had justified its decision, given that Article 4 of Protocol No. 7 to the European Convention on Human Rights and Article 14-7 of the International Covenant on Civil and Political Rights, which prohibits dual prosecutions of the same facts, only applies in cases where the two proceedings were initiated in the same State. The Supreme Court thereby adopted a strict interpretation of the territorial scope of the *ne bis in idem* principle.

GERMANY

Investigation into suspected airport accounting fraud discontinued

According to press reports, the public prosecutor of Potsdam has discontinued its investigation of accounting fraud in connection with the construction of a German airport by a major manufacturing company. This investigation was instigated following a complaint by the manufacturing company's counterparty, which queried invoices issued by the manufacturing company in 2013 and 2014.

Investigation into major aeronautical manufacturer discontinued

The Munich public prosecutor has discontinued its investigation into allegations of bribery regarding an aeronautical manufacturer's sale of jets to Austria. The aeronautical manufacturer reportedly agreed to pay EUR81,250,000 to settle the investigation. This payment has been made in connection with an alleged breach of supervisory duties by the former management of the manufacturer, rather than the substantive bribery claim.

Investigation opened into ex-manager of car manufacturer

According to press reports, the Munich public prosecutor is investigating allegations of bribery, corruption and tax evasion committed by an ex-manager of a large car manufacturing company. It is alleged that the individual procured bribes from suppliers over several years. Eight other employees of the car manufacturer are allegedly also subject to investigation. The car manufacturer, which terminated the employment of the ex-manager in early 2017 following an internal investigation, reportedly believes this to be an isolated case. At this stage, the Munich public prosecutor has not made a public statement.

European chemical company investigates employees for potential fraud

According to press reports, a major European chemical company is investigating four employees and several external companies working on behalf of the chemical company at its headquarters. The allegations appear to relate to false invoices issued by the employees to the external companies who in turn billed for hours which were not worked. It is alleged that the employees potentially defrauded the company out of over a million Euros.

ROMANIA

Romania continues its battle against corruption, says European Commission

In March 2018, the European Commission published the 2018 edition of its long-awaited annual country report for Romania.

The report specifically flagged Romania's long-term and widespread issues with corruption in the healthcare sector. Despite crediting Romania's progress over the past ten years towards securing good results in the fight against corruption and the independence of the judiciary system, the Commission noted that corruption is still widely perceived as a major issue in Romania with one survey ranking it among the top challenges for doing business in the jurisdiction.

The Commission also found that, in light of on-going legal reforms, the progress achieved by Romania over the past decade is at risk of regression, citing concerns over judicial independence and the weakening of the legal framework when it comes to the fight against corruption. This is attributed to the lack of clear political support for Romania's national anti-corruption strategy.

Success for RTPR and Allen & Overy in reinstating esteemed magistrate to office

Justice Bogdan, a respected Romanian magistrate, has built a reputation as one of the country's premier anti-corruption and

anti-money laundering justices having presided over multiple criminal trials and sentencing a number of political leaders and businessmen for corruption. In addition to serving as a magistrate, Justice Bogdan frequently delivered legal seminars. Such participation was deemed by the Supreme Council of Magistracy to be incompatible with Justice Bogdan's position as a magistrate and they excluded her from office.

Allen & Overy's associated office, Radu Tărăcilă Pădurari Retevoescu SCA (RTPR), provided constitutional law analysis acting as co-counsel for Justice Bogdan before the High Court of Cassation and Justice. The team was successful in overturning the decision and Justice Bogdan has been allowed to resume office.

Romania tackles bribery within football, and the judiciary

A former justice of the Bucharest Tribunal has been sentenced to seven years' imprisonment for passive bribery, having been found to have accepted approximately EUR220,000 in bribes.

From 2009 to 2012, the former justice accepted bribes from defendants intending to secure acquittals. The defendants, some of whom have also been jailed for bribery offences, were football club owners, managers and agents who declared player transfer sums far below those actually received, leading to allegations of tax evasion, fraud and money laundering between 1999 and 2005.

UNITED KINGDOM

Guilty verdict returned in first contested case for failure to prevent bribery, highlighting the limitations of self-reporting

The first contested case in the UK for failure to prevent bribery under section 7 of the Bribery Act 2010 has resulted in a conviction at trial. A company, Skansen Interiors Limited, reported bribery by two of its employees to the police, but was itself charged with the section 7 offence. Skansen argued at trial that it had adequate procedures in place to prevent bribery, but a jury found this not to be the case. See the 'Closer Look' section for further details and analysis of the lessons to be learned from this case for all businesses.

SFO launches investigation into defence company

Ammunitions manufacturer, Chemring Group Plc, and its subsidiary, CTSL is under investigation by the SFO following a voluntary self-report by CTSL.

The investigation, launched on 18 January 2018, concerns allegations of historic bribery, corruption and money laundering involving intermediaries. The allegations relate to two specific contracts, the first of which was awarded prior to Chemring's ownership of CTSL. This investigation is the latest inquiry into the UK aerospace and defence sector, after the SFO looked into similar allegations in relation to Airbus in 2016 and 2017.

Unexplained Wealth Orders and the remainder of the Criminal Finances Act come into force

See 'Closer Look' section for more details.

The UK National Crime Agency has acted quickly to use its new powers and secure the first Unexplained Wealth Orders, announcing in February that it had secured two Unexplained Wealth Orders and associated interim freezing orders relating to assets totalling GBP22m that are believed to be ultimately owned by politically exposed persons.



