In-house counsel advising on investigations and financial crime risk at large, multinational companies have had to contend with a plethora of developments over the past 18 months. More countries are introducing or amending financial crime laws, new types of businesses are being bought into the scope of existing laws, and there is a flow of guidance from enforcing authorities. Some jurisdictions are reinvigorating or introducing laws that make it more difficult to transfer information across borders during an investigation. Others are encouraging enforcement authorities to collaborate with other investigating authorities across borders.

The result has been a significant rise in the volume, scale and complexity of financial crime investigations. In parallel, expectations of corporate behaviour before, during and after investigation, have never been higher.

The Allen & Overy Cross-Border White Collar Crime and Investigations Review analyses the latest developments and trends, and highlights the most significant among the current and emerging issues that white collar crime and investigations in-house counsel should prioritise in the year ahead.

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We asked our global white collar crime team for their views on the main issues for in-house investigations teams in 2020. Although the picture is not uniformly the same across jurisdictions, there were some reoccurring themes.

Managing data during an investigation

We expect to see increased data protection enforcement, with large fines, as the data protection regimes in many jurisdictions begin to mature. Those involved with conducting internal investigations will need to:

– ensure protection of personal data, for example when reviewing employee devices and communications;
– check local laws to see whether there are any restrictions on transferring personal data across borders; and
– keep up to date on how these laws are being enforced – for example, the French Blocking Statute has been recently reinvigorated, and China has introduced new laws which effectively represent a blocking statute.

Data affects enforcement

The availability of data, and faster machine learning, will likely lead to greater enforcement as authorities can leverage data analytics to uncover misconduct more easily. For example, the planned overhaul of the UK’s suspicious activity reporting regime is partly aimed at the authorities being able to use data analytics to gather better financial crime intelligence from the mass of information reported.

Financial services firms may, and indeed are being encouraged to, take advantage of machine learning for their own internal compliance purposes, but they will need to communicate to regulators what that machine learning is, and what systems and controls are in place to manage the use of machine learning and its associated risks. Regulators may challenge firms to explain how, for example, they are managing potential bias. Often financial crime compliance technology is outsourced to a third-party provider, but the responsibility remains with the regulated firm.

Intermediaries remain a higher risk business relationship

The use of intermediaries remains a very high corruption risk. Many enforcement actions in 2019 related to payments made to third parties concealed as, for example, consultancy fees or sponsorship or charitable donations, including sports team sponsorship. Companies must ensure that their policies and procedures around the use of such business partners are properly implemented, and reviewed on a regular basis to reflect the business as it evolves.

Increased focus on culture and compliance

Recent enforcement suggests that just having policies and procedures in place, even if externally certified, will not necessarily be adequate either to prevent financial crime in an organisation or to provide an ‘adequate procedures’ defence for a company faced with prosecution under the increasingly popular ‘failure to prevent’ type bribery offences. How the policies and procedures are embedded in an organisation is critical to making them effective. We expect to see even more scrutiny by authorities on ‘tone from the top’ and corporate culture in general.

Keeping up with expectations on ‘cooperation’ with the authorities

Many developed regimes now encourage a company under investigation to cooperate with the authorities in order to obtain ‘credit’ which can, in turn, mean a greater chance of avoiding a corporate conviction and help to secure a discounted fine. Some authorities have provided guidance on exactly what is expected. There is often a tension between an authority’s expectations of cooperation, and rules on legal professional privilege in some countries. Some authorities are hardening their stance on privilege. For example, some are demanding either third-party certification of privilege claims or exercising or demanding more power to determine the applicability of legal privilege in particular cases. In-house counsel are advised to consider carefully how to manage issues of privilege and cooperation, perhaps adopting a tiered approach with ‘crown jewel’ privilege claims (for example communications with external lawyers) and other privilege claims which it may be less uncomfortable about waiving (for example, notes of interviews with some employees).

Calls for increased transparency of settlements

While companies and enforcement authorities may favour settlements, there have been calls in some countries for increased transparency and scrutiny of the settlements. The degree of scrutiny and transparency varies by jurisdiction. For example, in the Netherlands the settlement regime is the subject of political debate meaning that, at present, there is some doubt around whether there will be any new settlements.

Dual-track investigations

Many authorities have an avowed intent to pursue criminal prosecutions for money laundering failings in the financial services sector. Whilst administrative penalties are still the norm, we are seeing in the UK ‘dual track’ investigations whereby a regulator pursues both civil and criminal lines of enquiry. This approach can present challenges for investigations lawyers, particularly in the treatment of individuals.

Anti-Money Laundering and Counter-Terrorism Finance laws expand scope

More types of companies and advisors are being brought within the scope of AML and CTF regulation as the law makers try to keep up with the money launderers and those who finance terrorism. For example the implementation of the EU’s 5th Anti-money laundering directive in the UK has bought crypto asset exchange providers, custodian wallet providers, high value art market participants (eg art dealers and freeport operators) and high value property letting agents (previously it was just estate agents) into scope. An expanded definition of ‘tax adviser’ means that those who offer material aid or assistance on tax matters will also fall in scope.

Sectors under the spotlight

Whilst there is some enforcement in most business sectors, there continues to be a higher level of enforcement worldwide, and record breaking fines, against some of the perceived ‘facilitators’ of financial crime such as financial services firms, in a number of areas including in particular AML and the facilitation of tax evasion. Telecoms companies can also be caught in the crosshairs given their role as communications service providers – recent fines relating to financial sanctions breaches.

Increasing law and more global cooperation

Multinationals will be familiar with the financial crime laws in jurisdictions where they operate. As more countries amend their laws (for example, South Africa, Germany, UAE) it is important that compliance takes account of new requirements, in particular to understand the ‘strictest’ regime under which it operates which may in turn help shape the compliance programme.

There is undoubtedly more collaboration between jurisdictions now. Any investigation that has touch points in more than one jurisdiction will likely involve the authorities talking behind the scenes at the investigation, charging and settlement stages.

There have been instances of an authority ‘piggy backing’ on an interview by another authority, outside of its own jurisdiction. This should impact decisions made during an investigations concerning interactions with authorities.

There remain some challenges for companies dealing with multiple authorities. Laws in a number of countries (eg China, France) make it difficult to cooperate with foreign regulators.

Our lawyers are used to helping our clients navigate all these issues, if you need more information please contact amy.edwards@allenovery.com.

Overview of recent developments by jurisdiction

**AUSTRALIA**

Substantial increases in funding for government investigative agencies, and major reforms of the corporate criminal and regulatory framework (with the promise of more to come), has increased the workload of in-house litigation teams. A greater willingness from regulators to use the full range of their enforcement toolkit is generating more criminal and civil penalty investigations and court proceedings. While the financial sector has been the immediate focus and will remain so in the short term, recent reforms have radically changed the compliance landscape, and boards of all companies are under unprecedented pressure to manage conduct risk effectively.

**BELGIUM**

The Belgian legal landscape of criminal law and criminal procedure has changed over the past years and is bound to be amended even more substantially with a view to improving the efficiency of the judicial, investigative and prosecutorial functions. After several years of uncertainty, the legal framework for criminal settlement is now set as a result of landmark Supreme Court cases and subsequent legislative reforms. The prosecutorial policy is strongly in favour of settling financial and economic criminal cases which effectively translate as an increase in criminal settlements. Cross-border co-operation between judicial and regulatory authorities is intense both at EU and global level. Financial intermediaries continue to be a point of focus in fraud matters, especially in complex cross-border cases.

**CHINA**

2019 was an active year for white collar enforcement in China on all fronts. The consolidation of enforcement agencies into one “super regulator”, plus the addition of new agencies is likely to increase the scope and pace of enforcement action. The life sciences sector is a primary target, and regulatory enforcement against financial services has increased markedly. New laws provide for more significant fines for market manipulation and commercial bribery offences. Moreover, the International Criminal Justice Assistance Law, along with the Cybersecurity Law and State Secrets Law, pose challenges to how multinational companies conduct internal investigations, and potentially share information with foreign regulators in their home countries.

**FRANCE**

The criminal enforcement landscape has clearly changed in France over the course of 2019, with unprecedented fines being imposed against UBS and a rise in the number of French-style deferred prosecution agreements (Convention Judiciaire d’Intérêt Public). Money-laundering, tax evasion and corrupt practices have been a key focus, and are likely to remain so. The National Financial Prosecutor’s Office changed hands towards the end of 2019, with its director Eliane Houlette being replaced by Jean-François Bohnert. In light of the latter’s experience in Germany and with Eurojust, cross-border cooperation is likely to increase in 2020. The revivalisation of the French Blocking Statute may make it more difficult for a company to cooperate with a non-French authority during an investigation.

**GERMANY**

The diesel emissions scandal and the so-called cum/ex trades have unleashed unprecedented enforcement activity by German criminal prosecution authorities against national and international companies. In their wake, the German legislator is determined to expand the enforcement options available to sanction corporate crimes with the introduction of a new Corporate Sanctions Act, the draft of which is currently coordinated within the Federal Government. This Act will also impact how internal investigations with a German nexus are conducted. In the current enforcement environment, investigations into tax evasion, money laundering and insider trading are high on the agenda of German criminal prosecution authorities.

**HONG KONG**

Hong Kong regulatory authorities have recently focussed on white collar and financial crime, corporate governance and senior management accountability, book building within the equity and debt capital markets, and financial product suitability. On the cross-border enforcement activity front, the High Court handed down an important judgment which supports the ability of the Securities and Futures Commission (SFC) to share evidence collected, using its investigative powers, with foreign regulators, but recognises that parties may invoke their privilege against self-incrimination in response. This could change the way future SFC enquiries may be conducted. Further, to combat “rolling bad apples” in the regulated sector the SFC has introduced a new obligation to disclose internal investigations of leaving employees. Regulated entities should ensure internal investigations are balanced to manage exposure to claims by former employees.
NETHERLANDS

Legal entities can be prosecuted for criminal offences committed by their employees, including by their employees abroad. In the last couple of years, we have seen the Dutch Anti-Money Laundering regime being strengthened and we expect this trend to continue. Out-of-court corporate settlements have been criticised for lack of transparency and there has been a call for some form of judicial review of these settlements. This discussion is still on-going, and has the attention of the Dutch government and Parliament. This has effectively put a freeze on new settlements until the issue is resolved. A new child labour due diligence law will increase corporate focus on supply chains.

SOUTH AFRICA

In the previous decade, South Africa has had low levels of prosecution for corruption, money laundering and other white-collar offences. The end of the Jacob Zuma era, the establishment by President Cyril Ramaphosa of a new Investigating Directorate at the National Prosecuting Authority and three recent Presidential Commissions of Enquiry into corruption herald a new era in South African enforcement efforts. Coupled with anticipated changes in South Africa’s key anti-bribery and corruption law, corporates are expected to face increased scrutiny by regulators in 2020 after years of inaction.

UNITED ARAB EMIRATES

The UAE is at the forefront of a trend across the Gulf region to crack down on financial crime. Recent legislative changes introduced in the UAE have strengthened the powers and resources available to enforcement authorities. These changes have extended the scope and territorial reach of the anti-bribery law, increased penalties for private companies involved in criminal activities, and allowed authorities to seize the proceeds of crime.

UNITED KINGDOM

The UK has high ambitions to fight financial crime, but 2019 saw mixed success for enforcement authorities. Whilst there were some successful prosecutions of individuals, and some decision making by the Serious Fraud Office (SFO) on legacy cases, there were some high-profile failures of SFO corruption prosecutions against individuals where their employers had already entered into deferred prosecution agreements (DPAs) and paid huge fines, for the same alleged conduct. The Office of Financial Sanctions Implementation saw its first three sanctions fines – but at quite low levels. Looking ahead, in the year of the Bribery Act’s 10th birthday, there was a significant start for the SFO with the ground breaking multi-jurisdictional DPA with Airbus. Both the SFO and the Financial Conduct Authority (FCA) have stated their intention to make greater use of money-laundering related offences. We await the outcome of an appeal of KBR v SFO on the UK authorities’ ability to order a company to produce documents from overseas parent companies.

