ALLEN & OVERY

Legal & Regulatory Risk Note

A risk management briefing putting the key issues at the top of the agenda

October 2018

Contents

Editorial

This edition of the Risk Note considers some of the legal developments over the past quarter which will affect how those in the finance sector operate.

For example, for those who continue to do business, or are involved with those who do business, in Iran, we take a look at how to navigate the legal minefield between new U.S. Iran sanctions and the amended EU Blocking Regulation.

We cover imminent changes to the way non-Australian financial service providers do business in Australia. The reforms, which are likely to be implemented, will require such foreign providers to apply for new licences and be subject to increased regulation.

We take a close look at the legislative arrangements for Brexit, and also the UK FCA's recent scrutiny of unfair terms in consumer contracts.

Etay Katz
Partner
London – Banking
Tel +44 20 3088 3823
etay.katz@allenovery.com

Please do not hesitate to contact me or any of the contributors if you require further information about any of the matters covered in this note.

Section I: Global

Iran sanctions and the EU Blocking Regulation: Navigating legal conflict

The European Union promised a strong response to the withdrawal of the U.S. from the Iran deal, as announced by President Trump on 8 May 2018. To this end, it has taken a key step by amending the EU Blocking Regulation. This bulletin considers a number of the practical and legal issues that have subsequently arisen for non-U.S. businesses caught between the requirements of the Blocking Regulations on the one hand and the newly re-imposed U.S. secondary targeting Iran on the other.

The core purpose of the updated Blocking Regulation is to ensure that EU-based businesses can take investment decisions in relation to Iran freely and, in particular, in such a way that they are not coerced into complying with certain of the U.S.'s recently re-imposed "secondary sanctions" which EU law does not recognise as having applicability. To this end, the Blocking Regulation creates a number of requirements, one of which prohibits EU persons from complying with such re-imposed U.S. sanctions. However, the threat of this requirement in and of itself is unlikely to be enough to protect EU businesses from the risk of enforcement by the U.S. authorities for breaching these U.S. sanctions, creating an obvious dilemma for EU businesses and particularly those with links to Iran.

More widely, ensuring that EU businesses continue to do business with Iran is believed by many commentators to be an important element in incentivising the Iranians to keep to their commitments under the JCPOA. We await to see what else will be done by the EU and the JCPOA's other remaining signatories to save the deal (if anything), and to enable Iran to continue to participate in the global economy.

U.S. extraterritorial reach

At first glance, you may wonder why U.S. sanctions on Iran should matter to EU businesses, or indeed any other non-U.S. businesses, operating exclusively outside of the U.S.. The reason is that a number of the U.S.'s sanctions have wide extraterritorial reach. More fully, the U.S. seeks to apply certain of its sanctions to non-U.S. persons and entities acting outside of the U.S. in various situations. These extraterritorial sanctions are often referred to as U.S. "secondary sanctions".

A number of U.S. secondary sanctions have been, and are being re-imposed, which target Iranian-related activities as a consequence of the U.S.'s departure from the JCPOA. These sanctions are being re-introduced in two phases, with some having come back into force on 7 August 2018 and others set to come into force on 5 November 2018. A wide range of activities are targeted, including: (i) having dealings with persons on the so-called "SDN List" (ie asset freeze targets); (ii) conducting or facilitating significant transactions for the purchase or sale of Iranian rials or of contracts whose value are based on the exchange rate of the Iranian rial; or (iii) conducting or facilitating significant transactions for the purchase, sale, marketing, or transport of petroleum, petroleum products, or petrochemical products from Iran.

Even where the sorts of activities targeted by the U.S. secondary sanctions are undertaken by non-U.S. persons operating outside of the U.S., such persons can be targeted with a range of measures. The exact measures that can be imposed in any given case are dependent on the underlying secondary sanctions that have been engaged, but they can include being: (i) added to the SDN List; (ii) restricted from obtaining financing provided by U.S. financial institutions; and (iii) denied U.S. export and re-export privileges.

The EU response

The Blocking Regulation was originally introduced by the EU in 1996 in response to the extraterritorial reach of certain sanctions imposed by the U.S. in relation to Cuba in the 1990s. It has now been updated to include several of the U.S. extraterritorial sanctions in relation to Iran that have been, or will be, re-imposed subsequent to the U.S.'s exit from the Iran deal.

The Blocking Regulation prohibits any EU person or entity from complying with certain of the re-imposed U.S. extraterritorial sanctions. An associated licensing derogation is also provided for. That said, it will only be possible for EU persons to obtain such a licence where it can be demonstrated that "serious damage" would arise for either the applicant and/or the EU where the applicant is *not* allowed to comply with the targeted U.S. laws. This licensing mechanism is not believed to have been widely used historically, and its potential availability to EU persons is, therefore, uncertain.

The Blocking Regulation also provides protection to EU persons and entities by containing:

– an assurance that any U.S. court judgment or administrative determination against an EU person or entity giving effect to the U.S. sanctions listed in its annex will not be enforced in an EU court; and

– a right for any EU person or entity suffering damage as a result of a person complying with the listed U.S. sanctions to recover those damages from that person.

EU persons affected by the application of the U.S. laws targeted by the Blocking Regulation must further report the same to the European Commission.

The future of the regime created by the Blocking Regulation is also uncertain. The European Commission has stated that it intends to give extra teeth to its response to the re-imposition of U.S. sanctions on Iran, and it remains to be seen what this will lead to in practice. In particular, the prospect of substantive amendments to the main body of the Blocking Regulation cannot be ruled out.

Conflict of laws

The consequence of the U.S.'s re-imposition of secondary sanctions targeting Iran and the EU's subsequent updating of the Blocking Regulation is that the respective laws are now directly conflicted. On the one hand, non-compliance with the U.S.'s secondary sanctions can result in EU businesses being targeted with U.S. sanctions should they offend the same. On the other hand, it is now an offence for EU businesses under the Blocking Regulation to comply with the very same secondary sanctions.

Many EU businesses, both financial institutions and corporates, have historically sought to comply with both EU and U.S. regimes as a matter of course (often as a natural consequence of requirements within their financing documentation), and for them the conflict is a live issue of immediate concern. These businesses are now faced with a difficult choice as to how to proceed – particularly in any transactions that have an Iranian nexus.

For these EU businesses, there is no simple or obvious answer. Possible approaches could involve: (i) looking to obtain an authorisation from the European Commission to enable simultaneous compliance with both the Blocking Regulation and the targeted U.S. secondary sanctions; (ii) establishing a technical *alignment* with what is required by the targeted U.S. secondary sanctions without actually seeking to comply with the same; or (iii) approaching each scenario on a case-by-case basis. There are pros and cons with each of these approaches. We briefly explore these further below.

Licensing route

As noted above, the Blocking Regulation provides for a licensing derogation that allows for EU persons to be authorized to comply fully or partially with the targeted U.S. secondary sanctions to the extent that their non-compliance with the same would seriously damage their interests or those of the European Community.

Obtaining such licenses could be difficult. The term "seriously damage" is not defined in the Blocking Regulation, although associated EU guidance confirms that not every nuisance or damage suffered by EU operators will entitle them to obtain such a license. Similarly, a set of criteria has been developed by the European Commission to use when determining license applications, which appears to set a high bar. This makes sense in context. If the bar was not set high, there would be a risk that the licensing route would undermine the overriding objectives of the Blocking Regulation.