A closer look: United Kingdom

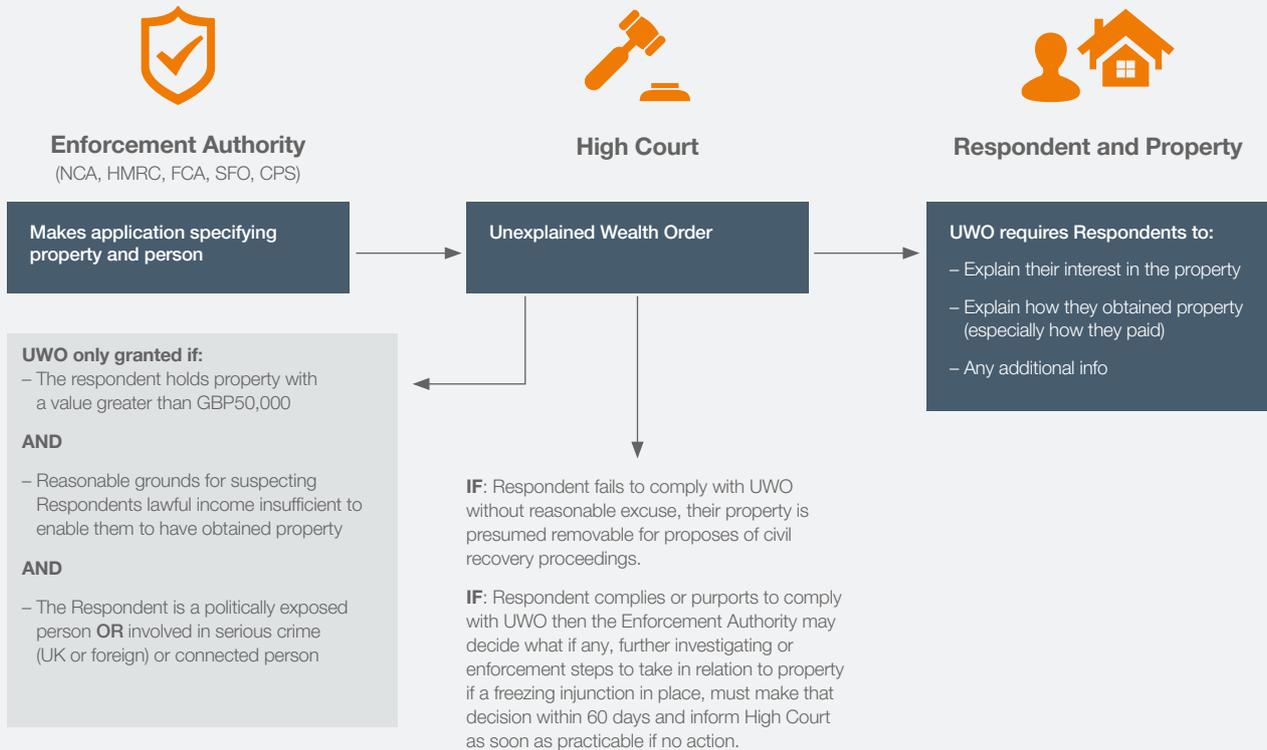
Unexplained Wealth Orders and the remainder of the Criminal Finances Act come into force

You have the right to remain silent. However – under changes to the Proceeds of Crime Act 2002 – it may cost you. With effect from 31 January 2018, the Criminal Finances Act 2017 introduces an Unexplained Wealth Orders regime in the UK.

What are Unexplained Wealth Orders?

An Unexplained Wealth Order (UWO) is an order granted by the High Court at the request of an enforcement authority relating to specific property. A UWO requires the respondent – generally a non-EEA politically exposed person or someone connected to serious crime – to provide a statement setting out the nature and extent of their interest in the property and how they obtained the property (in particular how it was paid for). A UWO may only be granted where the court is satisfied

that there are “reasonable grounds for suspecting that the known sources of the respondent’s lawfully obtained income would have been insufficient” to allow the respondent to obtain the specified property. The mechanism for granting a UWO is set out below. Financial services firms are likely to be involved at the information gathering and enforcement stages.



How will Unexplained Wealth Orders be used?

UWOs are likely to be used primarily as a tool to expose and recover illicit wealth. However, the Act provides that information obtained via a UWO may be used in “any legal proceedings”. The sole restriction is that information obtained via a UWO cannot be used in criminal proceedings against the Respondent (with limited exceptions in cases of perjury etc.). Information obtained via a UWO may be kept for an indefinite period and shared with other enforcement agencies. There is therefore considerable scope for them to be used as a broader investigative tool in cases of financial crime.

In this vein, it is interesting to note that the FCA (along with the SFO, HMRC and NCA) has been granted the power to apply for UWOs. What appetite the FCA will have to use its new powers is hard to predict. That being said, the Act’s protection against self-incrimination only applies to criminal proceedings against the Respondent. Information supplied in response to a UWO could therefore be used against the individual or their employer in regulatory/enforcement proceedings.

A number of commentators have speculated that UWOs may run into trouble in the courts on the basis that the reversed burden of proof infringes human rights relating to privacy and property. In straight forward cases where a Respondent has been linked to serious crime, the likelihood of an UWO application being rejected or struck down for these reasons appears remote (and the European Court of Human Rights has upheld similar presumptions in the past). However, in cases with weaker links to criminality, for example where a UWO is sought simply because a Respondent is a politically exposed person and there is an unexplained disparity in their income and assets, such arguments could conceivably impact whether a UWO is granted.