UNITED STATES

Mixed signals to companies came out of the U.S. last year. FCPA enforcement is at an all-time high, and the DOJ Antitrust Division continues to coordinate across borders, while the DOJ National Security Division enforces U.S. sanctions on non-U.S. companies without notable cross-border cooperation. The DOJ Criminal and Antitrust Divisions are giving companies more incentive than ever to beef up compliance efforts and cooperate with government investigations, while a U.S. court has signalled that such cooperation may infringe on individuals’ rights. Companies should invest in robust compliance, prioritize early disclosure of potential problems to U.S. authorities, and know that the long arm of U.S. sanctions can and will follow them across increasingly attenuated connections to the U.S.
Substantial increases in funding for government investigative agencies, and major reforms of the corporate criminal and regulatory framework (with the promise of more to come), has increased the workload of in-house litigation teams. A greater willingness from regulators to use the full range of their enforcement toolkit is generating more criminal and civil penalty investigations and court proceedings. While the financial sector has been the immediate focus and will remain so in the short term, recent reforms have radically changed the compliance landscape, and boards of all companies are under unprecedented pressure to manage conduct risk effectively.

Investigations trends/developments

Australia saw a significant increase in enforcement activity in 2019, particularly from the regulators of financial services entities and institutions. This arose in part from recommendations made following a government inquiry (The Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry) (FS Royal Commission). In response, the Australian Securities and Investments Commission (ASIC) adopted a new enforcement approach, resulting in more cases being pursued through the courts, rather than by way of settlements or enforceable undertakings (the latter down to 20 in the most recent financial year, from 57 in the prior year).

Separately, following years of quiet and moderate achievement, the Australian money laundering regulator (AUSTRAC) successfully brought its first major actions under Australian anti-money laundering regulations resulting in large fines, with several further actions announced in 2019.

Regulators now have a larger array of enforcement tools available to them. There have been reforms to Australia’s regime for punishing corporate criminal offences and civil penalty contraventions (discussed in more detail below) as well as the Banking Executive Accountability Regime (BEAR) that commenced in full on 1 July 2019 and imposes a range of accountability obligations on banks and their senior executives.

In its 2019 enforcement priorities, Australia’s competition regulator, the Australian Competition and Consumer Commission (ACCC), placed an increased focus on cartel conduct and other anti-competitive practices that involve “Australians, Australian business or entities carrying on business in Australia”. It has brought several cartel actions in recent years, including a high-profile criminal cartel case against two global investment banks, one of Australia’s largest domestic banks and six of their senior executives. The ACCC also strengthened its cartel immunity and co-operation policy, which came into effect on 1 October 2019.

Significant law reforms impacting corporate criminal liability

There were significant changes to the Australian enforcement framework in 2019 and a raft of proposed further reforms were announced. Australia’s corporate liability regime was the subject of far-reaching reform:

– an increase in potential imprisonment terms for breach of criminal offences;
– a substantial increase in the potential fines or civil penalties against corporates (from AUD1 million to a maximum of 10% of a company’s annual turnover);
– enhancing the remedies available under the civil penalty regime through expanding the number of obligations punishable by civil penalty, as well as increased availability of infringement notices and the creation of relinquishment (or disgorgement) orders;

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– a simplification of the definition of “dishonesty” to a single-limb, objective test as to whether the conduct is “dishonest according to the standards of ordinary people”, bringing the legislative test in line with the common law in Australia and the UK (see, in relation to the UK, “Re-defining criminal dishonesty: why does it matter?”).

Australia’s whistleblower regime was also substantially revised to broaden the range of people who can make a protected disclosure, the conduct in respect of which a protected disclosure can be made, and the remedies available to whistleblowers that suffer detriment as a result of having made a protected disclosure. Australian entities (and foreign entities carrying on business in Australia) with annual consolidated revenue of AUD100m now need to submit and publish a Modern Slavery Statement in respect of their business, as a result of changes made effective on 1 January 2019. The legislation imposes a number of mandatory content requirements, some of which are not present in other comparable legislation (eg, the UK Modern Slavery Act 2015) that may be applicable to corporates caught by this legislation.

In terms of proposed reforms:
– perhaps most significantly, the Government has reintroduced the “Combatting Corporate Crime Bill”, which proposes to create an offence for “failing to prevent bribery” (in a similar form to that contained in the UK Bribery Act 2010) and establish a deferred prosecution agreement regime;
– amendments to Australia’s anti-money laundering legislation have also been introduced into Parliament to simplify and clarify provisions relating to customer due diligence, correspondent banking and tipping off; and
– the Australian Law Reform Commission has authored a discussion paper on proposed reforms to how liability is attributed to corporations and their senior executives.

Internal investigations – key developments

Whistleblower reforms will likely result in an increase in the number of internal investigations commenced by whistleblower reports, particularly for entities that were not previously required to have a whistleblower policy in place. The penalties for breaching the confidentiality of an eligible whistleblower, or causing/threatening detriment to such a person, has substantially increased to a maximum of the greater of: (i) AUD10.5m; or (ii) 10% of the company’s annual turnover.

Greater pressure on regulators to focus on “deterrence, public denunciation and punishment” has resulted in an increasing reliance on public enforcement through court action. Several recent court actions have been the result of investigations arising out of self-reporting by corporates. While financial services institutions are subject to a range of breach reporting obligations that will guide the timing of self-reporting, the practice of regulators picking “the low-hanging fruit” to bolster their reputations may make other corporates wary of self-reporting before they have a clear understanding of the conduct of their employees and the potential contraventions and liability.

Regulators (including the Australian Taxation Office) have stepped up their challenges to claims of privilege by corporates. In March 2019, ASIC settled proceedings against a financial institution and a large Australian law firm seeking to compel them to produce interview notes taken as part of the law firm’s independent investigation into the conduct of employees at the institution. This followed a high-profile dispute aired during the FS Royal Commission about whether the final report by the law firm should be regarded as “independent”, given the level of input from management and the board of the financial institution on the law firm’s drafts of the report. There have also been reports that ASIC has recently issued a number of compulsory examination notices to General Counsel, whose knowledge of relevant matters is likely to have arisen from requests for legal advice.

Sectors targeted by law reforms or enforcement action

Australia’s financial services sector was the primary focus of enforcement action in 2019. The public pressure on that sector was prompted by the FS Royal Commission, which released its final report in February 2019, however several reforms and amendments were already in train prior to it. The Federal Government pledged to introduce legislation in relation to all the recommendations of the FS Royal Commission by the end of 2020. The report contained a number of findings of misconduct (dishonest and otherwise) in the industry, and exhorted regulators to take a more aggressive approach (see Key Themes in the Interim Report). ASIC, APRA and the Commonwealth Director of Public Prosecutions have all taken action in response to the misconduct identified.

Cross-border co-ordinated enforcement activity

The Australian authorities collaborate with their overseas counterparts. The Australian Federal Police (AFP) has been a member of the International Foreign Bribery Taskforce since 2013 and worked on several matters with its other members (including the UK National Crime Agency and the U.S. Federal Bureau of Investigations (FBI)), a number of which are ongoing. In November 2018, an investigation by the AFP into foreign bribery by a subsidiary of the Reserve Bank of Australia concluded with several guilty pleas. That investigation involved the co-operation of the UK Serious Fraud Office (SFO), the Malaysian Anti-Corruption Commission and Attorney-General’s Chambers, and the Indonesian National Police. More recently, the AFP has been assisting the SFO with its investigation into Unaoil.

AUSTRAC recently announced several actions against entities and individuals connected with child exploitation offences in the Philippines. This has included the prosecution of individuals with the cooperation of the AFP and Philippine authorities (AUSTRAC’s media release here). It has also involved proceedings against Westpac, one of Australia’s largest domestic banks, for numerous money laundering compliance failures at the bank, including for money transfers to the Philippines.

Financial crime issue predictions for 2020

Responding to greater enforcement activity and improved enforcement powers of regulators is a principal challenge for corporates operating in Australia at present. Regulators have received major additional funding to undertake this enforcement activity. In April 2019, it was announced that ASIC would be receiving a AUD405m increase, and APRA would receive a AUD152m increase, increases in their annual budgets of 25% and 30%, respectively. The increased funding has led to greater co-operation and co-ordination between regulators, as well as an increase in concurrent regulatory investigations (where the conduct falls within overlapping regulatory ambits). As a result, the Australian legal and compliance market is experiencing a considerable skills shortage, making it even more difficult to staff the increased workload.

Further, pressure on boards to adequately monitor non-financial risks, as well as the recent imposition of several new obligations that are broadly-worded or principles-based (such as BEAR), has necessitated the development of more mature compliance...
systems. This has led to an increase in change projects designed to identify and manage such risks, and a greater investment in consultants with expertise in regulatory compliance, as well as corporate culture and governance. General Counsel will need to be particularly focused on the use of IT systems and infrastructure to address conduct risk and compliance processes. Such systems can be critical for meeting the regulatory obligations of large institutions, however breakdowns in those systems or related processes can lead to large-scale data breaches or systemic non-compliance with the regulations they were intended to meet.

Recent legal directory quotes

“Allen & Overy LLP is engaged for a broad array of compliance and investigation work with core strengths in anti-bribery and corruption, economic sanctions and anti-money laundering, regulatory support and transaction due diligence. Key partners are based in Sydney though the practice is active throughout the Asia Pacific region. The practice also regularly handles matters with elements in the U.S., UK and other jurisdictions with Jason Gray recently acting for a U.S.-based consumer goods company on two bribery-related investigations in India and another in Russia. Gray heads the anti-bribery and corruption, white collar crime and government enforcement practices while Jason Denisenko oversees regulatory financial services matters; John Samaha serves as practice head of the litigation and contentious regulatory departments.”

The Legal 500 2020, Regulatory Compliance & Investigations

“Jason Gray is commended for his ability to advise on anti-bribery and corruption matters throughout the Asia-Pacific region, and is especially highlighted for his expertise in U.S. FCPA matters. Clients say: “He is U.S.-qualified, which is fantastic. He knows the U.S. regulations very well and can leverage that well on matters in the Middle East and Asia, leading a lot of investigations in Asia-Pacific and Europe.””

Chambers 2020, Anti-Bribery and Corruption.

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The Belgian legal landscape of criminal law and criminal procedure has changed over
the past years and is bound to be amended even more substantially with a view to
improving the efficiency of the judicial, investigative and prosecutorial functions.
After several years of uncertainty, the legal framework for criminal settlement is now
set as a result of landmark Supreme Court cases and subsequent legislative reforms.
The prosecutorial policy is strongly in favour of settling financial and economic
criminal cases which effectively translate as an increase in criminal settlements.
Cross-border co-operation between judicial and regulatory authorities is intense
both at EU and global level. Financial intermediaries continue to be a point of focus
in fraud matters, especially in complex cross-border cases.

Investigations trends/developments

We have seen an increase in enforcement action for (i) corruption; (ii) terrorism; (iii) cyber criminality; (iv) human trafficking; and (v) economic and financial crime, including tax fraud. These are all ‘priority subjects’ identified by The Belgian College of Prosecutors General (BCPG), whose mission includes setting Belgian criminal policy.
The use of alternative resolution mechanisms for criminal matters has continued to rise, following recent amendments to the Criminal Code on criminal settlements. Criminal settlements can be entered into by entities and individuals. BCPG guidelines (2018) state that a criminal settlement should be considered by prosecutors for certain offences listed in the guidelines, including economic, financial, tax and labour offences.
The largest settlement ever reached with Belgian authorities was finalised in September 2019 in a cross-border tax fraud matter involving a Swiss bank, for EUR300 million.

Significant law reforms impacting corporate criminal liability

There have been several amendments to criminal law and criminal procedure rules aimed at improving the efficiency of the judicial, investigative and prosecutorial functions. Among these legislative reforms, the law on criminal settlements and the law on the confiscation and seizure of criminal assets were amended following several landmark Constitutional Court cases. The law on corporate criminal liability has also been reformed and expanded, in that individuals and corporate entities may now be prosecuted jointly for engaging in the same criminal conduct (this was possible only to a limited extent previously). Further structural changes are expected and a bill proposing a new Criminal Code a just been introduced in Parliament.