The key advantage of this route is that, assuming that a license is actually obtained, a technical compliance could follow with both the Blocking Regulation and the targeted U.S. secondary sanctions. That said, there is no guarantee that any given applicant will actually obtain a license (in whole or in part) at the point they make their application. Further, the application could alert the relevant authorities in and of itself of a desire on the part of the applicant to conduct its business in a manner that would otherwise be illegal.

Lastly, even if the license were to be granted, the same may not be a complete defence to third parties bringing civil claims for damages against the license holder pursuant to the Blocking Regulations' wider provisions as described above.

Alignment route

The Blocking Regulation does not restrict EU businesses from choosing to start, continue or cease business operations with an Iranian nexus for reasons beyond sanctions. This particular point is confirmed in guidance from the European Commission, which observes that EU businesses are free to choose whether to start working, continue, or cease business operations in Iran, and whether to engage or not in an economic sector on the basis of their assessment of the economic situation.

In other words, EU businesses could opt to reject any particular transactions with an Iranian-link on wider grounds not related to the U.S. secondary sanctions targeted by the Blocking Regulation. By way of example, and, in a banking context, examples could include: (a) credit-risk related concerns; (b) concerns relating to money laundering-related issues; (c) concerns over bribery or human rights-related issues; and/or (d) a need to comply with legislation (including U.S. legislation) *other than* the U.S. secondary sanctions targeted by the Blocking Regulation. Making decisions for reasons such as these should not offend the Blocking Regulations' requirements, but should nevertheless simultaneously provide a technical alignment with the requirements of the U.S. secondary sanctions that target Iran.

Should an EU business want to rely on this route, however, it would have to take care that it did not, if terminating or ending any Iranian business, do so on any grounds that could be inferred as being related to seeking compliance with the U.S.'s targeted secondary sanctions. This could prove to be particularly difficult for those EU businesses that have historically traded with Iran but are now looking to stop Iranian-related activities at this point. Such businesses' decision-making processes could potentially come under close scrutiny, and care would have to be taken to demonstrate that the conclusions reached by such processes were not, in fact, based upon a simple desire to comply with the U.S. secondary sanctions targeted by the Blocking Regulation.

Case-by-case basis approach

Alternatively, EU operators may decide to consider these issues on a case-by-case basis as Iran-related proposals arise. It is worth noting that the U.S. secondary sanctions do not prohibit EU persons from undertaking *any/all* activities with Iran – merely those activities that are targeted by the relevant U.S. secondary sanctions as listed within the Blocking Regulation.

From a Blocking Regulation perspective, and to the extent that it is concluded in any given case that none of the U.S. laws that are targeted by the Blocking Regulation actually have obvious applicability to the activities being contemplated, the Blocking Regulation should have only limited direct relevance to such activities. In other words, a decision to undertake the Iranian-related activities (or not undertake them, as the case may be) would not be materially based on a desire or otherwise to comply with the U.S. laws targeted by the Blocking Regulation (ie as the same would not be engaged).

The disadvantage of this approach, of course, is that were an EU person to conclude that the relevant activities that it was contemplating engaging in *were* targeted by the relevant U.S. secondary sanctions but *not* otherwise restricted pursuant to the EU's own sanctions regime or any other applicable EU laws, it would potentially find itself in an awkward position i.e., as to abandon or stop such activities could result in accusations being made that such abandonment was brought about as a consequence of seeking compliance with the targeted U.S. secondary sanctions in a manner that was prohibited by the Blocking Regulation.

Enforcement

The Blocking Regulation itself does not impose any penalties for the breach of its requirements. However, pursuant to its provisions, EU Member States are under an obligation to impose sanctions which are "effective, proportional and dissuasive" where a breach arises. That said, it is widely understood that the Blocking Regulation has not been heavily enforced to date. No jurisprudence is believed to exist at the EU level, and only one enforcement action is heavily reported, being an Austrian case which dates to 2007.

From a U.S. perspective, one of the key sanctions regulators, OFAC, has historically engaged with non-U.S. persons in question before imposing secondary sanctions on them, and offered them an opportunity to cease their sanctionable activities before targeting them with any sanctions. It is also worth noting that secondary sanctions are not, therefore, imposed very often. That is not to say this may not change, particularly given the current political focus on Iran.

The one potential exception, however, is designation as an SDN. OFAC has historically viewed its designation authority to be very broad, and it can target non-U.S. persons quickly and without notice. OFAC designates SDNs on a continual basis, and so the risk in this regard is believed to be higher. This notwithstanding, it is difficult to isolate the basis for individual designations, thus making it equally difficult to say with certainty how frequently OFAC employs this authority against persons engaged in some measure of sanctionable activity as regulated through the secondary sanctions.

In any event, the U.S. authorities have historically not seen the Blocking Regulation (and, in particular, the excuse of illegality it provides to EU operators) as being a defence to the undertaking of activities that are targeted by U.S. sanctions.

In the current environment, EU businesses with links to Iran should keep a close watch on this issue moving forward, and adapt their approach accordingly.

Conclusions

The U.S.'s decision to withdraw from the JCPOA has caused political ructions with global implications. Many businesses are now feeling its indirect effects. In various scenarios, it may simply not be possible for European corporates to ensure technical compliance with both the U.S.'s secondary sanctions regime and its countermeasure as created by the Blocking Regulation. Navigating the complexity and risks associated with this conflicting legal landscape will no doubt be challenging for some time to come.

If you require further details please contact:

Matthew Townsend
Partner
London – UK
Tel +44 203 088 3174
matthew.townsend@allenovery.com

Tom D'Ardenne
Senior Associate
London – UK
Tel +44 203 088 3534
tom.dardenne@allenovery.com

Helen Collip
Senior Professional Support Lawyer
London – UK
Tel +44 20 3088 3036
helen.collip@allenovery.com

Europe

The Road to Brexit – The UK's legislative preparations

With just over six months to go until the UK leaves the EU, the UK Government's preparations for both a 'hard' Brexit and a Brexit that commences with a transitional period continue in earnest.

'Hard' Brexit preparations

Once the EU (Withdrawal) Act 2018 (**EUWA**) received Royal Assent, UK Government departments like HM Treasury began engaging with industry and technical specialists on the draft secondary legislation required to ensure there is a functioning statute book on 30 March 2019. In the financial services area, seventy statutory instruments are expected with some being the subject of confidential review whereas others have simply been laid without consultation. All seventy are expected to be laid before the end of this year. To the extent the Article 50 withdrawal agreement is ratified, these instruments will be withdrawn from the statute book and the form and structure of subsequent secondary legislation will only emerge once a future trade relationship is agreed between the UK and EU 27.

In addition to the legislative advancements, the UK Government has published a number of 'no deal' notices-similar to those published by the European Commission six months ago. These notices are intended to set out information to allow businesses and citizens to understand what they would need to do in a 'no deal' scenario, so they can make informed plans and reparations.

Preparations for ratifying the Article 50 withdrawal agreement

Whilst preparations for a 'no deal' scenario have been ramping up, the UK Government has also been focusing on ensuring that the possibility of concluding and ratifying the Article 50 withdrawal agreement and proposed transitional arrangements is still alive. Following publication of the White Paper, which sets out the detailed elements of the 'Chequers deal' (our detailed bulletin can be found here), the UK Government published its White Paper (the **EUWAB White Paper**) on the EU (Withdrawal Agreement) Bill (the **Bill**) – formerly known as the Withdrawal Agreement and Implementation Bill. This will legislate for the major elements of the Article 50 withdrawal agreement that is reached with the EU, including issues such as the agreement on citizens' rights, the financial settlement and the details of a time-limited implementation period.