Extra-territorial effect of Unexplained Wealth Orders

The international reach of UWOs is striking. A Respondent does not need to reside in the UK. Their property does not need to be located in the UK (POCA applies to property located outside the UK). If they are a politically exposed person they must be located outside the EU to be caught by the Act. If they are connected to serious crime, it does not matter where the crime occurred (provided it would amount to an offence in the UK).

As a result, the limits on a UWO’s territorial scope will be more practical than legal. UK enforcement authorities are unlikely to expend resources seeking UWOs where neither the Respondent nor the property has a UK nexus. They will, however, be a particularly useful tool for investigating individuals with a very limited UK footprint but who choose to hold their wealth in the country given the ability to seek a supporting freezing injunction.

A UK enforcement authority may seek assistance from foreign authorities to enforce a UWO (and an interim freezing order). The willingness of foreign authorities to assist in enforcing this novel tool will be a key factor in UWO’s practical jurisdictional reach. State immunity for foreign officials may also blunt their impact in many jurisdictions.

Impact of Unexplained Wealth Orders for firms

UWOs will principally be of significance to a firm’s private clients although UWOs can be issued against an individual or a company.

The limited carve outs in the legislation means that firms may find themselves placed in a difficult position with regards to disclosing client confidential information or banking secrecy (for example if they are aware a client has additional assets not subject to the UWO).

Finally, to support the UWO regime, a court may grant interim freezing orders in respect of property subject to a UWO. Inevitably, financial services firms will be on the receiving end of such injunctions. Moreover, given the extensive extraterritorial scope of UWOs, a client with little or no UK connection may be surprised to find themselves and their property frozen pursuant to such an order. Firms will also need to be mindful to a UWO raising potential Suspicious Activity Reports or other regulatory reporting obligations.

Other parts of Criminal Finances Act

The [implementing legislation](#) also brings into force the remainder of the Criminal Finances Act 2017 – in particular, disclosure orders in money laundering investigations and the ‘Magnitsky amendment’ which allows for civil recovery of property connected to a gross abuse of human rights. For further coverage please see Allen & Overy’s publication ***The Criminal Finances Act 2017: A guide for the financial services sector.***

Calum Macdonald, Associate, London



A closer look: United Kingdom

Following the conviction of a company in the first contested case for failure to prevent bribery under section 7 of the Bribery Act 2010, we consider what lessons businesses can learn from the case

R v Skansen: the facts

Skansen Interiors Limited (Skansen) was, until it ceased trading in 2014, a small refurbishment company operating mainly in London. In 2013, it won two tenders worth GBP6m in total for office refurbishment from a company called DTZ. In January 2014, Skansen appointed a new CEO. Skansen's Managing Director, Stephen Banks, informed the new CEO that following the award of the DTZ contracts to Skansen, GBP10,000 had been paid to Graham Deakin, a project manager at DTZ. Mr Banks also said that a further GBP29,000 was due to Mr Deakin on completion of the contracts.

The CEO was concerned that these payments were designed to give Skansen an improper advantage over its rivals in the DTZ tender. He therefore (a) initiated an internal investigation and (b) established an anti-bribery and corruption policy, having identified that none appeared to be in place. When Mr Banks attempted to make the GBP29,000 payment to Mr Deakin, it was blocked, and at the conclusion of the internal investigation, both Mr Banks and Skansen's Commercial Director were dismissed.

Self-reporting

Skansen then submitted a suspicious activity report to the National Crime Agency and reported the matter to the police. The company gave extensive assistance to the police during their investigation, including handing over legally privileged material.

At the conclusion of the investigation, Mr Banks and Mr Deakin were charged with and pleaded guilty to offences under sections 1 and 2 of the Bribery Act 2010 (the Act). However, Skansen was also charged under section 7.

The 'failure to prevent' offence

Section 7(1) of the Act provides that a company is guilty of an offence if a person associated with it bribes another person, intending to obtain or retain business or an advantage for the company. It is a defence under section 7(2) of the Act, however, if the company had in place adequate procedures designed to prevent people associated with it from undertaking such conduct.

The 'adequate procedures' defence

Skansen declined to plead guilty to the section 7 offence on the grounds that it had adequate procedures in place to prevent bribery. Although its controls were limited, it argued that they were proportionate for a small company operating only in the UK. There were also clauses in the DTZ contracts prohibiting bribery and providing a termination right in the event that bribery occurred.

The jury did not accept Skansen's defence and returned a guilty verdict. Given that the company had no assets by this time, the only penalty available was an immediate discharge.

Comment

This case will be of greatest interest to smaller companies, especially those reliant on 'company values' to establish proper behaviour rather than having in place specific anti-bribery and corruption policies and dedicated compliance departments. However, there are lessons too for larger companies, in particular that self-reporting and provision of assistance to investigating authorities may not – if the offence is serious – incur any benefit at all. Skansen had hoped to negotiate a deferred prosecution agreement (DPA), but the fact that it had no assets meant that this was not considered an option by the Crown Prosecution Service (CPS) and charges were brought.

A further point of interest is the decision of the CPS to pursue Skansen for the section 7 'failure to prevent' offence rather than the direct bribery offence under section 1 of the Act. On the basis of Mr Banks' guilty plea and his senior role at the company, it would have potentially been open to the CPS to charge Skansen on the basis that the 'directing mind and will' of the company had committed the offence. One possible reason is that the CPS felt it better to make an example of the company on the basis of its lack of procedures with the potentially broader preventative impact that may have than to pursue it for the section 1 offence, which may be viewed as more fact-specific.

