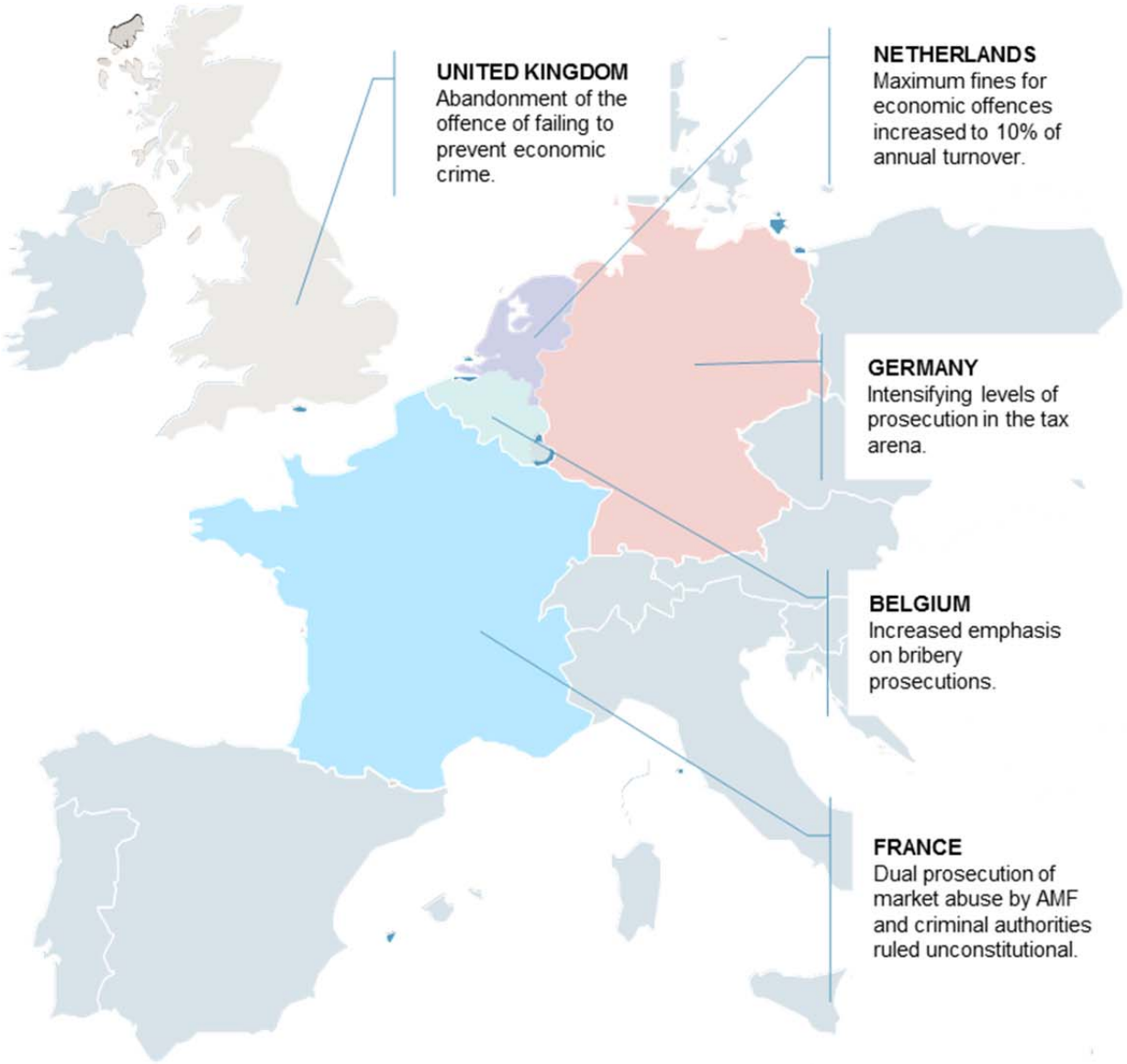
ALLEN & OVERY

White Collar Crime in Europe Themes and Trends

November 2015

White Collar Crime in Europe Highlights



White Collar Crime in Europe Key Themes

Bribery and corruption

- The United Kingdom Serious Fraud Office (**SFO**) achieved its first convictions under the UK Bribery Act 2010. In December 2014, a jury found Stuart Stone guilty of bribery and Gary West guilty of being bribed (amongst other fraud offences). Stone was sentenced to six years' imprisonment and West was sentenced to four years' imprisonment on their bribery charges (although West received an overall sentence of 13 years' imprisonment for other offences). The section 7 offence remains untried.
- In December 2014, the United Kingdom Government published its first anti-corruption plan, which contained 66 action points in support of the Government's strategic response to corruption.
- The plan stated (among other things) that the Ministry of Justice would examine the case for a new corporate offence of failing to prevent economic crime (similar to the failure to prevent bribery offence at section 7 of the Bribery Act 2010) and the rules on establishing corporate criminal liability more widely. However, in September 2015, the Government revealed that it did not intend to pursue this work any further *"as there have been no prosecutions under the model BA 2010 offence and there is little evidence of corporate economic crime going unpunished."*
- In August 2015, the National Crime Agency (**NCA**) set up a dedicated International Corruption Unit (bringing together personnel from the Metropolitan Police, City of London Police and NCA). The team will be the central point in the United Kingdom for the investigation of international corruption.
- France has increased the maximum penalties for a range of corruption offences. Maximum fines for individuals have been increased from €150,000 to €1 million. Maximum fines for companies have been increased from €750,000 to up to €5 million. Maximum periods of imprisonment are unchanged.
- The French National Assembly has voted to impose a duty of care upon companies, which, preparatory works suggest, will include a duty of care to prevent corruption. If adopted by the Senate, the bill will impose a legal obligation on certain companies to implement internal anti-corruption policies. Breach of this duty may give rise to civil liability for the company.
- In this context, France's Central Service for Prevention of Corruption (*Service Central de Prévention de la Corruption* (**SCPC**)) issued guidelines on 31 March 2015 to foster *"a culture of prevention in companies"*. Although not binding, the guidelines may provide a benchmark to assess the adequacy of a company's anti-bribery policies. A draft bill in France is expected to create an Independent Anti-Bribery Authority which will oversee the implementation of anti-bribery compliance measures by companies.