Internal investigations – key developments

There is no regulatory or statutory framework dealing with internal investigations under Belgian law. Corporates are free to conduct internal investigations in parallel with criminal or regulatory investigations without any positive duty to disclose the results of the investigation. The materials produced in the process of an investigation can be seized by the authorities in the context of a search. However, they can be protected by legal privilege if they have been produced and sent by a solicitor.
Sectors targeted by law reforms or enforcement action

Because of the opacity of money flows in complex cases, Belgian prosecutors tend to focus more intensely on financial intermediaries when investigating and prosecuting fraud matters. While it is often difficult for them to arrest the actual fraudsters, who may be abroad, act through the internet or have no traceable assets; the entities which make transactions possible are generally well-established companies that are easier to prosecute. Charges against these companies are often based on aiding and abetting.

Cross-border co-ordinated enforcement activity

There is increased cross-border co-operation in criminal investigations (eg mutual assistance, appointment of joint task forces on specific cases) and also in regulatory investigations (eg investigations conducted by tax authorities).

We are also seeing an increase in cases that are initiated and investigated at EU level by the European Anti-fraud Office (OLAF) and then subsequently submitted to authorities of Member States for prosecution. We expect that this trend will continue to develop as the European Public Prosecutor’s Office becomes operational.

There is an increasing propensity for Belgian prosecutors to resort to criminal seizure and confiscation, especially in complex cross-border cases involving money laundering and corruption. Recent amendments to the law have broadened the possibilities of criminal confiscation and seizure under Belgian law and have entirely reformed the functioning and powers of the Belgian Asset Recovery Office.
Recent legal directory quotes

Allen & Overy LLP’s group has been handling cases of money laundering, tax fraud, embezzlement, and cybercrime, among other areas. Regulatory investigations and compliance matters are additional core strengths.

Legal 500 2019

Joost Everaert was rated as Leading Individual and Nanyi Kaluma as Next Generation Lawyer.

Legal 500 2019

Nanyi Kaluma is noted for her expertise in cross-border money laundering and bribery investigations.

Legal 500 2019

Financial crime issue predictions for 2020

The following issues will stay high up on the agenda for 2020: detecting and preventing corrupt practices, data protection breaches and cyber security attacks, money laundering and sanctions/embargoes.

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Investigations trends/developments

Consolidation of enforcement authorities: For the past several years, China’s enforcement of criminal and administrative laws has been rigorous, and 2019 is no different. The reorganization of key regulators in China is likely to increase the pace and scope of enforcement actions. The creation of a “super-regulator”, the Administration for Market Regulation (SAMR), which now assumes the responsibilities of all antitrust enforcement, product quality supervision and food and drug administration in addition to the functions of the industrial and commercial administration, is intended to bring greater cooperation among multiple enforcement agencies that previously operated independently, and greater consistency for those subject to enforcement actions.

New regulator bares its teeth in life sciences and healthcare sector: The Supervision Law of the People’s Republic of China (Supervision Law), effective March 2018, creates a new regulator, the National Supervisory Committee, exercising power over a broadly defined group of “public officials.” The Supervisory Committee can investigate public officials’ conduct such as bribery, abuse of power, dereliction of duty, improper transfer of benefits, nepotism, and waste of state assets. It has wasted little time in initiating a broad range of investigations. In 2019, the Supervisory Committee launched a wave of investigations, focused on the life sciences industry, reviewing the conduct of hospitals, public medical associations, and healthcare providers. Although multinational companies are not the target of these investigations, they are often pulled into investigations related to their dealings with these public bodies. The findings of the Supervisory Committee can be referred to other regulators to take additional action.

Increased enforcement against financial institutions – market offences and AML: The continuing development and opening of China’s financial market has driven a move towards regulation that is more in line with international standards. Financial regulators in China have stepped up their enforcement action. Two areas are of particular interest to international financial institutions.

– Securities market misconduct: More international financial institutions are participating in China’s capital markets either through their onshore presence or cross-border utilising regimes such as QFII/RQFII and Stock Connect. The securities regulator, the China Securities Regulatory Commission (CSRC), has continued its enforcement focus on market manipulation, one of its three key enforcement areas (the other two being misrepresentation of information and insider dealing). The number of market manipulation enforcement cases has increased significantly:

– Between 2010 to 2014, there were on average four market manipulation enforcement cases per year.
– Between 2015 and the third quarter of 2019, the average rose to 21.

Fines are also getting tougher. Before 1 March 2020, an institution could be fined up to five times its illegal income for market manipulation, and an individual could be fined up to RMB0.6m. The new Securities Law of the People’s Republic of China provides that an institution can be fined up to ten times its illegal income, and an individual can be fined up to RMB5 million.
The AML regime has been extended from its focus on traditional banking financial institutions in 2007 (when China joined the Financial Action Task Force), to insurance companies and securities firms after 2007, and with a stronger focus on payment institutions in 2012. The People’s Bank of China (PBOC), the main regulator for AML enforcement, has significantly stepped up enforcement efforts. In 2019, the majority of administrative penalty cases enforced by PBOC were AML related. There were 468 AML enforcement cases in 2019, an increase from 396 in 2018. The total fines increased from RMB13.1m to RMB17.3m. Of the AML enforcement cases against institutions, more than 80% also imposed liability on individuals. Six of the top ten highest penalties were issued against third party payment institutions. The highest penalty in 2019 was RMB6.3m. On 14 February 2020, PBOC issued three penalty decisions with penalties in each of the decisions exceeding RMB10m.

The “conversion rate” from administrative liability to criminal liability in these areas, however, remains fairly low. From 2010 to the third quarter of 2019, CSRC issued 130 administrative penalty decisions on market manipulation, whereas there are only 13 criminal convictions for market manipulation in the same period. For AML, PBOC issued 468 administrative penalty decisions in 2019, while there are only 53 criminal convictions for AML in the same year.

Internal investigations — significant developments

As noted above, the ICJA Law could potentially have a substantial impact on how internal investigations are conducted in China. In addition, there are laws that influence how data can be handled, particularly with respect to the transfer of data outside the People’s Republic of China. For years, the State Secrets Law of the People’s Republic of China has posed concerns about how information that may fall within the definition of “state secrets” is transmitted outside of China.

The 2016 Cyber Security Law of the People’s Republic of China (the Cyber Security Law) has also generated debate in light of the vagueness of the legislation coupled with the significant penalties associated with breach. New guidelines were issued in 2018 and 2019, although they still leave large grey areas. The potential impact of the Cyber Security Law on cross-border investigations is significant, particularly on the handling and cross-border transmission of “personal information”.

The Cyber Security Law, coupled with the State Secrets Law, has the potential to act essentially as a blocking statute to prevent the transmission of data (including the results of investigations) outside the People’s Republic of China, with expanded penalties if provided to a foreign government authority.

Sectors targeted by enforcement action

The life science industry has been a primary focus of enforcement activity in China, and 2019 is no exception. In 2019, 48% of the published administrative penalties relating to bribery concerned the life sciences industry, followed by the technology, entertainment, and logistics sectors.
Cross-border enforcement activity

A step towards collaboration: China has not traditionally co-operated well with other global enforcement agencies, although there are developments that suggest it is taking small steps towards greater international engagement in this area.

Given that many international financial institutions use their Hong Kong presence to gain access to China’s securities market, financial regulators such as the CSRC have increasingly co-operated with their counterparts in the Hong Kong Securities and Futures Commission (SFC), including asking the latter to pass on requests for the production of documents and conduct interviews for CSRC investigations.

But significant obstacles remain: In October 2018, a new law introduced rules and procedures on international criminal justice assistance between China and other countries (the Law of the People’s Republic of China on International Criminal Justice Assistance (ICJA Law)). It covers service of documents, investigations and evidence collection, arrangements for witnesses to testify or assist in investigations, sealing, seizure, and freezing of property, confiscation and return of illegal gains and other relevant property, and transfer of sentenced persons. The law provides that no foreign authority, organization, or individual may carry out activities in China, in relation to foreign criminal proceedings, nor provide a foreign country with evidentiary materials or the assistance prescribed in the ICJA Law without the approval of the competent Chinese authorities.

The ICJA Law has the potential to substantially change the process of conducting investigations in China. While it is not entirely clear how the law will be interpreted and enforced, on its face, the law may well pose a challenge for a company wishing to conduct an internal investigation and self-report the results to a foreign authority.

Financial crime issue predictions for 2020

2020 is likely to present a host of challenges to multinational companies doing business in China. We anticipate significant legislative developments and enforcement activities in relation to cyber security and data privacy offences, as well as continued enforcement of the country’s anti-bribery laws and financial market regulation laws. As the world becomes increasingly hostile to globalisation, and China comes under increasing scrutiny around the world, the potential of countervailing scrutiny over the operations of multinational companies in China is also likely to increase. Clients would be well-advised to keep a close eye on legal developments, and prepare themselves for what could be a rocky ride.
The criminal enforcement landscape has clearly changed in France over the course of 2019, with unprecedented fines being imposed against UBS and a rise in the number of French-style DPAs (Convention Judiciaire d’Intérêt Public). Money-laundering, tax evasion and corrupt practices have been a key focus, and are likely to remain so. The National Financial Prosecutor’s Office changed hands towards the end of 2019, with its director Eliane Houlette being replaced by Jean-François Bohnert. In light of the latter’s experience in Germany and with Eurojust, cross-border cooperation is likely to increase in 2020. The revitalisation of the French Blocking Statute may make it more difficult for a company to cooperate with a non-French authority during an investigation.

Investigations trends/developments

Of the 513 ongoing cases at the National Financial Prosecutor’s Office (the PNF) in January 2019, 47% related to corrupt practices (eg corruption, influence peddling, favouritism, misappropriation of public funds). 45% was linked to damage to public finances (tax evasion, VAT fraud and the laundering of the proceeds of these offences) and 8% concerned market abuse (insider dealing, price manipulation, dissemination of false information). Read more1.

In February 2019, French judges ordered a large Swiss bank to pay a record EUR3.7 billion fine for illicit banking solicitation and aggravated money-laundering of the proceeds of tax evasion. This is the largest fine incurred in French history and represents a major shift in approach. Although it has been appealed, the ruling is viewed as a benchmark for future similar cases, and may encourage other entities to reach a settlement instead of facing a trial at all costs.

Settlements by corporates are already becoming more common. Since the Sapin II law entered into force in late 2016, French authorities have entered into ten French-style deferred prosecution agreement (known as CJIPs – Convention Judiciaire d’Intérêt Public) with entities accused of corruption, tax evasion or laundering the proceeds of tax evasion. They have resulted in the payment of significant fines, particularly by banks (eg, EUR300m for HSBC Private Bank Suisse SA, EUR250m for Société Générale SA, EUR3m for Bank of China) although Airbus SE recently broke the record by paying a fine of more than EUR2b to the French treasury as part of its co-ordinated settlement2 of investigations led by the French PNF, the U.S. Department of Justice and the UK Serious Fraud Office into alleged corrupt practices.

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1. https://www.tribunal-de-paris.justice.fr/75 going proceedings
Significant law reforms impacting corporate criminal liability

Enforcement risk for financial services regulatory breaches has increased as the limitation period has been extended from three to six years by French Statute No. 2019-486 dated 22 May 2019 on business growth and transformation (known as the “PACTE” law). Time begins to run on the day of infringement, or if the breach has been hidden or concealed, on the day on which the breach appeared and could be notified to the regulator, with a maximum limitation period being capped at 12 years. This means that the limitation period applicable to market abuse is the same, irrespective of whether such abuse is enforced by the AMF or the PNF.

Internal investigations – key developments

The PNF and the Anti-corruption Agency (the AFA) issued joint guidelines in June 2019, setting out their expectations for internal investigations in the context of a CJIP. The guidelines highlight the degree of co-operation with prosecution authorities as a key factor taken into account when deciding whether to offer a CJIP. Prosecutors expect a company to proactively reveal wrongdoing, establish the facts and identify failures in systems and controls. The guidelines make clear that if a company conducts its own internal investigation, before the authorities become involved, it must ensure the preservation of evidence. An internal investigation conducted in parallel with a criminal investigation must be conducted in coordination with criminal authorities. In both cases, the internal investigation must result in a report, which must include precise and accurate reporting of the facts, and must be provided to prosecutors.

In its recently published guidelines, the Paris Bar Council addressed issues that may arise relating to the status and role of a lawyer while conducting an internal investigation. It reminds lawyers that they are required to defend the interests of their clients and to do so in a manner compliant with the applicable statutory and professional conduct rules. AFA-PNF guidelines on privilege are controversial. They make it clear that if an entity refuses to provide documents on the basis of privilege, the PNF will decide if this refusal appears justified under French privilege rules. An unjustified (in the PNF’s view) refusal will reduce a company’s co-operation credit. The PNF expressly states that it expects investigation reports and interview notes, as well as any relevant documents and documents relied upon in interview, to be made available. The guidelines are the subject of discussion within the Paris Bar Council, particularly as they relate to privilege, and new Bar Council guidelines for lawyers instructed to conduct internal investigations are expected soon.