The precise details of the Bill will be subject to the on-going negotiations with the EU but the EUWAB White Paper confirms that the Bill will:

– be the primary means by which the rights of EU citizens will be implemented and protected under UK law;

– amend some parts of the EUWA to ensure that the UK statute book functions correctly during the time-limited implementation period; and

– create a financial authority to manage the specific payments to be made under the financial settlement, with appropriate Parliamentary oversight.

Although timing for agreeing the Article 50 withdrawal agreement appears to have slipped, the EU negotiator, Michel Barnier, now has November in sight. It is understood that the agreement would then go before the UK Parliament very quickly – possibly within 10 days. Our bulletin on the EUWA looks at the process required for approving any deal that is struck.

What UK legislative changes are required if a transitional period is ratified?

The EUWA will repeal the European Communities Act 1972 (**ECA**) as of 29 March 2019, thereby removing the mechanism by which EU law has effect and supremacy in UK law. It will be necessary, however, to ensure that EU law continues to apply in the UK during the transitional period. The EUWAB White Paper states that this will be achieved by way of transitional provision, in which the Bill will amend the EUWA so that the effect of the ECA is saved for the time-limited transitional period. Exit day, as defined in the EUWA, will remain 29 March 2019. The UK Government believes that this approach will provide legal certainty to businesses and individuals during the transitional period by ensuring that there is continuity in the effect that EU law has in the UK during this time. The Bill will make provision to end this saving of the effect of the ECA on 31 December 2020.

The Bill will also modify the parts of the ECA whose effect is saved to reflect the fact that the UK has left the EU, and that the UK's relationship with EU law during this period is determined by the UK's commitments in the Article 50 withdrawal agreement, rather than as a Member State. The Bill will take a selective approach to saving the effect of the ECA; the UK Government will not, for example, seek to save the effect of section 2(3) of the ECA, which provides the authority for the UK Government to make payments to the EU.

Domestic legislation implementing EU law in the UK will need to be amended, however, to reflect the fact the UK is no longer a Member State during the transitional period. For example, throughout the statute book there are references to the obligations on "Member States". During the transitional period, these references will need to be read as "Member States and the UK." The Bill will make sure that such EU-related terminology in existing legislation can continue to operate effectively on the UK statute book.

How is the Bill intended to interact with the EUWA?

None of the Bill's proposed amendments to the EUWA is intended to change the purpose of the Act. All of the Bill's proposed amendments to the EUWA are technical changes to ensure that this vital piece of legislation can operate in the way that Parliament intended at the end of the transitional period.

The Bill will amend the correcting powers in the EUWA to allow them to correct deficiencies arising from withdrawal and the end of the transitional period. These powers are currently sunsetted to two years after exit day (29 March 2021). The powers will therefore be available to the UK Government during the transitional period, allowing secondary legislation to be made during this time to correct deficiencies. The existing sunset would, however, provide ministers with only three months to correct any deficiencies in retained EU law that became apparent after that conversion of EU law has taken place. This would include any changes required to EU legislation which were only introduced shortly before the end of the transitional period. Whilst the UK Government would hope to make any corrections before the end of the transitional period, it is possible that some deficiencies will only become apparent after the conversion of EU law has taken place. The Bill will therefore amend the sunset on the correcting power at section 8 of the EUWA so that the power expires on 31 December 2022.

If you require further details please contact:

Oonagh Harrison
Senior Professional Support Lawyer
London – UK
Tel +44 20 3088 3255
oonagh.harrison@allenovery.com

Section II: A summary of developments in different jurisdictions

Australia

Imminent changes to Australian rules for foreign financial service providers

Foreign financial service providers of financial services to Australian wholesale (institutional) clients may lose the benefit of existing regulatory 'sufficient equivalence relief' as a result of proposed reforms which aim to subject such providers to direct regulation by the Australian financial services regulator. The reforms, which are likely to be implemented, will require such foreign providers to apply for new licences and be subject to increased regulation.

Any failure to do so whilst at the same time continuing to offer financial services into the Australian market will result in enforcement action and fines. The proposed time frame means that such foreign providers will need to decide by 30 September 2019 (noting that ASIC has indicated a 12 month transitional period will operate from 1 October 2019 to 30 September 2020) whether they wish to continue with this part of their business.

Currently a FFSP which provides financial services to Australian wholesale (institutional) clients can rely on sufficient equivalence relief or a separate "limited connection to Australia relief."

The rationale behind introducing sufficient equivalence relief was to attract foreign investment and liquidity to Australian markets by preventing duplicated regulatory burdens, as FFSPs were already subject to equivalent regulations in their home jurisdictions.

Sufficient equivalence relief applies to those whose domestic or home jurisdictions and regulators are as follows:

Jurisdiction	Regulator(s)
United Kingdom	Financial Conduct Authority and Prudential Regulation Authority
United States	U.S. Securities and Exchange Commission U.S. Federal Reserve and Comptroller of the Currency U.S. Commodities Futures Trading Commission
Singapore	Monetary Authority of Singapore
Hong Kong	Securities & Futures Commission
Germany	BaFin
Luxembourg	CSSF

The ‘limited connection’ relief applies where the FFSP is:

– not in Australia;
– dealing only with wholesale clients; and
– carrying on a financial services business only by engaging in conduct that is intended to induce people in this jurisdiction to use the financial services it provides, or is likely to have that effect.

The purpose of this relief was to address concerns that overseas counterparties to derivatives, foreign exchange transactions and providers of investment management services may be engaging in “inducing” activities when inducing wholesale clients in Australia to use their financial services. Without the benefit of this “limited connection relief”, they would be required to hold an AFS licence when engaging in inducing activity even when they were not otherwise carrying on a financial services business in Australia.

ASIC motivated to reform

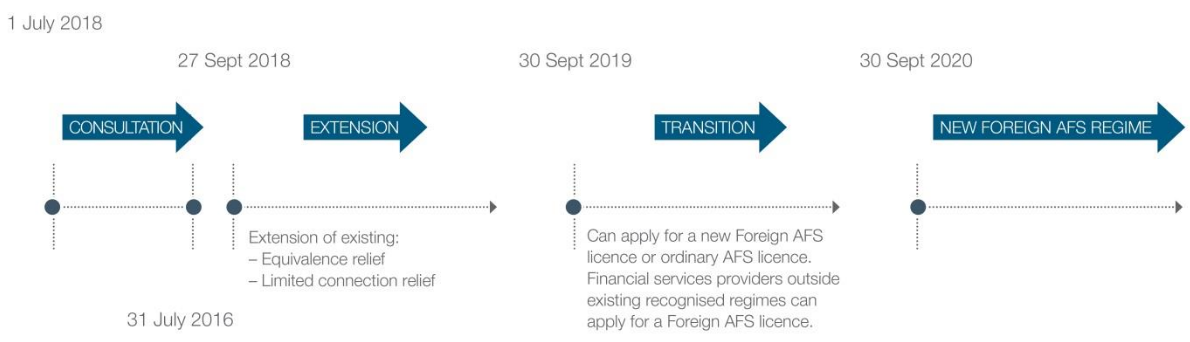
Having reviewed the existing FFSP relief, and having regard to regulatory and supervisory concerns, the Australian Securities & Investments Commission (**ASIC**) has determined that the relief may no longer be appropriate. There is no equivalent relief for Australian licensees in each of the above foreign jurisdictions and, in light of the Royal Commission into financial services currently being conducted in Australia, the need for a more stringent regulatory regime and active regulatory enforcement has been brought into sharp focus. The proposed changes are also likely to be as a result of perceived limitations in the monitoring of, and enforcement against, FFSPs. The ASIC released a consultation paper on Foreign Financial Service Providers (**FFSP**) on 1 June.