India Lenon, Associate, London

ACTIONS



UK: Companies should review the latest case law on what constitutes 'adequate procedures' to prevent bribery and consider whether their anti-bribery systems are over-reliant on general Code of Conduct rules or similar provisions.



Prosecution attitudes and resources

BELGIUM

Partial annulment of the Pot-Pourri II Act of 5 February 2016 by the Belgian Constitutional Court

The Belgian Constitutional Court has annulled some provisions of the so-called Pot-Pourri II Act of 5 February 2016 by its decision n°148/2017 of 21 December 2017. The Pot-Pourri II Act of 5 February 2016 brought some significant modifications to Belgian criminal law and criminal procedure law.

One of the major changes introduced by the Pot-Pourri II Act was to include dawn raids within the list of investigative measures which could be performed by an investigative judge upon the prompt request of the Public Prosecutor without referring the full investigation to the investigative judge (the so-called “*mini-instruction/mini-onderzoek*”, provided for by Article 28septies of the Belgian Code of Criminal Procedure).

In such a case, the investigative judge would consider whether or not to grant the Public Prosecutor’s request and issue a search warrant, but the Public Prosecutor would conduct the rest of the investigation (“*information/opsporingsonderzoek*”), with lesser procedural safeguards and guarantees for the suspects than in the framework of an investigation led by the investigative judge (“*instruction/onderzoek*”). The Belgian Constitutional Court annulled the changes made by the Pot-Pourri II Act to dawn raids, thereby reinstating the previous version of Article 28septies of the Belgian Code of Criminal Procedure which excluded dawn raids from the list of investigative measures which could be performed in the framework of *the mini-instruction/mini-onderzoek*. It is to be noted that the Belgian Constitutional Court issued an interpretative decision on 9 March 2018 (n°28/2018), in order to clarify the scope of its decision n° 148/2017 of 21 December 2017, with respect to some of the other provisions of the Pot-Pourri II Act which it has annulled.

FRANCE

France issues a European Arrest Warrant to British authorities

On 26 February 2018, a French businessman was arrested and remanded in custody in the U.K following a European Arrest Warrant (EAW) having been issued by the French authorities. The individual is suspected of fraud and money laundering related to channelling money from a former North African leader in order to finance a French candidate’s presidential campaign.

The EAW was established in 2004 to replace long extradition processes and reinforce cooperation between European countries in criminal matters. Under the conditions in the EAW, the British authorities are required to take a final decision on its execution within 60 days of the arrest. Unless limited grounds for refusal apply (ie application of *ne bis in idem*, pending criminal procedure in the executing country etc.), the British authorities are required to transfer the suspected individual. Over 16,000 EAWs were issued across Europe in 2015. Approximately 500 EAWs are issued by the French authorities on average per year.

Victims of a major ‘Ponzi scheme’ criticise French banks’ lack of due diligence

The Paris Civil Court recently judged admissible the claims of victims against two French banks in a major ‘Ponzi scheme’. According to the claimants’ writ of summons dated 27 October 2015, the two financial institutions offered their services to the perpetrator of the fraud, hence breaching their due

diligence duties by failing to verify the legality of the funds. During a first hearing, the banks requested that a stay of proceedings be issued awaiting the outcome of ongoing criminal proceedings. The judges dismissed their claims, reiterating that criminal law no longer takes precedence over civil law. The judges therefore referred the case to a further procedural hearing.

French Supreme Court requires the reasoning of criminal fines imposed on corporate entities

The requirement for judges to provide their reasons when handing down a sentence punishing a major crime attracting at least 15 years’ imprisonment became mandatory in February 2017. The Supreme Court has now recently specified that this obligation extends to fines imposed on corporate entities. The criteria set out in the French Criminal Code, used by trial and appeal judges to provide reasons for their decisions, is however generally aimed at sentences imposed on individuals. It remains to be seen whether updated or additional guidance will be provided to help judges to comply with the new requirement.

GERMANY

Premises of major German car manufacturer raided in relation to diesel emissions scandal

On 6 February 2018, the public prosecutors of Bavaria and Baden-Württemberg undertook a dawn raid on the offices of a major German car manufacturer. The raids were undertaken as part of an investigation into the use by the company of software which, it is alleged, sought to cheat exhaust tests. At least 210,000 diesel-engine cars fitted with the software have reportedly been sold in the U.S. and Europe from 2009 onwards. The Munich prosecutor is investigating allegations of fraud and illegal product promotion in relation to those sales.

German prosecutor calls for custodial sentences for ex-bankers

According to press articles, the public prosecutor's office requested custodial sentences be handed down to former executives of a German private bank who, in 2015, received suspended sentences for causing losses of EUR83,700,000. The losses were linked to the injection of funds into a German retail company before it entered insolvency proceedings. A fourth banker was imprisoned for his actions following the initial proceedings.

The German Federal Court of Justice heard the German prosecutor's arguments and issued a ruling on 14 March 2018. The presiding judge rejected the prosecutor's arguments, noting that the provision of suspended sentences was an appropriate measure. The presiding judge also referred to various mitigating factors, including the age and health of the ex-bankers, and confirmed the existing ruling.