Sectors targeted by law reforms or enforcement action

The increasing level of fines and penalties incurred by banks and financial services corporates illustrates that the French financial and banking industry has been particularly targeted by enforcement authorities.

It is perhaps too early to tell if any particular sectors are being targeted in the anti-corruption sphere. The first decision to be issued under Sapin II concerned a French group specialising in the distribution of electrical products, solutions and related services. The company and all individuals were acquitted. A second action concerns a French multinational company which specialises in the production and processing of industrial minerals. According to the AFA’s 2018 Annual Report published in June 2019, the AFA conducted 47 inspections in 2018; four were conducted in execution of monitorships set out in CJIPs and 43


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were carried out on its own initiative. 28 inspections concerned corporates, including two public companies and 11 French subsidiaries of foreign groups, while 15 inspections concerned public actors and associations. In comparison, in 2017, the AFA conducted six inspections, which concerned five French private companies and one French public company. A major automobile group has also recently announced that it is being inspected by the AFA. These figures show that the enforcement agency is now fully operational and is subjecting more multinationals, with French subsidiaries, to scrutiny. Read more: The French Anti-Corruption Agency’s Enforcement Committee issues its first decision: First lessons learned...

Cross-border co-ordinated enforcement activity

There is increased co-ordination with overseas authorities. In 2018 the PNF issued 103 requests for mutual legal assistance to its foreign counterparts. By comparison, in 2014 only 14 such requests were submitted.

The joint guidelines published by the PNF and the French Anti-corruption Agency in June 2019 reiterate that where wrongdoing spans across different jurisdictions and a company’s compliance programme is under scrutiny, it is preferable for only one authority to conduct a monitorship, hence encouraging co-operation with the relevant foreign jurisdictions.

Financial crime issue predictions for 2020

Detecting and preventing corrupt practices, data protection breaches and cyber security attacks, market abuse and terrorist financing will stay high up on the agenda for 2020.

Another challenge will be the French blocking statute (Law No. 68-678 of 26 July 1968), which prohibits the transfer of information abroad in the context of, or with a view to, foreign judicial or administrative proceedings, outside the relevant international co-operation channels (ie the Hague Convention, MLATs, MOUs between agencies). It is currently gaining significant traction in France. Whilst a violation of the Blocking Statute is criminally sanctioned and may therefore be prosecuted by French prosecutors, the AFA is now in charge of ensuring compliance with the Blocking Statute. This means that a French company that provides certain types of information to a foreign authority may fall foul of the Blocking Statute, and will have to carry out a delicate balancing exercise between refusing to comply with the demands of a foreign investigating authority and risking prosecution under the Blocking Statute. To date there has been only one prosecution under the Blocking Statute, in 2007. A report drawn up by an MP in June 2019 at the request of the French Prime Minister recommends increasing the penalties for violations of the statute, on the grounds that the current punishments (six months’ imprisonment and/or a EUR18,000 fine for individuals and EUR90,000 fine for entities) are ineffective.
**Recent legal directory quotes**

**“Excellent and meticulous” practice head Denis Chemla is “hardworking” and “passionate about his cases”, has “high-quality writing skills” and “is a pleasure to watch pleading”.**

Legal 500 France 2019 – Dispute Resolution/White Collar Crime

**“Alongside their clarity of advice, they tick all the boxes in terms of knowledge of the issues and knowledge of local practices. They are able to articulate this to individuals who are not familiar with local laws.”**

Chambers Europe 2018, Corporate Investigations

**“Dan Benguigui, who is especially highly regarded for regulatory enforcement work.”**

Legal 500 France 2019 – Dispute Resolution/White Collar Crime

**“Hippolyte “defends several major French and international groups and their leaders. He is particularly involved in a major tax fraud case”.”**

Legal 500 – France 2018

**“Dan Benguigui has ‘great knowledge of the banking sector and is of great assistance to clients’. ”**

Legal 500 France 2018 – Dispute Resolution/White Collar Crime

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The diesel emissions scandal and the so-called cum/ex trades have unleashed unprecedented enforcement activity by German criminal prosecution authorities against national and international companies. In their wake, the German legislator is determined to expand the enforcement options available to sanction corporate crimes with the introduction of a new Corporate Sanctions Act, the draft of which is currently coordinated within the Federal Government. This Act will also impact how internal investigations with a German nexus are conducted. In the current enforcement environment, investigations into tax evasion, money laundering and insider trading are high on the agenda of German criminal prosecution authorities.

Investigations trends/developments

The enforcement environment in Germany remained active in 2019. Criminal prosecution authorities raided several leading businesses and imposed significant corporate administrative fines. A sizeable number of public prosecutors appear to be less open-minded about settling investigations into corporate crimes outside of a main public criminal trial. In line with this observation, four financial services companies were summoned to appear before the Regional Court in Bonn in the first main criminal trial concerning cum/ex trades as so-called “confiscation participants”.

Significant law reforms impacting corporate criminal liability

Following several corporate scandals, the German Federal Ministry of Justice prepared a draft bill of a Corporate Sanctions Act. If enacted in its current form, it will significantly affect the sanctioning of corporate crimes in Germany. The draft bill increases the ceiling on corporate fines for large companies with an annual turnover of more than EUR100 million to 10% of the company’s average annual worldwide turnover per case while allowing for the unlimited confiscation of economic benefits. The draft bill also introduces new ways to sanction companies. If the corporate crime impacted a large number of individuals or entities, the competent court may order that the judgment against the company be made public. As an ultima ratio in particular cases, the court may even order the liquidation of the company although this particular sanction currently appears to be among those that may be deleted from the draft. The draft bill also introduces new mechanisms to resolve proceedings against companies. These mechanisms include the possibility of appointing an expert to verify whether the company has taken appropriate compliance measures to prevent future criminal offences. Furthermore, the draft bill provides for the possibility to sanction activities abroad to which German criminal law currently does not apply.

Read more.

The German Federal Ministry of Finance published the first “National Risk Analysis” in October 2019. The analysis identifies how to overcome the challenges to combating money laundering and terrorist financing in Germany. The National Risk Analysis identified the following business sectors and activities as having the highest risks of money-laundering and terrorist financing: anonymous transaction opportunities, the real estate sector, the banking sector, cross-border activities and payment services. Those already obliged under existing money-laundering laws now face the task of taking into account the findings of the National Risk Analysis within the framework of their own risk analyses and prevention systems.

Internal investigations — key developments

German law does not have the concept of legal privilege. As a consequence, internal investigation reports and interview notes only enjoy a very limited protection from seizure by German criminal prosecution authorities. Attorney-work products may be exempted from seizure if they were produced with a view to defending a company in current or imminent proceedings aimed at the imposition of a corporate administrative fine or confiscation order. While the legal threshold for seizing documents at law firms continues to be high, German authorities raided at least two major law firms recently, one in 2019 and another one early in 2020.

There are moves afoot to make granting employees certain rights during an internal investigation one of the relevant considerations for a significant reduction of a potential corporate sanction. This would affect the conduct of internal investigations which have a German nexus. The draft bill for a Corporate Sanctions Act envisages that a corporate sanction can be reduced if, inter alia:

– a third party commissioned with the investigation is not also acting as defence counsel for the company or any individual defendant; and
– the internal investigation must have been conducted in accordance with the principles of fair proceedings. In relation to employee interviews, this means that:
  – employees are cautioned before interview;
  – they are notified of, and granted, the right to independent legal representation or to consult a member of the works council; and
  – they are advised in advance of, and have a right to remain silent to, any question which could expose the interviewee, or their relatives, to the risk of being prosecuted.

German criminal prosecution authorities often lack the resources to swiftly investigate complex corporate crimes and increasingly suggest that companies conduct an internal investigation, the results of which they are expected to hand to the authorities. Such behaviour may lead to co-operation credit, thus increasing the possibility of a less severe sanction.

Following the General Data Protection Regulation’s entry into force, companies have become more cautious when reviewing personal data, such as e-mail, during internal investigations.

Sectors targeted by law reforms or enforcement action

Enforcement actions by German criminal prosecution authorities into cum/ex trades have affected most of the national banks and international banks. The investigations into the diesel emissions scandal have concerned many car manufacturers and car components suppliers. The National Risk Analysis may lead to greater scrutiny of the real estate sector in the coming year.

Cross-border co-ordinated enforcement activity

Many large-scale investigations have a cross-border element and require the German authorities to reach out to foreign authorities in mutual legal assistance procedures. However, we have not yet seen a joint approach such as the one taken by the French Parquet National Financier (PNF), the UK Serious Fraud Office (SFO) and the U.S. Department of Justice (DoJ) in the Airbus bribery and corruption case resolved in January 2020.

Financial crime issue predictions for 2020

Cybercrime incidents, such as the notorious “fake president” fraud cases and data theft, will continue to pose a business critical threat to companies. In addition, we observe an increase in whistle-blower reports and internal investigations regarding potential harassment cases (#MeToo investigations). In line with the current trend of Environment, Social and Governance-compliant investments, potential human rights issues in the supply chain could attract increased scrutiny from authorities. We also expect a rise in investigations into allegations of money laundering, particularly in the real estate sector. Finally, in-house legal and investigation teams will need to attend closely to further developments around the draft Corporate Sanctions Act.
Recent legal directory quotes

“The compliance practice maintains extremely good connections in the financial sector, which ensure capacity utilization in the course of cum-ex matters at A&O.”
JUVE Handbook Germany, 2019/2020 – Compliance

“The hallmarks of the practice include cross-border investigations into possible market manipulation, cartel infringements and tax fraud.”
Legal 500 Germany 2018

[Wolf Bussian] is “very clever and extremely sociable”.
JUVE Handbook Germany, 2019/2020

“Allen & Overy has market leading capabilities at the interface with the tax practice.”
Legal 500 Germany 2018

Jan Erik Windthorst is “Creative, highly professional”.
JUVE Handbook Germany, 2019/2020

“Also held in high esteem for its capabilities in regulatory investigations concerning financial trading and tax structures.”
Chambers Europe 2018, 2019 – Germany

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Hong Kong

Hong Kong regulatory authorities have recently focussed on white collar and financial crime, corporate governance and senior management accountability, book building within the equity and debt capital markets, and financial product suitability. On the cross-border enforcement activity front, the High Court handed down an important judgment which supports the ability of the Securities and Futures Commission (SFC) to share evidence collected, using its investigative powers, with foreign regulators, but recognises that parties may invoke their privilege against self-incrimination in response. This could change the way future SFC enquiries may be conducted. Further, to combat “rolling bad apples” in the regulated sector the SFC has introduced a new obligation to disclose internal investigations of leaving employees. Regulated entities should ensure internal investigations are balanced to manage exposure to claims by former employees.

Investigations trends/developments

**Corporate misconduct:** 2019 saw high profile joint actions by the SFC, the Independent Commission Against Corruption (ICAC) and the Police including investigations, dawn raids, arrests, and charges laid against the “Enigma Network” or what the SFC refers to as the “nefarious networks” – a group of people who own or control listed companies, licensed dealers, money lenders, financial advisory services and placing agents who have allegedly enriched themselves at the expense of unsuspecting investors. The SFC and the ICAC also signed a memorandum of understanding to strengthen and formalise cooperation in combating financial crime.

**Corporate governance:** The number of investigations conducted by the SFC relating to corporate governance failures increased 30% from 2014 to 2019.

**Book building process:** The SFC conducted a thematic review of book building processes in equity and debt capital markets. It concluded that conflicts of interest may arise at various stages of the book building process, including when underwriting syndicates produce connected research, or when they submit fictitious and inflated orders or provide inducement to investors.

**Suitability:** The SFC has said time and again that the suitability requirement is the cornerstone of investor protection. In December 2019 the SFC launched a joint annual product survey with the Hong Kong Monetary Authority (the HKMA) to better understand market trends and to identify risks associated with the sale of non-exchange traded investment products. Any shortcomings in compliance with the suitability requirement will be the focus of investigations and enforcement actions.