New licence required

The consultation paper indicates that an organisation that currently relies on FFSP instruments of relief will, going forward, need to apply for a modified form of an Australian Financial Services (AFS) Licence (**Foreign AFS Licence**) or obtain an existing form of Australian Financial Services licence (**Ordinary AFS Licence**). The proposed Foreign AFS Licence has a less onerous compliance regime than an Ordinary AFS Licence and is available to an FFSP that can demonstrate that its domestic regulatory regime is sufficiently equivalent to the legal regime applicable in Australia.

ASIC has extended the current sufficient equivalence relief for 12 months until 30 September 2019. The consultation paper proposes a further transition period of 12 months to 30 September 2020 if ASIC proceeds with the new Foreign AFS Licence regime.

Timing:



New Foreign AFS Licence

Currently FFSPs are able to provide services to Australian institutional clients on the basis that they comply with the laws and regulations that apply in their home jurisdiction. The Foreign AFS Licence regime represents a significant departure as it will be necessary for an FFSP to be licensed in Australia and to understand and comply with certain Australian financial services regulatory requirements when dealing with Australian institutional clients. Whilst many of the Australian regulatory requirements and enforcement options are similar to those applying to an FFSP in other jurisdictions (eg the U.S., UK), there would undoubtedly be an increased compliance burden.

It is likely, based on past approaches to regulatory relief applications by ASIC, that the first applicant from a particular jurisdiction for a Foreign AFS Licence will have to demonstrate regulatory equivalence for that jurisdiction. Future applicants are likely to be able to take the benefit of such regulatory equivalence having already been demonstrated to ASIC and so will be able to focus on showing that there have been no changes which have altered the equivalency analysis.

Impact for FFSPs

FFSPs will need to decide if they are committed to the Australian market, and therefore are prepared to be subject to Australian regulation. If the answer is yes, an FFSP will need to decide whether to apply for a Foreign AFSL or an Ordinary AFSL; or determine whether it is possible to rely on another exemption. It is proposed that FFSPs who are able to demonstrate regulatory equivalency will be able to apply for a Foreign AFSL on and from 1 October 2019.

If you would like to know more about the proposed reforms please contact:

Jason Denisenko
Partner
Sydney – Australia
Tel +612 9373 7809
jason.denisenko@allenovery.com

Lucy Adamson
Senior Associate
Sydney – Australia
Tel +612 9373 7640
lucy.adamson@allenovery.com

Renji Cai
Senior Lawyer
Sydney – Australia
Tel +612 9373 7737
renji.cai@allenovery.com

Germany

Internal investigations documents seized in lawful law firm raid

Federal Constitutional Court, orders dated 27 June 2018, file numbers 2 BvR 1405/17, 2 BvR 1780/17, 2 BvR 1562/17, 2 BvR 1287/17, 2 BvR 1583/17:

The much publicised raid of U.S. law firm Jones Day's Munich office and the seizure of documents relating to VW's internal investigation by prosecutors in an investigation of Audi AG were legal, according to German courts. A constitutional complaint by the law firm, its client (**VW**) and individual German Jones Day lawyers has recently failed. The rulings highlight the (now familiar) tension in a corporate wanting to carry out an internal investigation, with external legal assistance, without fear of the internal investigation documents being disclosed to investigators.

VW retained US law firm Jones Day to provide legal advice and assist with an investigation during the U.S. Department of Justice investigation of VW and its subsidiary, Audi, and relating to the diesel emissions scandal.

In Germany, the public prosecutor's offices in Brunswick were investigating VW and prosecutors in Munich were investigating Audi, on suspicion of fraud and criminal advertising.

The Munich prosecutors conducted a raid at Jones Day's Munich offices in March 2017. They seized a large number of paper files and electronic data which related to the VW investigation for use in the Audi investigation. Jones Day and VW challenged the seizure, but were unsuccessful both before the Munich Local and Regional Courts. Jones Day, three individual German Jones Day lawyers and VW lodged constitutional complaints with the German Federal Constitutional Court (**BVerfG**), but these have also failed. The essence of these constitutional complaints was an allegation that the lower courts had not sufficiently considered the relationship of trust between a client and a law firm when examining the proportionality of the seizure.

VW

The court held that VW's fundamental rights (which it has as a German entity) were not violated. Although its right to informational self-determination was affected, the state measures were proportionate, considering the severity of the alleged offences and the intensity of the suspicion.

It is important to remember that whilst it was the Munich prosecutors that raided Jones Day, Jones Day's client, VW, was not being investigated by the Munich prosecutors (they were investigating Audi – who were not Jones Day's client). VW was being investigated by different investigators – in Brunswick. This was important, as the court found[1] that search and seizure of documents at a law firm is lawful unless the law firm's client is a suspect in the criminal investigation concerned or is subject to proceedings for an administrative fine or for confiscation of property.[2]

For a client who is not yet under criminal investigation or subject to proceedings for an administrative fine, the same protections against search and seizure will apply if an investigation is 'imminent'; in particular, if there is sufficient objective suspicion that senior management have committed a criminal offence or breached a supervisory[3] duty – a mere fear of an investigation does not suffice.

The BVerfG ruled that the search and seizure by the Munich prosecutors did not violate VW's fundamental rights, but the documents could not be used in the investigation of VW by Brunswick prosecutors.

Jones Day – no fundamental rights for non-EU entity

The court refused to hear the constitutional complaint from Jones Day. It held that Jones Day does not have fundamental rights under the German Constitution. Only German legal entities and legal entities seated in the EU have such rights. Jones Day, an Ohio partnership, did not have its main seat in the EU. The BVerfG held that the German branch of a foreign entity may have fundamental rights provided certain conditions are met. This is consistent with its ruling in a previous decision on a law firm raid involving a raid on the Dusseldorf and Frankfurt offices of a large international law firm organised as an English partnership[4]. The conditions are that:

– The branch must be impacted by the actions of the state.

– It must have a largely domestic (ie German) focus for its business activities.

– It must be organisationally autonomous.

The BVerfG found that this was not the case for Jones Day's Munich office. It remains unclear what exactly was the difference in the facts, compared to the previous case.

Foreign law firms still have the same rights as German entities under the German Criminal Procedure Code (**StPO**). This means that the lower courts must apply the same criteria as for a German entity when examining whether a search and seizure is lawful. One of the criteria is proportionality. The law firm argued as part of its complaint to the BVerfG, that the search and seizure was disproportionate and that the lower courts had not properly considered the relationship of trust between lawyer and client when considering proportionality. Despite declining to hear the constitutional complaint by Jones Day, the BVerfG nevertheless confirmed that, in its view the relationship between a client and a law firm (irrespective of whether it is EU or not) conducting an independent internal investigation into allegations of misconduct does not involve particular trust.