- On 1 October 2015, the Belgian College of Prosecutors General issued an instruction for prosecutors to pursue cases of bribery and corruption (both public and private) more vigorously. Under the instruction, bribery and corruption offences (particularly those involving foreign officials) are to be prosecuted as a matter of priority. Depriving offenders of the proceeds of bribery and corruption is an additional priority. In Belgium, bribery and corruption cases cannot be settled prior to trial without the consent of a prosecutor general.
- The German Federal Government has proposed a new offence of bribery in the healthcare sector. This proposal will make prosecution of bribery in the healthcare sector easier. Previously, not all aspects of bribery relating to commercial practices in the healthcare sector could be prosecuted.

Money laundering

- The UK Government has initiated a review into the Suspicious Activities Reporting (**SARs**) regime. The review will look into how the consent and reporting regime under the Proceeds of Crime Act 2002 (**POCA**) can be improved and/or made more efficient.
- POCA has been amended so that any person who in good faith makes an authorised disclosure under the consent and reporting regime has statutory immunity from any civil claims relating to that disclosure.
- The English Court of Appeal in *Rogers* has interpreted the jurisdictional scope of United Kingdom money laundering offences to "laundering" conduct that occurs entirely outside the United Kingdom where a significant part of the underlying criminality took place in the UK and had harmful consequences in the UK. Previously, it was thought that the money laundering offences required the act of money laundering itself to have taken place in whole or in part in the UK.
- France has enacted legislation to make the establishment of money laundering offences easier. The French Criminal Code now contains a rebuttable presumption that goods or income derived from transactions for which there is no apparent explanation constitute the proceeds of crime. Previously, prosecutors needed to prove all elements of the underlying offence before they could establish money laundering.
- Belgium has enacted a number of amendments to its money laundering legislation (*the* Law *of 11 January 1993*). The amendments have expanded the money laundering regime to capture the proceeds of any *"serious tax fraud, whether organised or not"*. Previously, only the proceeds of *"serious organised tax fraud"* fell within the money laundering regime. More recent amendments have expanded the money laundering reporting regime to include agents providing financial planning services (among others).
- Recent decisions of the Belgian Supreme Court (*Cour de Cassation/Hof van Cassatie*) have confirmed that the prosecution is only required to prove knowledge of the illegal origin of funds in order to establish an offence of money laundering. It is not necessary that the money launderer know the specific offence from which the funds were derived.