**Senior managers:** The SFC continues to place a strong emphasis on senior management accountability under the Manager-In-Charge (MIC) regime. By its own admission, the MIC regime is the means to allow the SFC to “quickly identify the individuals to whom we could communicate our supervisory concerns and who could be held accountable for control failures or conduct issues”.

For more information, see Financial Regulatory Focus: Expected Developments in the Year of the Rat.¹

Internal investigations – key developments

In order to deal with the problem of “rolling bad apples”, the SFC has introduced a new measure and issued a FAQ relating to the disclosure of investigations commenced by licensed corporations in the notifications of cessation of accreditation.

Licensed corporations (LCs) and registered institutions (RIs) are required to notify the SFC when a licensed individual ceases to be accredited to the licensed corporation, and to provide information about whether such individual was under any internal investigation within six months prior to his/her cessation of accreditation. If the internal investigation commences subsequent to the notification of cessation of accreditation, the LCs/RIs should also notify the SFC as soon as practicable.

This is to address the problem of employees resigning during an internal investigation, expecting that the LCs/RIs would only notify the SFC that the individual simply resigned and not disclosing his misconduct to the SFC.

LCs/RIs should ensure not only a system to comply with the notification requirement, but also that internal investigations and notifications are balanced to manage exposure to claims by former employees.

The HKMA has recently started its own consultation on a similar initiative for the banking sector.

Sectors targeted by law reforms or enforcement action

The SFC has publicly expressed its intent to use its powers under the Securities and Futures (Stock Market Listing) Rules (SMLR) to direct the suspension of listed companies’ shares where appropriate. The SFC has repeatedly stated over recent years that it will intervene in suspected cases of serious misconduct involving transactions that: (i) are oppressive or unfairly prejudicial to shareholders or potential investors in a listed company; (ii) involve fraud or other serious misconduct towards a listed company or its shareholders or potential investors; or (iii) result in the shareholders or potential investors in a listed company not being given all information with respect to its business or affairs. As illustrated from the table below, the number of cases in which the SFC exercised its direct intervention powers increased significantly from 2013 to 2019.


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Cross-border enforcement activity

In *AA v The Securities and Futures Commission [2019] HKCFI 246*, the High Court rejected an application for judicial review brought against the SFC challenging the SFC’s ability to share information obtained during an investigation with foreign regulators. The decision supports the SFC’s ability to share information with foreign regulators under the Securities and Futures Ordinance (Cap 571, SFO) and the International Organization of Securities Commissions’ Multilateral Memorandum of Understanding, but recognises that parties may invoke their privilege against self-incrimination in response. The Ministry of Finance of the People’s Republic of China (MoF), the China Securities Regulatory Commission (CSRC) and the SFC have entered into a memorandum of understanding (MoU) concerning the obtaining of audit working papers in the Mainland arising from the audits of Hong Kong-listed Mainland companies.

Financial crime issue predictions for 2020

**SFC’s power to seize digital devices and demand passwords**

The recent High Court decision of *Cheung Ka Ho Cyril v Securities and Futures Commission and another [2020] HKCFI 270* confirmed the power of the SFC to (i) seize digital devices such as smart phones and tablets in the course of executing a search warrant, and (ii) demand passwords to the seized digital devices and email accounts. The power to compel passwords is notable, given the vast amount of confidential data held in digital devices. In-house counsel should note that any concerns regarding invasion of privacy may be best handled by liaising with the SFC rather than relying on the court to intervene.

For more information, see *Hong Kong Court of First Instance confirms SFCs powers to seize digital devices and demand passwords*.

**Privilege against self-incrimination in regulatory inquiries**

In the High Court judgment of *AA v The Securities and Futures Commission [2019] HKCFI 246*, the Court recognises that a party may invoke privilege against self-incrimination in response to the SFC’s notices for information issued before formal investigations were commenced. A party’s right against self-incrimination in formal investigations is clearly provided for in law.

The MoU will facilitate the SFC’s access to audit working papers created by Hong Kong accounting firms in their audits and kept in Mainland China when conducting investigations into Mainland-based issuers or listed companies, and their related entities or persons. This addresses an extent difficulties perceived by audit firms when required by regulators in one jurisdiction to produce documents considered confidential in the other jurisdiction.

The SFC banned a former responsible officer of a financial institution for re-entering the industry for life in relation to his conduct connected to 1Malaysia Development Berhad. The individual was found guilty in the US for conspiring to commit money laundering and violation of the Foreign Corrupt Practices Act.

This decision makes it clear that a similar right exists in the absence of a formal investigation too. In-house counsel should note that this could change the way future SFC enquiries may be conducted, especially in light of the court’s suggestion in this case that the SFC should, in the future, warn and caution a recipient of a notice (under s181 of the SFO) about the availability of privilege against self-incrimination.

On anti-trust, the Hong Kong Competition Tribunal handed down a decision in *Competition Commission v Nutanix Hong Kong Limited [2017] 5 HKLRD 712*. In this case, the employees of the respondent companies were required by a notice under the Competition Ordinance to answer questions by the Competition Commission. The employees were held to be the beneficiaries of “direct use prohibition” (ie the statement made by an individual cannot be used by the regulator against him) under the Competition Ordinance. However, the individual employees could not refuse to answer questions by the Competition Commission on the basis that such answers may incriminate the employer. The Tribunal rejected the respondent companies’ argument to strike out references to the employees’ statements on the Competition Commission’s originating notice of application, and to debar the Competition Commission from relying upon such statements.
This decision suggests corporations under investigation by the Competition Commission should consider engaging separate legal representatives for its employees interviewed by the Competition Commission.

**Data privacy – a more aggressive regulatory regime?**

The Privacy Commissioner for Personal Data (PCPD) has identified a number of areas of reform to enhance and strengthen the Hong Kong personal data privacy regime. These include:

- imposing a mandatory obligation on data users to notify affected data subjects or the PCPD of data breaches if the risk of harm to individuals is substantial; and
- providing regulatory authorities with appropriate enforcements tools such as the power to impose administrative fines for breaches of data protection law provisions.

We expect to soon see a draft bill. If enacted, these changes would create a more aggressive regulatory enforcement regime for data protection. For more information, see [Hong Kong’s Privacy Commissioner for personal data – the end of the paper dragon](https://www.aoinvestigationsinsight.com/hong-kongs-privacy-commissioner-for-personal-data-the-end-of-the-paper-dragon/).

**Recent legal directory quotes**

"Offers expertise in regulatory investigations and mis-selling claims, leveraging off the strength of the firm’s fraud, white-collar crime and money-laundering practices. Particularly noted for its work on multi-jurisdictional disputes across the Asia-Pacific region.”

Chambers Asia-Pacific 2020, China, Litigation

"Cheung Fai Hung has notable experience acting for financial institutions and multinationals on cross-border disputes involving Greater China. He advises clients on a wide range of white-collar crime, shareholder disputes, debt recovery and banking litigation mandates. “He's sound and very good at operating in Chinese,” notes one impressed source.”

Chambers Asia-Pacific 2020, China, Litigation

"Matt Bower rises in the rankings after receiving significant praise for his commercial and financial litigation practice, which spans contentious regulatory issues and shareholder disputes. According to one source, “his technical knowledge is excellent and he runs matters so that you don’t have to worry about things, because he’s got everything covered procedurally.”"

Chambers Asia-Pacific 2020, China, Litigation

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Legal entities can be prosecuted for criminal offences committed by their employees, including by their employees abroad. In the last couple of years, we have seen the Dutch Anti-Money Laundering regime being strengthened and we expect this trend to continue. Out-of-court corporate settlements have been criticised for lack of transparency and there has been a call for some form of judicial review of these settlements. This discussion is still on-going, and has the attention of the Dutch government and Parliament. This has effectively put a freeze on new settlements until the issue is resolved. A new child labour due diligence law will increase corporate focus on supply chains.

Investigations trends/developments

The amounts paid in out-of-court settlements with the Dutch Public Prosecution Service have increased rapidly in the last couple of years. In 2013, the highest out-of-court settlement ever reached was with Rabobank for EUR70 million, followed by an out-of-court settlement with VimpelCom in 2016 for almost EUR400m. In 2018, ING paid an out-of-court settlement of EUR775m.

Increasing out-of-court settlement amounts have been widely criticised for a lack of transparency, especially compared to a public trial. Some form of judicial review of out-of-court settlements of EUR50,000 or more is being considered in Parliament. It is unlikely that any large out-of-court settlements will be agreed whilst this issue is being considered.

Both the Dutch regulators and the Dutch Public Prosecution Service are more focussed on AML compliance by financial institutions and other entities that fall within the scope of Dutch AML laws. The out-of-court settlement agreement with ING in 2018 for EUR775m related to alleged breaches of Dutch AML laws. There are currently criminal investigations into ABN AMRO and EY for alleged breaches of Dutch AML laws.

The Netherlands has taken its first steps in the field of human rights due diligence by enacting the “child labour due diligence law” (Wet zorgplicht kinderarbeid) in October 2019. This obliges a company with end-users in the Netherlands to conduct due diligence on its supply chain, and to publish a declaration stating that the company adheres to due diligence requirements to prevent child labour. Compared to similar laws, like the UK Modern Slavery Act 2015, a key trait of this new due diligence law is its enforcement mechanism. Penalties include administrative fines, and the due diligence law will also be criminalized under the Economic Offences Act (Wet op de Economische Delicten).

The Economic Offences Act provides the legal basis for imprisonment of the responsible director (feitelijk leidinggevende) if a company violates the due diligence law twice within five years under the same director. The due diligence law is expected to enter into force mid-2022, so that companies have sufficient time to investigate their supply chains.
Significant law reforms impacting corporate criminal liability

Although there have not been any formal law reforms in 2019, existing Dutch AML laws have been strengthened due to the EU's 5th Money Laundering Directive being implemented. The Netherlands has gold plated certain rules, including those relating to the digital sharing of client information between banks and the authorities.

Internal investigations – key developments

The scope of legal privilege in general, but also in internal investigations in particular, has been widely discussed in the last year. The Dutch Public Prosecution Service has taken a firm standpoint in the media, arguing that the current system causes unworkable situations involving severe delays that affect their truth finding endeavours. Although debate is still ongoing, there is a good chance that there will be some changes, whether by law or by agreement in particular cases, to the scope of Dutch legal privilege. These changes might narrow the scope of legal privilege, for example if it is decided that the Dutch Public Prosecution Service should acquire more power to determine the applicability of legal privilege in a particular case.

Sectors targeted by law reforms or enforcement action

The focus of the regulators and the Dutch Public Prosecution Service has mainly been on banks and accountancy firms for AML compliance. In cases involving extensive fraud, AML or corruption, the role of the “facilitators” (e.g., banks, accountancy firms, notaries) in such transactions is now almost automatically reviewed too.

Cross-border enforcement activity

There are various criminal cross-border investigations currently going on in the Netherlands. The investigation into corruption allegations against a major oil company in respect of the purchase of oil fields in Nigeria and the investigation into corruption allegation against the a large Dutch building company in respect of the construction work for the metro system in Riyadh. A Dutch dredger company has been recently accused in the media of involvement in human rights violations in Angola, and is likely to be investigated by the Dutch Public Prosecution Service. The Dutch authorities regularly collaborate with their overseas counterparts (for example in relation to the LIBOR investigation and the investigation leading up to the ING settlement).

Financial crime issue predictions for 2020

The focus on AML breaches will intensify even more in the coming year not only for banks and accountancy firms, but on all entities that fall within the scope of the Dutch AML regime. At the same time, the chance of the regulators and the Dutch Public Prosecution Service detecting misconduct has increased due to the mass of data available, technological progress, e.g., in the field of electronic identification mechanisms, and better investigation and enforcement techniques.
Recent legal directory quotes

Allen & Overy LLP’s team is well-regarded for its “knowledge and understanding of the client” and its “out of the box thinking”.

Legal 500 – 2019 – Fraud and White Collar Crime

Biendon is described as an “excellent legal mind” and noted for his “knowledge and experience of criminal procedures”.