Individuals – their fundamental rights were not affected

The three individual lawyers were unsuccessful too. The court found their fundamental rights were not affected by the state's actions (the **raid**) because it was the law firm that had been retained by VW, not the lawyers as individuals.

Which documents are now safe from seizure?

The decisions highlight the risk that documents located in Germany with a law firm advising on an internal investigation for a client may not be protected from seizure by German criminal prosecutors unless the client entity is subject to current or imminent proceedings for an administrative fine or confiscation, related to an existing criminal investigation. The 'client' must be the same entity that is being investigated for this protection to apply – so, if a subsidiary of a large corporate group is being investigated, that subsidiary should instruct the law firm directly (ie not via its parent company).

Employee interview notes

Uncertainty remains about whether employee interview notes can be seized even if the client is subject to an investigation. Some German courts have held that these are not covered by the relationship of trust between the law firm and the client, as this does not extend to all interviewed employees. This was not an issue in the VW case, so the BVerfG did not state its view.

Data held on foreign servers

The Munich Regional Court ordered the Munich prosecutors to release data to Jones Day that was copied from a Jones Day server located in Belgium, as there had been no request from Germany to Belgium for judicial assistance. This confirms that the prosecutors' right to inspect accessible electronic data even if stored on a data carrier elsewhere[5] only relates to data stored in Germany.

Documents held by clients

Note that the BVerfG's decisions only relate to search and seizure in law firms. For documents held by a client under investigation the exceptions to a prosecutor's right to search and seize them is even more limited. The only documents protected are communications between the client and its defence counsel retained for that criminal investigation.

Plans to change the law

The German government, according to the coalition agreement, intends to reform corporate criminal liability and, as part of that, create legal certainty over what materials created during an internal investigation are protected from search and seizure. Related issues have been considered in depth in other countries – for example the UK Court of Appeal recently ruled (in *SFO v ENRC*) that documents created during an internal corruption investigation (including a lawyer's notes of employee interviews) did not have to be disclosed to the UK Serious Fraud Office in a subsequent criminal investigation against the company.

Effective compliance requires re-appraising past deficiencies. An internal investigation by a law firm is often essential for this, and the law should protect the investigation documents from search and seizure at the law firm. There is a difficult balancing act here, between on the one hand ensuring the effectiveness of criminal prosecution, and on the other protecting the relationship of trust between a lawyer and a client (which is important for the administration of justice). The BVerfG used to emphasise the latter aspect in many previous cases; now it seems to give more weight to the former.

If you require further details please contact:

Wolf Bussian
Partner
Frankfurt – Germany
Tel +49 69 2648 5674
wolf.bussian@allenovery.com

Jan Erik Windthorst
Partner
Frankfurt – Germany
Tel +49 69 2648 5674
jan-erik.windthorst@allenovery.com

1 The BVerfG re-examines lower court decisions only in relation to a potential violation of fundamental rights, not for mere errors of law. Although the court confirmed the interpretation of the law by the Munich courts, it does not mean that other interpretations would be unconstitutional or that the BVerfG agrees that the interpretation of the Munich courts is correct.

2 See section 97 StPO. The BVerfG held that wider rule generally forbidding investigative measures against law firms (section 160a StPO) does not apply for search a seizure; this had been previously disputed.

3 Sections 30, 130 Administrative Offences Act (*Ordnungswidrigkeitengesetz*, OWiG). Note that under current German law legal entities cannot commit criminal offences.

4 BVerfG, decision dated 18/3/2009, file no. 2 BvR 1036/08.

5 Section 110(3) StPO.

Poland

GetBack: reform of Polish corporate bond market

A recent corporate failure leading to unpaid corporate bond repayments has led to calls for a reform of Polish corporate bond laws. The reforms are good news for banks as they will make it more difficult for issuers to issue bonds without a bank or broker intermediary.

Trouble lurking beneath

GetBack S.A. (**GetBack**) is a Polish listed company operating in the debt management business. Until recently, GetBack looked like it had overtaken its competitors, with large volumes of acquired debt, significant growth in profits and a successful listing on the Warsaw Stock Exchange in July 2017. However, in April this year GetBack filed for restructuring proceedings. It transpired that each quarter over the last few years, GetBack had issued dozens of series of bonds, the majority of which were placed in private offerings. The bonds sold very well as the coupons were often much higher than interest on traditional bank deposits. However, when these bonds started to mature, GetBack failed to make the repayments.

The recent developments surrounding GetBack, including the arrests of most of its former management board members, and new evidence that has come to light, suggest that GetBack's management might have been involved in the manipulation of financial instruments and that the company's difficult financial condition had been concealed for a long time using sophisticated accounting techniques.

The GetBack case has significantly and negatively affected the corporate bond market in Poland, leading to calls for regulatory reform.

Impact on the corporate bond market in Poland

After several months of intense discussions prompted by the GetBack case, at the beginning of September 2018 the Ministry of Finance put forward a new draft law aiming to increase regulatory oversight and protection of investors on the financial market (the **Draft Law**). As at the beginning of October 2018, the Draft Law has been assessed and commented on by the Public Finance Commission within the lower house of the Parliament.

Three major proposals were included in the Draft Law that could significantly affect the bonds market in Poland.

No more securities in 'document' form

Currently, securities can exist in the form of a document as long as they are not intended to be traded on a regulated market or in an alternative trading system. Under the Draft Law, all Polish corporate bonds issued after 30 June 2018 should be dematerialised, ie registered in a securities depositary operating in Poland. The main aim of this change is to increase the transparency of trading and prevent counterfeiting of documents representing bonds. However, the key concern that has been raised over this requirement is that the National Depository of Securities (**KDPW**), a sole Polish CSD, may not be operationally or technically capable of registering a significant number of new bonds issues in satisfactory timeframes.

It is difficult to assess the extent to which this argument is valid, given that it is uncertain how many new bonds series will be issued in the future and what technical measures KDPW will introduce to address the increased volume of applications. It should also be noted that other EU CSDs may be willing to step in and offer their depositary services using their CSD passport under Regulation 909/2014 (**CSDR**).

Prohibition on issuers offering their own bonds

Currently, an issuer can execute private placements of bonds directly to investors without the intermediation of an investment firm or a bank. Under the Draft Law, all new issues would be carried out through an issue agent which must be a MiFID II investment firm authorised to maintain securities accounts or a Polish custodian. An issuer would be obliged to enter into an issue agent agreement before it commences the placing of its bonds. An issue agent's obligations would include, among others, performing a compliance check on the relevant issuer in relation to a particular issue and placing of bonds, maintaining a register of bondholders (until the bonds are dematerialised) and intermediating in registering bonds with KDPW (or other securities depositary).

The key concern that has been raised over the mandatory intermediation of an issue agent is that it will increase the costs of offering new bonds in private placements and will effectively limit small issuers' access to this type of funding. While it is certain that the overall cost of issuing new bonds will increase as issuers will need to cover fees of their issue agents, at this point it is unknown whether it will be significant and whether it will indeed deter issuers from choosing corporate bonds as instruments of financing. Should the requirement to appoint an issue agent be enacted, investment firms and custodians will need to find a proper balance in their fee levels to ensure that the bonds market continues to grow.

Increased regulatory reporting requirements

Under the Draft Law, issuers of bonds which are not redeemed by 30 June 2019 or registered with a securities deposit will be obliged to report to KDPW by the end of the first quarter of 2020 on all their bond issues, including the number of bonds, their nominal values and the amounts to be repaid. If there are any changes to the reported information, issuers will also be required to update the data within 15 days following the end of each calendar month. Failure to fulfil these obligations will expose the persons authorised to represent the relevant issuer to a fine of up to PLN 2 million (approx. EUR 500,000).