Expansion of operations concerning asset confiscation

In 2017, the judiciary in North Rhine-Westphalia established an office (the ZOV) to monitor money laundering in the region. According to press reports, 220 inquiries were sent to the ZOV in 2017. The state government of North Rhine-Westphalia has budgeted to expand the number of state prosecutors at the ZOV from five to eleven in 2018. Recent press reports indicate this expansion is due to the judiciary's greater ability to confiscate assets, due to the EU Directive on the Freezing and Confiscation of Instrumentalities and Proceeds of Crime (2014/42/EU) being transposed into German law in July 2017.

ITALY

Liability for crimes committed by employees extends to foreign companies merely operating in Italy

(See 'Closer Look' section)

Italy sanctions use of more invasive technology in criminal investigations

The Italian Supreme Court has recently issued judgments considering the regulation of the use of technology (such as spy software, malware and Trojan horses) in criminal investigations, as well as discussing how to strike the balance between the use of more invasive investigative techniques and the right to privacy.

As a result, the government has introduced a new legislative decree, 29 December 2017 n. 216 (the so-called Orlando reform), which comes into effect on 26 July 2018. The Orlando reform aims to strike a balance between the use of technology and the right to privacy, while at the same time providing a clear legal basis to use IT technology in criminal investigations.

Further enhancements to Italy's whistleblowing legislation

(See 'Closer Look' section)

NETHERLANDS

Netherlands extends ability to use wire-taps to the Dutch Fiscal Intelligence and Investigation Service

Special investigation services such as the Fiscal Intelligence and Investigation Service have been authorized to set up wire-taps and undercover operations (upon a warrant of the Dutch Public Prosecution Office (DPPO)). In the past, these tasks had to be

outsourced to the national police. These changes arise from a bill adopted in December 2017 that amends the Dutch Code of Criminal Procedure (Wetboek van Strafvordering, DCCP). The amendments to DCCP will enter into force in the summer of 2018.

ROMANIA

Call to dismiss Romania's Chief anti-corruption prosecutor sparks country-wide protests.

Romania's Justice Minister, Mr Tudorel Toader, has called for the dismissal of the Chief Prosecutor of Romania's National Anti-Corruption Directorate (DNA), Ms Laura Codruta Kovesi.

Mr Toader alleges that Ms Kovesi was responsible for "acts and facts intolerable to the rule of law". Reading a report on Ms Kovesi's conduct in office, Mr Toader criticised her alleged disobedience of the authority of Parliament and the Constitutional Court. Ms Kovesi has been head of the DNA since 2013 and has been praised for her performance in Romania, the EU and internationally. The announcement prompted significant public protests. The decision to remove Ms Kovesi rests with the Romanian President.

Amid such threats to her tenure, the Chief Prosecutor of the DNA announced a record number of case closures in 2017. The DNA closed 3,893 cases in 2017 – the highest number of cases closed within a single year since the institution's establishment.

Romania proposes changes to the presumption of innocence and the right to be present at a criminal trial

In December 2017, the Romanian coalition government initiated extended legislative changes to the Criminal Code and the Criminal Procedure Code in order to implement EU Directive 2016/343 regarding the presumption of innocence and the right to be present at a criminal trial. According to bodies representing prosecutors and the judiciary however, the proposed changes go beyond the provisions of the EU Directive, significantly limiting authorities' capacity to prosecute and punish criminal offences. Having sparked a number of protests, parliamentary debate has been postponed to Spring 2018. The most controversial provisions relate to:

- Preventing those involved in the prosecution of criminal proceedings from offering to the public, directly or indirectly, any information regarding such proceedings.
- Providing the accused with the right to participate in any hearings concerned with the prosecution, including being present when evidence is given by victims or witnesses. Removing the ability of the judge to issue a ruling in relation to any new suspects or further criminal offences identified during the prosecution. Consequently, the prosecutor would have to initiate a completely new procedure in relation to the newly discovered criminal offences or suspects.
- Removing the ability to use data obtained during the prosecution but not strictly linked to the prosecution, to pursue other criminal proceedings. Furthermore, the prosecutor must delete copies of such data.



UNITED KINGDOM

SFO eyes DPAs for tax evasion

Camilla de Silva, the SFO's joint head of bribery and corruption, has warned financial services companies that they can only use deferred prosecution agreements (DPAs) to avoid prosecution by cooperating fully and early with investigations. In a speech on

15 March 2018, Ms de Silva emphasised that the SFO has strict conditions for companies seeking to pursue DPAs and that they are not appropriate in every case. Ms de Silva also signalled that the SFO was ready to use DPAs as part of investigations into companies under the new failure to prevent tax evasion offences.

EU-WIDE

European Anti-fraud office and European Public Prosecutors Office: relationship

Following the creation of the European Public Prosecutor's Office (EPPO), whose mission will be to investigate and prosecute offences against the EU financial interests (as previously reported in *Allen & Overy's 2017 Q4 European White Collar Crime Report, p. 18*), the EU Commission intends to propose targeted amendments to the Regulation 883/2013 on the European Anti-Fraud Office (OLAF Regulation). As OLAF is an EU administrative body in charge of conducting administrative investigations into fraud and any other illegal activity affecting the EU financial interests, the missions of EPPO and OLAF will potentially overlap in the 20 Member States participating in the creation of the EPPO.

Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office (the EPPO Regulation) already lays down the main principles for the future relationship between EPPO and OLAF, providing inter alia that OLAF may not open any parallel administrative investigation where EPPO is already conducting a criminal investigation, without prejudice to EPPO's possibility to request OLAF to support or complement an EPPO investigation by, for instance, providing information,

analysis, expertise and operational support, or to facilitate coordination with national authorities. However, the EPPO Regulation states that EPPO may provide relevant information to OLAF where EPPO has decided not to conduct an investigation or has dismissed a case. According to the EU Commission, these principles should be further complemented in the OLAF Regulation by addressing specific issues such as the communication of information between EPPO and OLAF, the case selection process and the administrative follow up of cases no longer handled by EPPO. Concrete rules on EPPO's ability to request operational support from OLAF are also contemplated.

Besides the cooperation with EPPO, the EU Commission also intends to propose specific amendments aimed at, inter alia, improving the admissibility of OLAF reports as evidence in judicial proceedings and harmonising OLAF's powers across the Member States.

Following discussions between the EU Commission and EU Council, a proposal from the EU Commission is expected in the first half of 2018. The EU Commission intends the amendments to the OLAF Regulation to enter into force at the same time as the EPPO Regulation, ie by 2020-2021.



A closer look: Italy

Liability for crimes committed by employees extends to foreign companies merely operating in Italy

Companies which have their registered office in Italy can be sanctioned in Italy for crimes committed abroad, subject to certain conditions being met (art. 4 of Decree 231/2001). What is less clear however is whether companies registered abroad and operating in Italy are subject to the jurisdiction of the Italian Courts for crimes committed within Italy.

Although the debate is unsettled, the preferred view is that companies operating in Italy are subject to the Decree, regardless of whether the foreign company has an office, branch or secondary seat in Italy. This view is more in line with art. 6 of the Italian Criminal Code with respect to criminal sanctions for individuals. According to the Criminal Code, the Italian courts have jurisdiction where just a fraction of the criminal behaviour was perpetrated in Italy, even when such behaviour is not subject to criminal sanctions in the country where the perpetrator is resident.

This interpretation of Decree 231/2001 has been confirmed by the Court of Lucca which recently found certain foreign companies liable for violations of Decree 231 in relation to a well-known train accident that occurred in 2009. The companies, though not having any office, branch or seat in Italy, rented certain special railway wagons for transporting gas to the Italian Railway Company and retained responsibility for their up-keep. The companies failed to have in place an organisational model for preventing the commission of the crimes falling under the scope of Decree 231 and were therefore sanctioned, pursuant to Decree 231 itself.

Notably, this principle might have a considerable impact on companies, banks or financial intermediaries operating in Italy where their employees commit a criminal act which has an Italian nexus.

Matteo Fanton, Trainee, Milan



A closer look: Italy

Further enhancements to Italy's whistleblowing legislation

In November 2017, the Italian Parliament approved the entry into force of new legislation (n. 179/2017) which amends whistleblowing regulations in Italy. The new law aims to offer greater protection to public and private sector employees who report misconduct in the work place, and to regulate the obligations of employers in facilitating the whistleblowing process.

The new law outlines separate whistleblowing processes applicable to the private and public sectors. The differences include who the misconduct must be reported to. The law also offers different levels of protection in the event of retaliation or discrimination towards the whistleblower.

Companies must identify specific channels through which employees can report potential misconduct, including guaranteeing the confidentiality of the whistleblower's identity. In addition, they must prescribe specific sanctions applicable to individuals breaching the protection measures, including sanctions applicable to whistleblowers who falsely report alleged misconduct.

Legislation dealing with whistleblowing has now been enacted across many different aspects of Italian law, including in relation to suspicions of money laundering, breaches of the Borsa Italiana Code of Conduct, the Italian Financial Act and the Italian Banking Act.

In particular, the Bank of Italy has recently been working to open an online channel for whistleblowers, facilitating the reporting of violations. Submissions will have to be filed via email, using specific forms, and the management of such reports will be centralised. A similar procedure has already been implemented by CONSOB, although its introduction reportedly led to confusion among certain users between a traditional report of a breach and a whistleblowing submission. CONSOB's system also requires the whistleblower to be identified and requests the submission of proof of identity (although the whistleblower's identity will be kept confidential).

It remains to be seen how such legislation and tools will effect the ability of the authorities to detect and investigate financial crimes.

Matteo Fanton, Trainee, Milan

Summary of whistleblowing provisions in Italy

Legislation	Provision	Summary of scope
Italian Banking Law (TUB)	Article 52- <i>bis</i> of TUB	Reporting of banking activity violations
Italian Financial Law (TUF)	Article 4- <i>undecies</i> of TUF	Reporting of investments services violations and market abuse
Anti-Money Laundering	Article 48 of Legislative Decree 231/2007	Reporting AML violations
Italian Stock Exchange (Borsa Italiana)	Article 7 of the Corporate Governance Code	Reporting on the activities of listed companies
Italian Anti-Bribery Authority (ANAC)	Resolution No. 6 of 28 April 2015	Reporting of violations within the Public Administration
Decree 231/2001 on Companies' Liability for Crimes committed by employees and Consolidated Law on Public Employment	Law No. 179/2017	Reporting of crimes falling under the scope of Decree 231/2001 and violations within the Public Administration

ACTIONS



Romania: Continue to monitor the developments on the proposal for modification of the Criminal Code and Criminal Procedure Code in Romania.

Belgium: Consider (re)activating negotiations with the Belgian Public Prosecutor's Office if you face pending investigation or trial.

Italy: Review and ensure compliance with new whistleblowing regulations.

Italy: Note the risk of liability for criminal conduct for foreign companies merely having a business presence in Italy.