Chambers Europe: Dispute Resolution – White Collar Crime – 2019

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In the previous decade, South Africa has had low levels of prosecution for corruption, money laundering and other white-collar offences. The end of the Jacob Zuma era, the establishment by President Cyril Ramaphosa of a new Investigating Directorate at the National Prosecuting Authority and three recent Presidential Commissions of Enquiry into corruption herald a new era in South African enforcement efforts. Coupled with anticipated changes in South Africa’s key anti-bribery and corruption law, corporates are expected to face increased scrutiny by regulators in 2020 after years of inaction.

Investigations trends/developments

**Bribery and corruption**: Shortly after the end of the decade-long Jacob Zuma presidency, South Africa’s new President, Cyril Ramaphosa appointed retired Judge Raymond Zondo to preside over a Presidential Commission of Enquiry into State Capture, corruption and fraud in the South African public sector. Known as the “Zondo Commission”, its focus in 2019 was on “State Capture” – the alleged efforts of the Gupta family, closely connected to former President Jacob Zuma and his son, Duduzane, to influence cabinet appointments and the award of government contracts. The State Capture phenomenon has recently captivated South African national attention and resulted in dramatic concessions by several high-profile professional services global firms, that they benefitted from the phenomenon and were associated with entities owned and controlled by the Gupta family.

Ramaphosa has recently established Presidential Commissions of enquiry into the Public Investment Corporation and the South African tax authority, SARS. In 2019, he also announced the restructure and decentralisation of the National Prosecuting Authority (NPA) to form a new Investigating Directorate within the NPA, headed by Advocate Hermione Cronje. The Investigating Directorate is tasked with investigating serious, complex and high-profile corruption, most notably the subject matter of the Zondo Commission.

Although the NPA has conceded that the Zuma era generally resulted in the evisceration of its prosecutorial talent and capacity, it is anticipated that the new Investigating Directorate will announce various indictments of public and private individuals and companies in 2020.

The number of government officials convicted for corruption or offences related to corruption stands at 210 as at 2019, a figure that is slightly lower than the National Director of Public Prosecution’s initial target of 230 officials to be convicted. We expect this number to increase in coming years.

**Anti-Money Laundering**: The South African Reserve Bank announced on 20 December 2019 that it had fined four banks for anti-money-laundering compliance deficiencies and control weaknesses. This continues a trend over the past five years of the anti-money laundering regulator largely focusing on banks, resulting in the imposition of significant penalties. Money-laundering cases have also been successfully prosecuted with a 100% conviction rate achieved from all 87 cases prosecuted.

Significant law reforms impacting corporate criminal liability

The Prevention and Combating of Corrupt Activities Amendment Bill is aimed at amending the Prevention and Combating of Corrupt Activities Act (PRECCA) to provide for:

- the passive corruption of foreign public officials;
- extending the offence of unacceptable conduct towards ordinary witnesses to include whistleblowers and members of the accounting profession;
- criminalising facilitation payments;
- increasing fines payable;
- introducing an immunity provision for whistleblowers complying with reporting obligations;
- an obligation to implement internal compliance programmes; and
- further extraterritorial reach.

The Bill is likely to be enacted in 2020.
Internal investigations – key developments

The 2019 Financial Intelligence Centre (FIC) guidance on the use of automated transaction monitoring systems requires that a suspicious or unusual transaction must be investigated and reported to the FIC within 15 days after an alert is generated by the ATMS. The directive further requires that all investigations and decisions taken relating to alerts generated by the ATMS must be adequately documented and preserved. Where a reporter is a subsidiary or a branch of a foreign-based organisation which also utilises an ATMS, the domestic reporter must ensure that the ATMS is tailored to comply with domestic money laundering risks within the South African reporting regime.

Sectors targeted by law reforms or enforcement action

The Zondo Commission’s focus thus far has been on the IT, accounting and consulting sectors.

Cross-border co-ordinated enforcement activity

The South African Competition Commission, South Africa’s highly active anti-trust regulator, continued its enforcement action against various domestic and global banks arising from alleged currency manipulation. The Competition Commission’s efforts have been co-ordinated with other international regulators, which is a recent trend in anti-trust enforcement action in South Africa.

Financial crime issue predictions for 2020

Until recently, enforcement action for corruption was very low in South Africa. However, the recent investment of significant resources in the NPA and the Investigating Directorate will likely result in increased prosecution activity of corporates. The fallout from the Zondo Commission will continue to be a concern for in-house legal in corporates that conduct business with the South African government. The slew of revelations has had far-reaching and existential consequences for large multinational corporations in South Africa and indictments of certain of these entities and representatives are expected in 2020. In-house legal would be well advised to review internal compliance programmes, ahead of the anticipated changes to PRECCA.
The UAE is at the forefront of a trend across the Gulf region to crack down on financial crime. Recent legislative changes introduced in the UAE have strengthened the powers and resources available to enforcement authorities. These changes have extended the scope and territorial reach of the anti-bribery law, increased penalties for private companies involved in criminal activities, and allowed authorities to seize the proceeds of crime.

The trend towards increased scrutiny and transparency has become more pronounced in the UAE’s international policy, with it taking a more collaborative approach with foreign regulators and authorities in countering terrorist financing and money laundering. Companies operating in the UAE should consider how compliance with the new regime is likely to impact both business-wide strategic decisions (such as the selection of business partners or entering into new markets) as well as day-to-day decisions (including the financing of business operations). They should also ensure that appropriate compliance procedures and policies are in place.

Investigations trends/developments

There have been a number of legislative changes to the UAE’s financial crime regime.

**ABAC reforms:** The UAE Penal Code applies across all seven Emirates and the economic free zones (such as the Dubai International Financial Centre and the Abu Dhabi Global Market). Since 2016, the UAE has significantly extended the scope of the UAE Penal Code provisions relating to corrupt activities:

- **Extended to cover the private sector:** private companies are liable for acts of their directors, agents and other representatives if the criminal conduct is committed for the company’s benefit or in the company’s name. This means that a company may be held liable to the extent that their “inaction” resulted in the facilitation of the corruption regardless of the company’s knowledge of the criminal activity.

- **Increased cap on fines on companies tenfold:** from AED50,000 to AED500,000 (approx. USD13,614 to USD136,147).

- **Proceeds of crime can be seized and confiscated:** by court order, even if the objects being seized are not owned by the recipient of the order. As the offence has been extended to include the private sector, private companies may now face confiscation of their assets.

- **Bribery committed by foreign public officials, employees of international non-governmental organisations, and foreign companies operating outside the UAE’s territory are now covered if:** (i) either the perpetrator or the victim of the bribery offence is a UAE national; (ii) the offence is committed by an employee of a UAE public or private company; or (iii) the offence involves “public property” (which would likely include any moveable and immovable property owned, directly or indirectly, by the UAE Government). This means that international companies could face liability for acts performed by their subsidiaries in the UAE.

**AML reforms:** The new AML law (Federal Law No. 20 of 2018 on Anti-Money Laundering) introduced at the end of 2018 and then expanded1 provides a more robust framework for combating financial crime. The new AML law:

- **Introduces a “controlled delivery” operation:** whereby the UAE authorities permit a criminal transaction to proceed in order to trace the flow of money, thereby assisting the investigation of the offence and allowing the identification of all actors involved in the criminal network.

- **Strengthens deterrence and enforceability:** the UAE Public Prosecutor has new powers to obtain data from third parties by compelling disclosure from a broad range of agencies, institutions and businesses. The UAE authorities may freeze funds deposited in UAE financial institutions, in conjunction with the UAE Central Bank.

- **Applies to digital currencies:** There has been a big rise in crypto-currency dealings observed in the region and the UAE’s

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1. By the Cabinet Resolution No. 10 in 2019.
Securities and Commodities Authority announced in late 2019 that it is starting work on regulations that will target crypto-assets.

- Increases the cap for corporate liability for money laundering offences: to AED50 million (approx. USD 13,614,703).
- Introduces compulsory liquidation: if the illegal activity is related to terrorist financing.

**Financial services regulator’s reforms:** In light of the general trend in the UAE to bring its AML regime in line with international best practice, the Dubai Financial Services Authority (DFSA), an independent regulator of financial services in the Dubai International Financial Centre, has reviewed its regulatory legislation.

The most notable amendment is a new registration requirement for Designated Non-Financial Professions and Businesses (including law firms, real estate brokerages and accounting firms). This requires that corporates provide the DFSA with information on its beneficial ownership and senior management teams and identify a Money Laundering Reporting Officer.

Companies operating in the UAE should keep in mind that, in addition to the imposition of fines (which is the standard penalty for the violation of financial crime laws), companies can also face administrative sanctions if they are involved in money laundering or the financing of terrorism. Such sanctions can vary from sector exclusions and restrictions on board membership and ownership, to a suspension of the business or the cancellation of the company’s trade licence. In practice, it is difficult to predict what penalties may be imposed on businesses that fall foul of money laundering or terrorism financing laws, because the UAE Public Prosecutor has wide discretion.

**Cross-border co-ordinated enforcement activity**

There are multiple treaties in place (such as the UN Convention against Corruption, or the Arab Convention to Fight Corruption) that provide for cooperation between the UAE police authorities and regulators and foreign or international authorities in criminal matters. Under the Law on International Judicial Co-operation in Criminal Matters, the UAE authorities can request assistance from foreign judicial authorities and regulators, including the provision of information and evidence, extradition, or seizure of property.

In recent years, the UAE government has sent a clear message that it intends to use its international network to fight money laundering and terrorist financing. A prominent example of
increased international collaboration is the Terrorist Financing Targeting Centre (the TFTC), comprising the U.S., UAE and other GCC nations, which resulted in the imposition of specific sanctions directed at exchange houses and networks of money dealers across GCC countries. There have also been several high-profile enforcement actions undertaken jointly by the UAE and the U.S. authorities against the Iranian regime’s network. Most recently, in October 2019, the U.S. Department of Treasury announced that a TFTC-co-ordinated action resulted in the identification of 25 businesses which are thought to provide multi-billion dollar assistance to paramilitary units responsible for encouraging conflict across the Middle East and North Africa.

The UAE’s Financial Intelligence Unit has launched “go-AML”, an anti-money-laundering platform developed by the United Nations Office on Drugs and Crime, which is used by financial intelligence units around the world. The UAE has become the first country in the Gulf region to launch the platform, which is designed to facilitate the receipt and analysis of suspicious transactions, which are then passed onto law enforcement authorities for investigation.

Recent legal directory quotes

*Yacine Francis, whose promotion to partner is seen as “richly deserved”, is described by clients as “very user-friendly, concise but also knows the big picture”. He is heavily involved in financial crime and fraud cases.*

Chambers Global 2019 (UAE Dispute Resolution)

*“Clearly experts at what they do,” and “you feel that you are in good hands”.*

Chambers Global 2019 (Middle East Dispute Resolution)

*“The team are praised for doing an excellent job. They have a very extensive level of expertise, knowledge and ability to take complex matters and distil them into easy-to-digest explanations.”*

Chambers Global 2020 (Middle East, Dispute Resolution)
The UK has high ambitions to fight financial crime, but 2019 saw mixed success for enforcement authorities. Whilst there were some successful prosecutions of individuals, and some decision making by the SFO (Serious Fraud Office) on legacy cases, there were some high-profile failures of SFO corruption prosecutions against individuals where their employers had already entered into deferred prosecution agreements (DPAs) and paid huge fines, for the same alleged conduct. The Office of Financial Sanctions Implementation saw its first three sanctions fines – but at quite low levels. Looking ahead, in the year of the Bribery Act’s 10th birthday, there was a significant start for the SFO with the ground breaking multi jurisdictional DPA with Airbus. Both the SFO and the Financial Conduct Authority (FCA) have stated their intention to make greater use of money-laundering related offences. We await the outcome of an appeal of KBR v SFO on the UK authorities’ ability to order a company to produce documents from overseas parent companies.

**Investigations trends/developments**

*Don’t rush into a DPA*: A number of high-profile SFO corruption investigations of individuals have been dropped or the individuals acquitted, after their companies had already entered into DPAs (Rolls Royce, Sarelad, Guralp Systems, Tesco). The unsuccessful prosecution of individuals following the agreement of DPAs has highlighted the tensions where the illegal conduct in DPA statements of facts, agreed between the SFO and the corporate entity, is attributed to individuals who are subsequently acquitted at trial for the same conduct, or not even charged. Although the dial moves somewhat where companies are investigated for the “failure to prevent” offence under the UK Bribery Act in circumstances where they may not be able to fall back on the adequate procedures defence, the results may cause companies to consider carefully their position if invited to enter into DPA negotiations, given the difficulty the SFO has encountered in securing corruption-related convictions of individuals and the lack of track record of corporate convictions for bribery offences committed by their controlling minds.