Financial education for consumers

Finally, under the Draft Law, a Financial Education Fund is to be established. The purpose of the Fund would be to increase financial market knowledge among Poles. The Fund would be financed from penalties imposed by the Polish FSA and certain other Polish regulatory bodies.

Conclusions

The GetBack case has had a big impact on Poland's securities market. The proposals included in the Draft Law aim to address some of the most important issues relating to corporate bonds offerings that have come to light: insufficient transparency of their private placements. Although the Draft Law has already been subject to some critique among market participants, it is hoped that their key concerns will be properly addressed by the legislator and the corporate bonds market will regain its pre-GetBack strength.

If you require further details please contact:

Pawel Mruk-Zawirski

Senior Associate
Warsaw – Poland
Tel +48 22 820 6146
pawel.mruk-zawirski@allenovery.com

Michał Truszczyński

Senior Associate
Warsaw – Poland
Tel +48 22 820 6146
michal.truszczynski@allenovery.com

United Arab Emirates

New UAE arbitration law – good news for finance parties

The new UAE arbitration law came into effect on 16 June 2018. It significantly updates and improves the onshore UAE's arbitration regime, and should give commercial parties more confidence when choosing to arbitrate disputes onshore in the UAE.

The new law has immediate application to all current arbitrations with an onshore UAE seat (regardless of when the arbitration began). The new law is a welcome development within the arbitration community, both in the Middle East and internationally.

If you require further details please contact:

Yacine Francis
Partner
Dubai – United Arab Emirates
Tel +971 4 426 7228
yacine.francis@allenovery.com

Arash Koozehkanani
Senior Associate
Dubai – United Arab Emirates
Tel +971 4 426 7176
arash.koozehkanani@allenovery.com

Promising enforcement in DIFC and onshore Dubai courts

In a recent case, the onshore Dubai Courts have granted an interim attachment over assets held onshore in Dubai, following a DIFC Court freezing order that was granted in support of the enforcement of an English High Court judgment. This is an interesting case for banks seeking to enforce foreign judgments against debtors holding assets onshore in Dubai (and the wider UAE).

The claimant obtained a judgment for financial relief in divorce proceedings in the English High Court. The claimant then sought to have that judgment enforced in the DIFC Courts, and applied for a DIFC Court freezing order in respect of assets held in onshore Dubai. In bringing the enforcement proceedings, the claimant expressly sought to invoke the DIFC Courts' 'conduit jurisdiction' to make an order which could then be enforced in onshore Dubai. Subsequent to obtaining the DIFC Court freezing order, the claimant applied for, and was successful in, obtaining an interim attachment from the onshore Dubai Courts over the onshore assets.

This case is another example of the DIFC Courts' willingness to act as a conduit jurisdiction for enforcement of foreign judgments in the onshore Dubai Courts.

We have previously reported on the use of the DIFC Courts as a conduit jurisdiction, which has the potential to provide judgment creditors with significant benefits; effectively bypassing the usual route for enforcement of foreign court judgments or arbitral awards in the onshore Dubai Courts, which is often unpredictable and time-consuming. The use of the DIFC Courts as a conduit jurisdiction has proved controversial in Dubai. See: allenovery.com/publications/en-gb/lrrfs/middleeastandafrica/Pages/The-conduit-jurisdiction-of-the-DIFC-Courts.aspx

We understand that the onshore Dubai Courts granted the interim attachment in recognition of, and to give effect to, the DIFC Court freezing order. Accordingly, the case would also appear to be an example of the DIFC Courts' conduit jurisdiction working in practice. However, it is not clear whether, in granting that relief, the onshore Dubai Courts considered the English High Court judgment and/or recognised the conduit jurisdiction of the DIFC Courts.

Further, we understand that the case has since been referred to the Joint Judicial Committee to determine potential conflicts of jurisdiction between the Dubai and DIFC Courts, and that the DIFC Court proceedings have been stayed in the interim.

If you require further details please contact:

Yacine Francis

Partner
Dubai – United Arab Emirates
Tel +971 4 426 7228
yacine.francis@allenovery.com

Arash Koozehkanani

Senior Associate
Dubai – United Arab Emirates
Tel +971 4 426 7176
arash.koozehkanani@allenovery.com

United Kingdom

Unfair terms under scrutiny from FCA

The fairness of variation terms in financial services consumer contracts under the Consumer Rights Act 2015 (**CRA**) is currently under scrutiny by the FCA. Guidance consultation (**GC 18/2**) relates to all financial services consumer contracts entered into since 1 July 1995, whether or not such contract relates to regulated products. GC 18/2 should be taken into account when reviewing existing contracts and drafting new ones. The guidance consultation closed on 7 September 2018 and the finalised guidance is due in December 2018.

It is important to note at the outset that interpretation of the CRA is a matter for the courts and that the finalised guidance will not change the law. The guidance is intended to reflect case law developments at both the EU and UK level and sets out the FCA's understanding of the law in respect of unilateral variation terms. As the FCA is a regulator under the CRA (and qualifying body under the Unfair Terms in Consumer Contracts Regulations 1999, which preceded the CRA) and may consider the fairness of terms in consumer contracts issued by FCA authorised firms or their appointed representatives, the FCA will take into account whether the firm has followed the finalised guidance when considering whether to take action against a firm for unfair terms.

Scope of the guidance

The scope of GC 18/2 in relation to the fairness of variation terms is broad. It relates to all financial services consumer contracts entered into since 1 July 1995. The FCA may consider the fairness of variation terms in any type of contract, whether or not such contract relates to regulated products. GC 18/2 should be taken into account when reviewing existing contracts and drafting new ones. The guidance is focused on variation terms given the FCA considers that such terms can be some of the most complex terms to assess for fairness and because the Court of Justice of the European Union has issued rulings on such terms in recent years.

Significance of variation terms

The FCA indicated that a large proportion of the contract terms referred to it gives firms the right to vary contracts without obtaining consent from consumers (so-called "unilateral variation terms"). An example of a unilateral variation term is one included in a variable rate contract, where firms can offer products that do not simply track a reference rate such as the base rate. The FCA recognises that there is a fine balance to be achieved in drafting these terms: on the one hand, consumers run the risk of being subjected to exorbitant terms which were not agreed at the outset; on the other hand, variation clauses can enable greater pricing flexibility, thereby promoting healthy competition and greater consumer choice.

Trends in unfair terms supervision

Unfair terms in consumer contracts have long been a particular focus of the FCA. Throughout the lifetime of the FCA/FSA, firms have been required to give undertakings to stop relying on terms in concluded contracts that the regulator has deemed to be unfair.

Since responsibility for consumer credit regulation transferred from the OFT to the FCA on 1 April 2014, the FCA has been withdrawing unfair terms guidance from its website. The FCA website now refers to the Competition and Market Authority's (**CMA**) guidance, published in July 2015, as the latest development in guidance on unfair contract terms.

Other than undertakings, the last significant publications indicating the direction of the FCA's thinking on this topic date back to 2013/2014. Still on its website are a discussion paper on changes to mortgage contracts and a thematic review on the automatic renewal of fixed term bonds from July 2014 and July 2013 respectively.