Settlement

BELGIUM

Criminal settlements – to be subject to greater judicial scrutiny

A new Belgian law means that any proposed criminal settlement will have to be reviewed and approved by a judge first. This follows a 2016 decision in which the Belgian Constitutional Court declared that the existing procedure for criminal settlements lacked judicial oversight.

The Remedial Bill was enacted in plenary session by the Belgian House of Representatives on 8 March 2018. The substantive conditions to be met for a settlement to be approved include the

(i) proportionality of the terms of the proposed settlement to the seriousness of the offence and the offender's behaviour, and (ii) the free and informed consent of the offender to the settlement.

The approval (*homologation*) of the proposed criminal settlement must now take place before the criminal settlement is entered into. As the new proportionality test is not further defined, it grants the approving judge some discretion, thereby creating a certain level of legal uncertainty.

The new Act is expected to enter into force in Spring 2018.

FRANCE

The first French-style DPAs to settle investigations into corrupt practices

Deferred Prosecution Agreements (known as CJIP) with two French companies to settle investigations into corruption offences were executed in France in February. This new type of

settlement introduced by the so-called "Sapin II Law" enacted on 9 December 2016, had already been reached between a Swiss subsidiary of a major financial institution headquartered in the UK, represented by Allen & Overy Paris, and the National Financial Prosecutor's Office (see 'Closer Look' section).



A closer look: France

French-style DPAs: What next?

While the first French style DPA concerned a foreign company and the laundering of the proceeds of tax evasion, the two new DPAs executed by the French public prosecutor of Nanterre and two French companies in February, are the first to deal with French companies suspected of corruption. One of the obligations under the DPA is for the French Anti-corruption Agency (AFA) to inspect and evaluate the companies' anti-bribery and corruption programs, using monitorship powers created by the Sapin II Law.

These DPAs include the first monitorships to be imposed since the Sapin II Law entered into force. The AFA will monitor compliance with the eight anti-corruption and bribery measures set out in Article 18 of the Sapin II Law, namely: a code of conduct integrated in the company's bylaws; an internal whistle-blowing mechanism for reporting any failure to comply with the code of conduct; adapted and regularly updated risk mapping of the company's exposure to corrupt practices; internal or external accounting procedures aimed at ensuring that the company's registers, books and accounts do not conceal acts of corruption or influence peddling; mandatory training for the officers and employees most at risk of exposure to corrupt practices; internal disciplinary procedures in the event that employees breach the code of conduct; and a system of internal audits ensuring proper implementation of these measures.

In order to settle, the companies first had to accept the legal qualification as well as the facts for which they had been placed under formal investigation (*mis en examen*), ie for the offence of active corruption of a French public official. They then agreed to: (i) be subject to the AFA's monitorship for eighteen months and two years respectively (less than the three-year maximum provided by the Sapin II Law); (ii) pay a public fine of EUR800,000 and EUR2.71m respectively; and (iii) to indemnify the French State which had registered as a victim (*partie civile*) during the judicial investigations for EUR30,000.

The impact of DPAs abroad remains highly uncertain at this stage. However, many further settlements are expected to follow. The AFA's deputy-director of inspections recently declared that six inspections were notified in 2017 and around a hundred inspections are scheduled for 2018. Any potentially criminal conduct discovered by the AFA would be notified to the public prosecutor and could lead to the opening of a criminal investigation.

Dan Benguigui, Counsel, and Jérémie Natay, Associate, Paris

ACTIONS



Belgium: Belgium: consider (re)activating negotiations with the Public Prosecutor's Office if you face pending investigation or trial.

France: continue to ensure compliance with the anti-corruption procedures required by Sapin II and note the possibility of inspections by the AFA.



Other developments

SPAIN

Spain proposes new law on trade secrets

The protection of confidential know-how and business information (trade secrets) against unlawful acquisition, use and disclosure is the subject of a preliminary draft proposal of a new Spanish Law on Corporate Secrecy, published in February, implementing the EU's Directive on Trade Secrets (Directive (EU) 2016/943)

Currently trade secrets are regulated by the Spanish Unfair Competition Law (*Ley de Competencia Desleal*). The Directive's provisions on the unlawful acquisition, use and disclosure of trade secrets have simply been reproduced in the proposal for the new law, hence no material derogations are expected. The deadline for transposing the Directive is 9 June 2018.

UNITED KINGDOM

ICO launches dawn raid into Cambridge Analytica

The UK Information Commissioner's Office (ICO) enforcement team searched the London offices of Cambridge Analytica (CA), a data analytic firm, in a seven-hour 'dawn raid' ending in the early hours of 24 March 2018.

The High Court granted the warrant after claims that CA amassed information and data about millions of Facebook users without their consent. The warrant allowed the ICO to access CA's databases and servers after CA failed to respond to the ICO's Demand for Access to its records and data. The ICO is investigating the circumstances in which Facebook data may have been illegally acquired and used in breach of UK data laws. This is part of an ongoing investigation into the use of data analytics for political purposes.

Treasury Select Committee launches inquiry into economic crime

The House of Commons Treasury Select Committee announced a new inquiry into economic crime on 29 March 2018. The inquiry will have two limbs: first, the UK's anti-money laundering and sanctions regime; and second, the impact on consumers of economic crime (along with the effectiveness of financial institutions in combatting it) and the security of customer data. The deadline for responses is 8 May 2018.