*Parent companies may need to take responsibility*: The UK’s fifth DPA, between the SFO and Serco Geografix Ltd, was the first to involve a group company (the parent) taking on substantial obligations, even though it was not liable for the underlying wrongdoing (fraud and false accounting by a subsidiary). Under a separate undertaking, responsibility fell on the parent for the payment of the financial penalty and to undertake the obligations required under the Serco DPA – ensuring that these are implemented by its subsidiaries. Read more.

*SFO clarifies its approach to compliance programmes*: The SFO updated its own operational guidance, adding a new chapter on compliance programmes. The addition provides some limited insight into how the SFO will evaluate past, present and future compliance programmes when making decisions on, eg whether to prosecute, whether a company has a defence under s7 Bribery Act 2010 (ie “adequate procedures”), whether to offer a DPA, the terms of a DPA and sentencing. There is however no further guidance on the meaning of “adequate procedures”, which remain ill-defined and perhaps one of the most useful aspects of the guidance are the footnotes linking to the U.S. DoJ and OECD guidance.

Documents and data stored abroad: The SFO is keen to get its hands on material stored abroad. SFO guidance for companies on co-operation issued in 2019 states that good practice for self-reporting includes providing “relevant material that is held abroad where it is in the possession or under the control of the organisation”. The question of what is in the possession or control of an organisation will be difficult to determine where organisational structures are complex. A 2018 ruling said that the SFO can compel production of documents held extraterritorially by a U.S. parent company, even where that parent company is not the focus of the UK investigation, if there is a “sufficient connection” between that company and a UK company under investigation (KBR v SFO). The KBR ruling was applied by the Court of Appeal in the civil context too, which held in January 2019 that a tax notice could be served on an individual overseas (Jimenez v HMRC). The KBR appeal is due to be heard in October 2020. The outcome will impact the conduct of cross-border investigations. Read more.

The Crime (Overseas Production Orders) Act 2019 in conjunction with a new U.S./UK data sharing agreement will allow UK law enforcement agencies to apply to an English court to obtain electronic data directly from U.S. communication service providers, without the involvement of the U.S. authorities. This means that large U.S. communications and social media companies may find themselves on the receiving end of English court orders to disclose communication records, to assist with criminal investigations. There are tricky issues concerning the time frames for responding to such a request (seven days), confidentiality, privilege and data protection. The extent to which these orders will be enforceable in the U.S. also remains to be seen.

Financial Conduct Authority focus on financial crime: The number of FCA open enforcement investigations relating to financial crime has increased by 1.367% in the last six years; and the number of Skilled Person Reviews commissioned by the FCA into financial crime issues has increased by 100% in the last six years. In 2017/18 and 2018/19 financial crime was the most “popular” topic for Skilled Person Reviews, representing 38% and 41% respectively of the Skilled Person Reviews commissioned by the FCA in those years. However, criminal enforcement is still a rarity despite the FCA’s avowed intent to pursue more criminal charges for the most egregious breaches of the money laundering rules. The FCA openly said in 2019 that it wants to use its criminal powers to prosecute the most egregious breaches of the Money Laundering, Terrorist Financing and Transfer of Funds (Information on Payer) Regulations 2017 (MLR) (these impose more onerous obligations on certain types of business considered to be at higher risk of money laundering, eg financial services, accountancy, estate agents, law firms), but to date nothing has hit that mark (yet). The FCA appears to be opening investigations and keeping the possibility of both civil (regulatory) and criminal action open throughout its lengthy investigations. These “dual track” investigations potentially present challenges for investigations lawyers, particularly as regards the treatment of individuals. For example, how should subjects deal with a scenario where they may be interviewed under caution, and perfectly properly exercise their right to silence, only to be compelled to answer questions on overlapping subject matter? Lengthy investigations can place a particular strain on individuals concerned, giving rise to mental and physical health risks that need to be managed and which can disrupt the progress of matters. Such issues are, at present, largely dealt with on an ad hoc, investigation-by-investigation basis. Further guidance and clarity on dealing with these situations could benefit investigation subjects.

Whistle-blowers – playing an important role in the surfacing of wrongdoing: Across all sectors there is greater recognition of the importance of empowering workers, as the eyes and ears of their organisations, to expose malpractice. The financial services regulators are arguably taking the lead on driving best practice in this area. Following the introduction of a new whistleblowing regime in September 2016 for large financial institutions, and a review of how firms have implemented these rules at the end of 2018, the FCA is of the view that there is more work to be done. As part of the regulator’s vigilance in this area, it is challenging firms to demonstrate how, for example, the identity of whistleblowers are protected in the course of investigations, and what measures and safeguards are in place to protect whistleblowers from retaliation. As a result firms are busy stress testing their whistleblowing and investigation arrangements and ensuring their training encourages the raising of concerns and their appropriate handling. Firms outside of this sector may benefit from some of its lessons learned and the structural framework it has now adopted to facilitate and protect those who wish to come forward with concerns.

**Cartels:** Following the failure to secure convictions in the Steel Tanks cartel trial, and a guilty plea in the Concretes case, there have been no recent criminal prosecutions of individuals for criminal cartel behaviour and the UK Competition and Markets Authority (CMA) has not publicised any criminal investigations that may be ongoing, if any. There has however been a significant uptick in the CMA using their Competition Directors Disqualification powers against individuals where they have pursued the connected entities using their civil powers. The CMA is establishing a digital unit which will, among other things, look into monitoring the use by companies of AI and machine learning technologies. There is also greater attention on bid-rigging and work done to help public bodies spot potential issues. Whether or not this and their intelligence-led approach to investigations will lead to more criminal investigations remains to be seen. For more information on recent civil enforcement activity by the CMA and others, please see the Allen & Overy Global Cartel Enforcement Report 8.

**Sanctions – a slow start for OFSI:** OFSI, created in 2016, imposed its first three penalties in 2019. These were for breaches of financial sanctions, by a bank9 (fined GBP50000), a foreign exchange provider (GBP10,000) and a tier one international telecoms carrier10 (GBP146,000). The creation of OFSI suggested that the historically low level of financial sanctions enforcement in the UK was likely to change. It has not been a quick change, with these three penalties at a relatively low level.

**Cybercrime and data protection:** The ICO has criminal powers but, to date, its criminal prosecutions for data protection breaches have been against individuals or small companies. However, on the regulatory front, following the increase in the level of fines they can impose, in July 2019 the Information Commissioner’s Office issued a notice of its intention to fine British Airways GBP183 million and Marriott GBP99m for infringements of the General Data Protection Regulation caused by cyber-breaches. Both parties have made representations which the ICO is considering. More significant fines are expected in 2020.

**Significant law reforms impacting corporate criminal liability**

There have not been any changes in the law relating to substantive financial crime offences for corporates in 2019, save for some new company types being brought under the umbrella of the UK’s anti-money laundering regulations (see below). We are still awaiting the outcome of a 2017 consultation on whether there should be a new corporate criminal offence relating to a failure to prevent any type of economic crime – this new law could be modelled on the s7 Bribery Act 2010 offence. There was no mention of this in the Autumn Queen’s Speech so it looks like it is not a government priority. A recent SFO failure to indict a large company on charges relating to fraud allegedly involving very senior individuals may however motivate the SFO to continue calling for this new offence.

The UK Solicitor General has confirmed plans to implement changes to the UK’s Suspicious Activity Reporting regime, as recommended by the UK Law Commission, to make it more effective. This may help to deal with OECD recommendations, in its Phase 4 Report (March 2019) for the UK to improve corruption detection through AML reporting mechanisms. If implemented, this may lead to an increase in financial crime being detected from SARs.

**Internal investigations – key developments**

The UK SFO issued long awaited guidance11 on what to expect if a company self-reports to the SFO. The new guidance appears to offer more flexibility on when to self-report, referring to the need for reporting within a reasonable time of the suspicions coming to light, preserving available evidence and providing it promptly in an evidentially sound format. The guidance states that organisations should consult in a timely way with the SFO before interviewing potential witnesses or suspects, taking personnel/HR actions or taking other “overt” steps. Where privilege is claimed, the SFO will require a schedule of material withheld for privilege (including the basis for the claim) and organisations will be expected to provide certification by independent counsel that the material in question is privileged. Read more12.

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Sectors targeted by law reforms or enforcement action

**Virtual currencies:** The MLR have been amended to implement the EU’s Fifth Anti-Money Laundering Directive, plus some other changes as a result of the FATF most recent mutual UK evaluation. Key changes involve bringing custodian wallet providers and virtual currency exchange platforms into the scope of AML regulations. Also brought into scope are high value art market participants and high value letting agents. Read more 13. OFSI’s fine of Telia (a tier one international telecoms carrier) for a sanctions breach 14, plus the new US/UK data sharing agreement highlight the core role that law enforcement consider is played by telecommunications service providers in facilitating financial crime, even if unwittingly.

The SFO’s investigation into Unaoil has spawned a number of other investigations in the energy sector (eg against Amec Foster Wheeler, Petrofac, Wood Group). There have been related actions in the U.S. (eg the U.S. DOJ plea deal with former Unaoil executives).

The CMA’s focus on the pharmaceutical sector continues with a number of on-going cases in the sector (not just in relation to cartels, but also some cases involving abusive practices).

The UK’s proceeds of crime laws continued to be under the spotlight in 2019 as being a major obstacle to UK investment in cannabis production abroad (where it is legal in some jurisdictions). Investors are concerned that they could be accused of laundering proceeds of crime, and as a result are treading very carefully.

Cross-border co-ordinated enforcement activity

Companies must now assume that most authorities are speaking to their overseas counterparts, and plan accordingly. Continuing the trend of greater cross-border information sharing and co-ordinated investigations, the UK enforcement authorities continue to regularly co-operate with their overseas counterparts. The Director of the SFO has publicly stated on many occasions the importance she attaches to international co-operation. Both the SFO and the FCA have had secondees from overseas enforcement authorities.

For the Airbus DPA (signed January 2020), the UK had co-ordinated with the U.S. and France to reach co-ordinated settlements, which were all announced on the same day.

The signing of the U.S./UK data sharing agreement in 2019 (see above) reinforces the trend towards increased cross-border cooperation between the UK and U.S.

The SFO 2018/2019 Annual Report records receiving 41 Mutual Legal Assistance (MLA) requests and European investigation Orders (EIO), and issued 104 MLAs and EIOs to overseas authorities during the 12 months until 31 March 2019.

Financial crime issue predictions for 2020

- As follow-on civil claims on the back of criminal enforcement continue (and given the increased presence of specialist claimant firms in the UK), the need for investigations lawyers to carefully consider future civil litigation disclosure issues when co-operating with the authorities remains.
- Disputes on privilege issues, and access to documents and data held abroad.
- Conflicting demands by different authorities relating to document disclosure (see, for example, a 2019 decision 15 which highlighted the care required by a party seeking to use or pass on, voluntarily or under compulsion, to the U.S. authorities documents disclosed by an opposing litigant in English civil litigation).
- Managing dual-track regulatory/criminal investigations (see above)
Greater focus on compliance and culture will likely mean that compliance personnel continue to come under closer scrutiny in an investigation. Having policies and procedures will not be enough if the culture is not supporting the right behaviours.

Related to the above, there is a greater focus by regulators on non-financial misconduct and crime. The uptick in complaints of sexual harassment following #metoo shows no sign of retreat and will likely broaden out to include instances of severe bullying, in particular, by senior leaders.

Compelled interviews of senior members of companies under investigation to test “tone from the top” in investigations under s7 Bribery Act 2010

Careful trade-off when considering whether to self-report wrong-doing, taking into account the cost/benefit analysis of a DPA and enforcement risk.

Data security.

Data protection questions will inevitably remain in cross-border investigations Read more16.