The fact that the FCA has decided to consult on new guidance suggests that the pressure on firms to monitor closely their consumer contract drafting will increase – at least in relation to variation clauses, given that in GC 18/2 the FCA states that it is not currently looking at other aspects of the law regarding unfair contract terms, albeit it may consider doing so in due course. We would not therefore treat this as necessarily opening the floodgates to scrutiny of unfair terms, but it could in due course lead to more rigorous and systematic FCA reviews.

Comparison with CMA guidance

The level of detail set out in GC 18/2 on variation terms far exceeds that contained on the same subject in the CMA guidance. The two pieces of guidance at the moment appear fairly cohesive, with no evident contradictions. However, the FCA draws out the following eleven non-exhaustive factors in the table below, for those reviewing or drafting variation terms to consider.

Themes	FCA Factors		
The firm's objective in including a variation term	Factor 1	–	Has the firm included the variation term to achieve a legitimate objective?
The scope and effect of the variation term	Factor 2	–	Are the reasons which a firm uses to justify amending contract terms pursuant to the variation term (the **Reasons**), no wider than are reasonably necessary to achieve a legitimate objective?
	Factor 3	–	The variation term permits a change to the contract. Is the extent of that change no wider than is reasonably necessary to achieve a legitimate purpose?
	Factor 4	–	Are the Reasons objective?
	Factor 5	–	Will it be possible to verify whether or not the Reasons have arisen (ie whether or not the firm is entitled to vary the contract when it invokes the variation term)?
Whether or not the term can operate in the consumer's favour	Factor 6	–	Does the variation term allow for: – variations in favour of the consumer where the reasons may in some circumstances justify changes in favour of the firm but in other circumstances justify changes in favour of the consumer (eg price decreases as well as increases)? – variations in only the consumer's favour?

Themes	FCA Factors		
The transparency of the variation term	Factor 7	–	Are the Reasons clearly expressed?
	Factor 8	–	Will the consumer understand at the time the contract is concluded the consequences that a change to the terms might have for him or her in the future?
		–	In particular, for a variation term that entitles the firm to vary the price: – does the contract (or other information provided to the consumer before the contract is concluded) set out the method for varying the price? – will the consumer understand the economic consequences of the variation term?
Notice	Factor 9	–	What, if any, notice of any variation does the contract require the firm to give the consumer?
Freedom to exit	Factor 10	–	Does the contract give the consumer the right to terminate the contract before or shortly after any variation takes effect? To what extent could that right be freely exercised in practice?
Striking a fair balance between the legitimate interests of the firm and the consumer	Factor 11	–	Does the term strike a fair balance between the legitimate interests of the firm and the legitimate interests of the consumer (taking into account any notice provisions, rights the consumer may have to terminate the contract, and the extent to which such rights could be freely exercised in practice)?

Impact on firms

It is clear from GC 18/2 that the FCA expects firms to allocate responsibility for consumer contracts under the Senior Managers Regime, where applicable. An appropriate senior individual should be accountable for ensuring that consumer contracts are fair and transparent under unfair terms law.
This prospect in itself suggests that drafting and reviewing consumer contracts will no longer be considered routine business. Senior figures will, if this proposal is retained in the final guidance, have a vested interest in ensuring that terms are compatible with the regime. Firms will be expected to take the guidance into account when reviewing existing contracts as well as when drafting new ones.

Moreover, certain industry standards may shift. Currently, some firms may be willing to assume the risk that certain industry-specific variation clauses are unfair on the basis that it may be market practice to draft the term in a particular way.
The ramifications of a finding that a term is unfair under the CRA ordinarily comprise the unenforceability of that term against the consumer but may also result in restitution to consumers where the FCA considers that the term has resulted in harm. For example, the FCA might require that refunds of fee increases are provided to consumers where such fee increases derive from an unenforceable variation provision. In future, if senior managers are allocated responsibility for consumer contracts then, with the risk of FCA enforcement action against the individual managers, they may well seek to revisit and refine their firm's approach to drafting such terms, to mitigate the risk of such enforcement action. Consequently, we can expect increased scrutiny on unfair terms, not only from the regulator, but also from within organisations.

If you require further details please contact:

Ben Regnard-Weinrabe
Partner
London – UK
Tel +44 20 3088 3207
ben.regnard-weinrabe@allenovery.com

Joanne Owens
Counsel
London – UK
Tel +44 20 3088 7363
joanne.owens@allenovery.com

Sophie Skeet
Associate
London – UK
Tel +44 20 3088 3990
sophie.skeet@allenovery.com

Heenal Vasu
Senior Professional Support Lawyer
London – UK
Tel +44 20 3088 1447
heenal.vasu@allenovery.com

United States

FCPA's extraterritorial reach narrowed but enforcement risk remains

The circumstances in which a non-U.S. person or company may be prosecuted under the main U.S. anti-corruption legislation (the Foreign Corrupt Practices Act (**FCPA**)) has been narrowed in a recent U.S. Court of Appeals for the Second Circuit ruling. However, the ruling is unlikely to alter the pattern of FCPA enforcement against non-U.S. companies as it does not prevent the prosecution of non-U.S. persons who act as agents of U.S. companies or issuers, regardless of where the conduct occurs. Furthermore, in light of the increased enforcement by non-U.S. regulators of anti-corruption laws and cooperation among global anti-corruption enforcement agencies, multi-national companies should continue efforts to prevent, detect, and remediate potential bribery-related conduct wherever it occurs.

Prosecution of non-U.S. companies and individuals under the FCPA

The FCPA, which prohibits making improper payments to foreign public officials for a business benefit or advantage, has been a top enforcement priority of the DOJ and SEC. Since the FCPA's enactment, the SEC and DOJ have collectively brought 540 FCPA actions.[1] Approximately 180 of these enforcement actions were targeted at foreign companies and nationals, including in circumstances where little or no relevant conduct occurred in the United States.[2]

The DOJ and SEC have jurisdiction under the FCPA only over the following persons and conduct:

– U.S. citizens, U.S. nationals, U.S. residents, and U.S. companies (domestic concerns), regardless of whether the conduct is domestic or abroad;

– U.S. and non-U.S. companies with securities listed on a U.S. exchange and that have periodic reporting obligations to the SEC (issuers), regardless of whether the conduct is domestic or abroad;

– agents, employees, officers, directors, and shareholders of U.S. companies or issuers, when they act on the company's behalf, regardless of whether the conduct is domestic or abroad; and

– foreign persons (foreign nationals and companies) who violate the FCPA while present in the United States.

Controversial 'accessory liability' used by prosecutors against non-U.S. parties

One of the more controversial 'extra-territorial' arguments relied on by U.S. prosecutors is that accessorial liability may be applied over a non-U.S. person who would not otherwise be subject to the FCPA. For example, in 2012 a Japanese energy company (the **Company**), paid the DOJ over USD54 million in criminal penalties to resolve FCPA charges in circumstances where there was no jurisdiction absent accessorial liability.[3]
The allegations related to bribes paid by a joint venture in Nigeria, which was created for the purpose of bidding on and, if successful, designing and building a liquefied natural gas plant. The relevant conduct did not occur in the United States, but one of the joint venture partners was a U.S. company. The DOJ asserted jurisdiction over the Company and the Japanese sales agent through whom bribes were funnelled, on

the basis that they had aided and conspired to violate the FCPA with a domestic concern. The case culminated in a Deferred Prosecution Agreement. Indeed, because such cases are often resolved by settlement, the jurisdictional theories pursued by the enforcement agencies are rarely subject to judicial scrutiny – until Hoskins.