A closer look: Germany

German coalition agreement signals overhaul to sanctions regime and new rules applicable to internal investigations

German Chancellor Angela Merkel's party agreed with the Social Democratic Party on 7 February 2018 to form a new coalition government. Their coalition agreement sets out several major changes that will have a significant impact on investigations and enforcement relating to white collar crime in Germany. The coalition agreement provides a clear signal that (i) companies may face a higher level of enforcement activities with increased sanctions in Germany; and (ii) there is growing recognition that internal investigations can play a pivotal role in uncovering and combatting corporate crime and that companies should be encouraged through an appropriate legal framework to carry out internal investigations:

1. Reforms of the corporate sanctions regime

The coalition parties intend to take a more stringent approach to tackling corporate crime:

- The discretion of competent authorities when deciding whether to pursue a company for wrong-doing is intended to be removed. Instead, the coalition parties committed to make it the rule, rather than the exception, to hold companies responsible for the wrongdoing of their employees.
- New legal instruments will enable a more flexible approach to the termination of enforcement proceedings. Although further details are yet to emerge, this may, for example, lead to instruments similar to deferred prosecution agreements (DPAs) being introduced in Germany.
- Sanctions for large companies shall be increased. For companies with an annual turnover of over EUR100 million, the maximum fine is intended to be increased to 10% of annual turnover. This would be in line with recent changes in regulatory law. In 2016, German legislation to implement the Market Abuse Regulation introduced a possible fine of up to 15% of annual turnover.

- Sentencing guidelines have also been put on the political agenda for the next few years. These are intended to provide clear guidance on how fines for companies are calculated. Currently, if a German law provides for a monetary sanction, there are no precise rules on how that sanction is to be calculated.
- There is a commitment to make increased use of 'naming and shaming' in connection with corporate sanctions and to create new types of sanctions for companies, although details are yet to be provided.

2. Reforms of legal framework for internal investigations

The coalition parties also intend to encourage companies to conduct internal investigations through two key means:

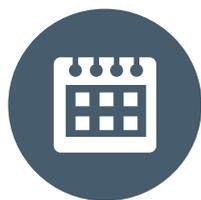
- The coalition agreement explicitly calls for new incentives for companies to conduct internal investigations. It is expected that such incentives will include a potential reduction of fines for companies that voluntarily disclose findings of internal investigations to the authorities. This would be in line with a recent decision of the German Federal Court of Justice where the court indicated for the first time that good faith co-operation efforts of a company should typically lead to a reduction of the fine imposed.
- Statutory rules establishing the parameters and limits on the seizure of documents relating to internal investigations are also to be created. At the moment, the question of whether any legal privilege exists in this context is highly controversial in Germany. In the context of an internal investigation relating to the diesel emissions scandal, the German Federal Constitutional Court is expected to rule on the existence and scope of legal privilege in the coming months.

Jan Erik Windhorst, Partner, and David Schmid, Senior Associate, Frankfurt

ACTIONS



UK: Companies should ensure that their dawn raids manual and procedures specifically include the possibility of action by the UK Information Commissioner's Office (or other equivalent European data protection authorities).



Looking ahead

Date	Event
UNITED KINGDOM	
8 May 2018	Deadline to respond to the Treasury Select Committee's inquiry into economic crime.
July 2018	Court of Appeal hearing in <i>SFO v ENRC</i> – with potentially significant impact for the English law of privilege in investigations.
FRANCE	
March/April 2018	<p>Harsher and evolving policies concerning tax-evasion, anti-money laundering and counter terrorist financing</p> <p>The French Government is contemplating whether to reform proceedings in matters of tax evasion and has placed the fight against tax evasion and money laundering at the top of its agenda. It has launched a consultative committee on the prosecution of tax offences, which will discuss with various professionals (judges, police services, lawyers etc.) about removing the so-called 'Verrou de Bercy', a mechanism that provides a monopoly for the French tax authorities to initiate criminal proceedings in pure tax-evasion cases (ie not involving laundering charges). A number of judges have criticised this restriction as hindering transparency and violating the discretionary prosecution principle. Furthermore, the Government presented a bill to the Council of Ministers at the end of March 2018, containing a series of measures to reinforce the fight against tax-evasion, the most emblematic one being the 'name and shame' policy.</p>
NETHERLANDS	
Summer 2018	Amendment of Dutch Criminal Procedure regarding wire-taps and undercover operations by special investigation services.
BELGIUM	
Spring 2018	Reform of Belgian legislation on the freezing and confiscation of criminal property will enter into force.
Spring 2018	Reform of the Belgian criminal settlement process will enter into force.
ITALY	
TBC	Second level AML regulations to be enacted in the next few months.
ROMANIA	
TBC	Adoption of the act implementing 4MLD.
2018	Parliamentary debates regarding the changes to the Criminal Code and Criminal Procedure Code.
EUROPEAN UNION	
25 May 2018	The General Data Protection Regulation comes into force across Europe.
9 June 2018	Deadline for Member States to implement EU Directive on Trade Secrets (2016/943) into national law.
Mid-2018	5MLD is expected to enter into force.
End-2019	Anticipated deadline for Member States to implement 5MLD into national law.
2020-21	Amendments to the OLAF Regulation are expected to enter into force.



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Our European white collar crime practice

As part of Allen & Overy LLP's market-leading global investigations practice, our European white collar crime experts advise clients on a wide range of high-profile criminal and regulatory investigations, with a particular focus on cross-border matters. The European team comprises lawyers with extensive experience of working together in multiple jurisdictions and includes former prosecutors in Europe.

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Chambers 2017, Corporate Investigations – Europe-wide



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