Recent legal directory quotes

“Distinguished investigations practice with extensive experience dealing with enforcement agencies around the globe. Features considerable strengths across a range of key jurisdictions such as Asia-Pacific, the USA and continental Europe as well as in its UK base.”
Chambers Global 2020, Global-wide Corporate Investigations

“Allen & Overy LLP’s corporate crime team is ‘practical and pragmatic’, and “is as adept at representing large multinational companies such as international financial institutions in business-critical investigations.”
Legal 500 UK 2019, Regulatory Investigations and Corporate Crime

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Mixed signals to companies came out of the U.S. last year. FCPA enforcement is at an all-time high, and the DOJ Antitrust Division continues to coordinate across borders, while the DOJ National Security Division enforces U.S. sanctions on non-U.S. companies without notable cross-border cooperation. The DOJ Criminal and Antitrust Divisions are giving companies more incentive than ever to beef up compliance efforts and cooperate with government investigations, while a U.S. court has signalled that such cooperation may infringe on individuals’ rights. Companies should invest in robust compliance, prioritize early disclosure of potential problems to U.S. authorities, and know that the long arm of U.S. sanctions can and will follow them across increasingly attenuated connections to the U.S.

Investigations trends/developments

2019 was a record breaking year for the DOJ fraud and anti-bribery prosecutions: The FCPA units at the DOJ and SEC were very active. They prosecuted more than a dozen companies between them, imposing penalties of nearly USD3 billion, including the two largest corporate resolutions in the statute’s history. More than 30 known individuals faced some type of FCPA criminal enforcement activity in 2019. According to public record, 11 FCPA defendants pleaded guilty to FCPA or related criminal charges during the year and four more were convicted at trial. Fourteen others were newly indicted for FCPA crimes. Moving into 2020, more than 100 companies still have on-going FCPA investigations. International anti-corruption enforcement has never been more vigorous. 2019 demonstrated the expansive reach of U.S. anti-bribery enforcement and why companies must remain ever-vigilant.

The DOJ Antitrust Division increased its focus on public procurement and labor markets: The Division established the Procurement Collusion Strike Force (PCSF), a new task force designed to detect criminal anticompetitive behavior in government procurements. We can expect the Division to be more aggressive in pressing criminal charges against companies and individuals that have rigged U.S. government contract bids, both domestically and internationally. The Assistant Attorney General for Antitrust testified to Congress that the Division had 91 pending grand jury investigations at the end of FY 2018, and more than a third of their open investigations relate to public procurement. The Division is also focused on the labor markets, which has remained a frequent topic in speeches by Antitrust Division officials. While the Division has yet to bring its first criminal charges in the labor market, they are under increasing pressure to do so.

Continued focus on sanctions violations by non-U.S. persons: U.S. enforcement agencies, including federal and state banking regulators showed continued focus on sanctions violations by non-U.S. persons and their activities in, from, and through the United States.

– 2019’s largest enforcement action, with total penalties of USD1.3bn, was imposed on a non-U.S. bank. UniCredit Bank AG (UCB AG), a German bank, pleaded guilty to illegally processing transactions in violation of U.S. sanctions on Iran. While the prohibited activities were undertaken primarily by UCB AG’s non-U.S. entities and their non-U.S. national personnel, UCB AG relied on third-party correspondent banks to provide USD clearing services to its customers. Only three nominal New York ‘touchpoints’ with UCB AG’s own New York branches were asserted. Nevertheless, the U.S. banking regulators asserted jurisdiction over the sanctioned conduct.


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DOJ charged three different non-U.S. banks or corporates with violating, evading, or attempting to violate or evade U.S. sanctions. These charges occurred across a range of industries (telecommunications, financial services, and export/import) and countries of origin (China, Turkey, the UAE). Non-U.S. persons and nationals seeking to do business in the United States, then, should be keen to ensure that their activities in the U.S., including the transit of related payments through the U.S. financial system, comply with U.S. sanctions, as such transactions provide sufficient grounds for U.S. enforcement authorities to exert jurisdiction.

Increased focus on Compliance Programs: There is increased focus on Compliance Programs as a potential “super mitigator”. The DOJ Criminal Division has continued to extoll and increase the potential benefits of implementing effective compliance programs. Corporate self-diagnosis, self-disclosure and remediation now weighs heavily in favor of a mitigated resolution. In parallel, in a sweeping policy change in July 2019, the DOJ Antitrust Division issued a policy statement announcing that, in line with the Criminal Division, it will now credit effective compliance programs at the charging stage rather than the sentencing stage. While the Division reiterated its commitment to its long-standing corporate leniency program, under the new framework companies can benefit significantly from robust and effective compliance programs, which can shift what would have been a corporate guilty plea with a reduced sentence to a more lenient deferred prosecution agreement (DPA).

Ability to pay – more scope for debate: The DOJ revised its guidance on organizational ability to pay, shifting from considering only the continued viability of the organization as a potential collateral consequence to considering other, lesser collateral consequences of substantial monetary penalties. Criminal Division attorneys may now adjust proposed criminal fines or monetary penalties based on other significant adverse collateral consequences.

Updates to the DOJ’s Corporate Enforcement Policy

<table>
<thead>
<tr>
<th>Instant Messaging and Communications</th>
<th>Credit available to companies that implement “appropriate guidance and controls” on the use of instant and ephemeral messaging services and platforms (as opposed to prohibiting them). Read more 4.</th>
</tr>
</thead>
<tbody>
<tr>
<td>De-confliction of Witness Interviews and other Investigative Steps</td>
<td>De-confliction of witness interviews (previously thought to apply to all interviews) only required where “requested” and “appropriate”</td>
</tr>
<tr>
<td>M&amp;A Due Diligence and Remediation</td>
<td>Credit available to acquiring companies who voluntarily disclose misconduct (as previously announced in July 2018)</td>
</tr>
<tr>
<td>Sharing Information on Employees</td>
<td>Credit available to companies that disclose individuals “substantially involved in” or “responsible for” the violations (as opposed to all individuals)</td>
</tr>
<tr>
<td>No Waiver Required</td>
<td>Unequivocal language added to provision disclaiming any link between credit eligibility and waiver of attorney-client privilege or work product</td>
</tr>
</tbody>
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Significant law reforms impacting corporate criminal liability

The most important reform impacting criminal antitrust liability was the DOJ Antitrust Division’s announcement that it would now credit effective compliance programs at the charging stage, which allows prosecutors to proceed by way of a deferred prosecution agreement. Previously, only the ‘first-in’ leniency applicant could secure a resolution with no charges or fines. This is a marked shift in policy for the Division, and brings it in line with the rest of the DOJ’s criminal division. The Division has been quick to implement this change in policy in its enforcement, entering into a DPA where it previously would have sought a guilty plea, first with Heritage Pharmaceuticals Inc. in May 2019, which was charged with conspiracy to fix prices, rig bids, and allocate customers with its competitors for a diabetes medication, and second with Rising Pharmaceuticals Inc. in December 2019, which was charged with conspiracy to fix prices and allocate customers for a hypertension medication.

The basis for demonstrating corporate criminal liability for violating U.S. sanctions remains the same. However, 2019 saw an expansion of U.S. sanctions themselves, especially with respect to Russia and Venezuela. Accordingly, U.S. sanctions now prohibit and restrict more activities with more sanctioned persons and jurisdictions than they did before. Since these expanded prohibitions provide prosecutors with more grounds on which to bring charges, we would expect such prohibitions to result in a broader range of investigations and enforcement actions across a broader range of industries.

A number of recent resolutions and ongoing public investigations also serve as an important reminder for multinational banks without a U.S. branch that they are not immune to U.S. civil and criminal exposure. While they are not subject to the oversight of U.S. banking regulators, civil and criminal federal authorities may enter the picture where USD transactions are cleared through the United States or there is some other U.S. nexus. For example, as reported in the press, a Danish bank is currently subject to investigation by a number of U.S. civil and criminal authorities in relation to conduct and transactions originating at its Estonian branch. The basis upon which U.S. authorities are asserting jurisdiction over this matter may be in relation to the USD flows which were cleared through the Danish bank’s U.S. correspondent banks. For more information on these developments, please see here.

Internal investigations — key developments

The DOJ’s Principles of Federal Prosecution of Business Organizations now instruct companies to disclose known relevant facts even when they may not know all the relevant facts early in an investigation. Companies should do so while also making clear the disclosure is based on a preliminary assessment of information. Additionally, the DOJ has clarified the meaning of ‘full co-operation’ which is now defined so as to advise companies to notify DOJ of evidence not in its position of which the company “is aware,” rather than evidence of which the company “should be” aware.

The extent of co-operation between a company and authority came under scrutiny, where the government was rebuffed in trying to introduce evidence at trial that had originally been obtained by company counsel during its internal investigation. In United States v. Connolly (2019 WL 2120523 (May 2, 2019 S.D.N.Y.)) the individual defendants won a court order barring the U.S. government from using, at their criminal trial the results of an interview given to corporate counsel during their employment. The court found that the government had failed to conduct its own investigation and directed the corporation’s internal investigation to such an extent that the corporation effectively acted as an agent of the government. Because the corporation’s internal investigation was found to be functionally a government investigation, the defendant employees should have had the right to avoid self-incrimination without fear of losing their jobs, without which the evidence was effectively coerced. The result in United States v. Connolly counsels caution in co-ordinating an internal investigation with governmental authorities, although the onus to alter its practice is on the government trying to build its criminal case, not the corporation trying to co-operate.

In the realm of sanctions enforcement, the DOJ National Security Division (NSD) revised and reissued its guidance on its
enforcement policy with respect to sanctions and export controls laws in December 2019. Despite its wide scrutiny of U.S. and non-U.S. persons, the NSD still relies on voluntary self-disclosures to enforce U.S. sanctions laws. While effective self-disclosure yields substantial rewards, the NSD articulates high standards for meeting each prong of self-disclosure. A company will receive full voluntary self-disclosure credit only if the disclosure is made (i) prior to an imminent threat of disclosure or a government investigation; (ii) within a reasonably prompt time after the company becomes aware of the conduct; and (iii) in full, with respect to all relevant facts known at the time of the disclosure. Accordingly, companies will face a natural tension between disclosing to the NSD before any other party (or other government agency) on the one hand and gathering sufficient information such that the NSD will view the disclosure to capture “all relevant facts,” on the other hand.

Cross-border co-ordinated enforcement activity

The DOJ Antitrust Division continued its efforts to extradite individuals charged with criminal violations of the U.S. antitrust laws. In January 2019, a defendant who had been extradicted from Spain was sentenced in connection with a collusive price-fixing scheme in the sale of wall posters on an online marketplace. And in July 2019, a former executive of Martinair Cargo was apprehended by Italian authorities while visiting Sicily, and was a later extradited to the U.S. to face charges stemming from a September 2010 indictment. Assistant Attorney General Makan Delrahim made clear in announcing the extraditions that “those who violate U.S. antitrust laws and seek to evade justice will find no place to hide.”

Sanctions enforcement in 2019 primarily showcased inter-agency co-operation within the U.S., with one notable exception: Standard Chartered Bank (SCB), a UK financial institution, admitted to processing financial transactions through the U.S. in violation of the U.S.’ Iranian sanctions, for over ten years. The majority of the penalties were imposed by U.S. enforcement agencies (eg, CES, the Fed, DFS, the New York Country District Attorney’s Office, and the U.S. Treasury Department’s Office of Foreign Assets Control (OFAC)). However, SCB also was ordered to pay the United Kingdom’s Financial Conduct Authority (FCA) additional penalties totalling more than USD477m. Accordingly, the U.S. authorities are willing to co-ordinate with their non-U.S. counterparts when appropriate.

The DOJ co-ordinated its Airbus enforcement response with the French and UK anti-corruption authorities.

Financial crime issue predictions for 2020

Given the expansion of U.S. sanctions prohibitions and the authorities’ focus on non-U.S. persons (in addition to U.S. persons), in-house legal and investigation teams likely will want to focus on how their companies are conducting business through the United States. Last year’s enforcement actions show that the U.S. authorities are happy to exert jurisdiction over entities organized outside the United States. Moreover, we would expect more information-sharing with OFAC to occur, given the expanded breadth of activities prohibited by U.S. sanctions.

To that end, banks and corporates will want to keep an eye on enforcement trends in the civil space as well, as OFAC’s enforcement priorities may inform the criminal enforcement agencies’ priorities. For example, OFAC recently has shown a willingness to impose civil penalties on businesses for violations arising out of a company’s failure to monitor the activities of its customers’ customers (OFAC’s fine of Apollo Aviation)⁸. Imposing such a penalty necessarily will increase companies’ diligence and compliance burdens.

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