U.S. v Hoskins – action against a UK individual

In Hoskins, the DOJ alleged that Lawrence Hoskins, a UK citizen, employed by a UK subsidiary of a French parent company, was involved in a scheme to pay bribes to Indonesian public officials for a U.S. subsidiary (of the same parent company) to win a USD118m government contract in Indonesia.[4] It was alleged that Hoskins approved the selection of and payments to third-party consultants who were retained to pay the bribes.[5] Hoskins was not an employee of the U.S. subsidiary and never travelled to the U.S. while the bribery scheme was on-going – his closest geographic connection was that he called and emailed U.S.-based co-conspirators while they were in the United States.[6]

The charges against Hoskins included that he acted as an agent of the U.S. company and that, independent of his agency relationship, that he also conspired with the U.S. company, its employees, and foreign persons to violate the FCPA, and aided and abetted their violations of the FCPA.[7] These charges rely on independent criminal statutes for aiding and abetting the commission of illegal acts by another, and conspiring with another to commit an offense.[8]

The narrow question on appeal was whether Hoskins could be charged for conspiring to violate the FCPA or aiding and abetting others' alleged FCPA violations where there was no jurisdictional nexus over his actions.[9]

Appeal Court rules no jurisdiction based on accessory liability

The Court affirmed the district court's decision to dismiss those claims, relying in the first instance on the text of the statute, which "defined precisely" the categories of persons who may be charged for violating its provisions and states clearly the extent of its extraterritorial application.[10]

The Court found that Congress's choice to define precisely the persons covered by the FCPA was in contrast to an earlier draft that primarily relied upon conspiracy and complicity theories of liability.[11] Further, the Court found that Congress narrowly circumscribed the FCPA's application to foreign nationals acting within the United States out of concern to take a "delicate touch where extraterritorial conduct and foreign nationals were concerned."[12]

The Court also relied upon the presumption against extraterritorial application.[13] Even if it could be argued that the text and legislative history were not clear that the FCPA's reach over foreign nationals was limited, the Court rejected the government's position as it would "transform the FCPA into a law that purports to rule the world."[14] The Court found that the extraterritorial application of the ancillary offenses of aiding and abetting and conspiracy should be coterminous with the underlying criminal statute.[15] The Court's rejection of expansive interpretations of the conspiracy and complicity statutes as applied to the FCPA was at least in part due to a recognition of those laws' potential for overreach, noting that the conspiracy and complicity statutes are "among the broadest and most shapeless of American law, and may ensnare persons with only a tenuous connection to a bribery scheme."[16]

Hoskins not out of trouble yet though

The Court's ruling is narrow and leaves open the possibility that Hoskins could be found liable under the FCPA if he acted as an agent of the U.S. company.[17] The Court found that such an interpretation is squarely within the confines of the statute, consistent with legislative history, and there is no extraterritorial application that arises if Hoskins were an agent of the U.S. company acting entirely abroad.[18] In a concurring opinion, Circuit Judge Gerard E. Lynch noted that leaving intact the agency theory of jurisdiction while eliminating the reliance on accessory liability claims creates a perverse result – a foreign national who is an agent of a U.S. company may be found liable under the FCPA, but a foreign national who is the mastermind of the bribery scheme or directs a U.S. person to pay a bribe in a foreign jurisdiction may not be if none of the foreign national's actions occur in the U.S.[19]

Implications – FCPA enforcement against non-U.S. persons and companies likely to continue

Hoskins is unlikely to have a meaningful impact on continued FCPA enforcement against non-U.S. companies and persons.

First, the decision applies narrowly to accessorial liability and the majority of FCPA actions against foreign companies do not rely on accessorial liability as the sole basis for jurisdiction. Typically such cases fall into two categories: (i) actions against non-U.S. companies in overseas joint ventures with a domestic concern or issuer; and (ii) actions against non-resident non-U.S. nationals that oversaw or overlooked improper conduct by a U.S. subsidiary, business partner or agent.

Second, the decision leaves intact the FCPA's defined scope of liability for foreign nationals who: (i) act on American soil; (ii) are officers, directors, employees or shareholders of U.S. companies; or (iii) are agents of U.S. companies.

Third, Hoskins does not offer any protection against the growing trend of anti-corruption enforcement by non-U.S. regulators. Foreign regulators are no longer content to allow the U.S. alone to collect large penalties in anti-corruption investigations. In addition, the DOJ and SEC regularly coordinate enforcement efforts with its counterparts in the UK, France, Germany, Switzerland, the Netherlands, Brazil, and others. In recent months, the DOJ has announced its first coordinated settlements with authorities in France and Singapore. This trend of non-U.S. enforcement and cooperation between regulators is only likely to increase.

In short, although Hoskins limits U.S. jurisdiction when relying solely on statutes other than the FCPA, this decision does not alter the corruption risk calculus for companies operating in high-risk markets. U.S. and non-U.S. companies should continue to take efforts to detect, prevent, and remediate bribery-related conduct.

If you require further details please contact:

Ken Rivlin
Partner
New York – USA
Tel +1 (212) 610 6460
ken.rivlin@allenovery.com

Andrew Rhys Davies
Partner
New York – USA
Tel +1 (212) 610 6496
andrewrhys.davies@allenovery.com

David Esseks
Partner
New York – USA
Tel +1 (212) 610 6326
david.esseks@allenovery.com

Eugene Ingoglia
Partner
New York – USA
Tel +1 (212) 610 6369
eugene.ingoglia@allenovery.com

William E White
Partner
Washington – USA
Tel +1 (202) 683-3876
william.white@allenovery.com

Claire Rajan

Senior Counsel
Washington – USA
Tel +1 (202) 683 3869
claire.rajan@allenovery.com

Tracy French

Associate
Washington – USA
Tel +1 (202) 683 3866
tracy.french@allenovery.com

Alexander Calthrop

Associate
New York – USA
Tel +1 (212) 756 1155
alexander.calthrop@allenovery.com

Melinda Bothe

Associate
Washington – USA
Tel +1 (202) 683 3880
melinda.bothe@allenovery.com

[1] See Stanford Law School Foreign Corrupt Practices Act Clearinghouse, Key Statistics.

[2] See id., Enforcement Actions.

[3] U.S. v. Marubeni Corp., Deferred Prosecution Agreement, 12-cr-00022 (Jan. 17, 2012).

[4] Id.

[5] Id. at *6.

[6] Id. at *6 – 7.

[7] Id. at *7.

[8] Id. at *8.

[9] 18 U.S.C. §§ 2(a) and 371.

[10] Id. at *4.

[11] Id. at *5.

[12] Id. at n. 1.

[13] Id. at *44.

[14] Id. at *43.

[15] Id. at *65 – 70.

[16] Id. at *59.

[17] Id. at *68.

[18] Id. at *65.

[19] Id. at n.1.

Key contacts

This note provides guidance as to legal trends and developments only, and should not be relied upon without seeking specific legal advice. If you do require legal advice in respect of a specific matter mentioned in this note, please do not hesitate to contact us.

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Tim House
Partner
New York – USA
Tel +1 212 610 6426
tim.house@allenovery.com

Karen Birch
Counsel and Head of Litigation Know-How and Training
London – UK
Tel +44 20 3088 3737
karen.birch@allenovery.com

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