Market offences

- The UK Financial Services (Banking Reform) Act 2013 has created a criminal offence for senior managers of financial institutions who have taken a decision that causes their institution to fail. The offence, punishable by up to seven years' imprisonment, comes into force on 7 March 2016.
- Belgium has introduced a criminal offence of intentionally manipulating a benchmark index. This offence, enacted in the aftermath of the global investigations into LIBOR, is punishable by up to two years' imprisonment and a fine of up to €60,000 for individuals. The maximum fine for corporates is €288,000.
- Tom Hayes was convicted by a jury of conspiracy to defraud and sentenced to 14 years' imprisonment in the first LIBOR prosecution in the United Kingdom. The judge's directions on dishonesty are likely to limit a defendant's ability to avoid conviction by adducing evidence of market practice (whether in the financial markets or elsewhere).
- In France, a draft bill has been introduced to significantly increase maximum penalties for insider trading, stock price manipulation and the disclosure of false information. Under the proposals, maximum fines for individuals will be increased from €1.5 million (or ten times profits made by the offence) to €15 million (or ten times advantages drawn from the offence). Maximum periods of imprisonment will be increased from two years to five years. Criminal courts will have a power to impose a financial penalty on a corporate of up to 15% of the entity's net turnover.
- The parallel prosecution of market abuse offences by regulatory and criminal authorities has been declared unconstitutional by the French Constitutional Council. Prior to the decision, the same person could be prosecuted before the criminal courts and subjected to regulatory enforcement action by the Autorité des Marchés Financier (**AMF**) for market abuse in relation to the same set of facts. The French Parliament is reviewing its response to the decision.
- In Belgium, parallel prosecution by regulatory and criminal authorities is permitted under certain conditions. However, a statute has significantly reduced the possibility of pursuing parallel prosecution in tax matters. Commentators have suggested that this exclusion of parallel prosecution should extend to non-tax matters as well after the European Court of Human Rights ruling in the *Grand Stevens* case on the Italian market abuse regime.
- The German Banking Act (*Kreditwesengesetz*) has been amended to create a criminal offence for managers of banks and insurance companies who cause a threat to the existence of their institution by, for example, failing to implement a sustainable business strategy and/or appropriate risk management processes. The offence is punishable by up to five years' imprisonment.
- The German Securities Trading Act (*Wertpapierhandelgesetz*) has been amended to reflect the contents of the Market Abuse Regulation and the Directive on criminal sanctions for market abuse. The amendments which clarify details of existing criminal behaviour such as insider trading will take effect from 3 July 2016.

Sentencing

- In 2015, the SFO and the Financial Conduct Authority (**FCA**) each secured some of the highest criminal sentences in their history. The SFO obtained a sentence of 14 years' imprisonment for Tom Hayes (four years higher than the statutory maximum). The FCA obtained a ten-year sentence for Phillip Boakes, who pleaded guilty to a series of offences relating to a fraudulent "Ponzi" investment scheme which caused losses of over £2.5 million.
- In Germany, the maximum fine that can be imposed on a company for the criminal conduct of its legal representatives and/or management has been increased from €1 million to €10 million. Under German law, only natural persons can be liable for criminal offences (although debate continues over whether this should remain the legal position).
- In the Netherlands, legislation has been enacted which raises the maximum sentences that can be imposed on both individuals and companies for a variety of offences (*verruiming mogelijkheden bestrijding financieel-economische criminaliteit*). For companies, the maximum fine for many economic offences is now 10% of the company's turnover. However, it is rare for a court to impose a fine near the legal maximum limit.

Settlement

- The SFO has announced its intention to conclude two Deferred Prosecution Agreements (**DPAs**) before the end of the year. In the absence of a lower threshold for corporate criminal liability, it had been doubted whether there would be any take-up of DPAs.
- The president of the Paris First Instance Court has encouraged prosecutors and judges to settle more criminal cases through the use of the French equivalent of "plea bargaining" (*comparution sur reconnaissance préalable de culpabilité*). Plea bargaining has been scarcely used by companies in white collar crime offences, due to the requirement for the corporate to acknowledge culpability.
- The Belgian Government has recently proposed legislation that would significantly modify Belgium's system of criminal settlements. The modifications, if enacted, would require that the defendant acknowledge guilt as part of settlement. The settlement would be recorded on the defendant's criminal record. Settlement would not be available once a first instance judgment was made on the defendant's criminal liability (previously settlement was available at any time until a final non-appealable judgment).
- The same proposals also seek to introduce a plea bargaining procedure into Belgian law, which would be available to both individuals and legal entities, under certain conditions. This would concern only facts that could lead to a sentence of up to five years' imprisonment. The agreement would have to be approved by a court. The court may accept or refuse the agreement, but may not modify it.
- Recent criminal settlements between the Dutch Public Ministry (*Openbaar Ministerie*) and corporate offenders have sparked a debate over the transparency of the settlement process and the need for formal settlement guidelines for the Public Ministry and greater judicial oversight over the settlement process.

Prosecutorial attitudes and resourcing

- The Conservative Government has recently declared the United Kingdom 'open for business' and signalled a possible retreat from bullish enforcement. In contrast to these comments (and the Government's abandonment of the offence of failing to prevent economic crime), the SFO has publicly expressed the necessity for the United Kingdom to adopt vicarious liability as a means of prosecuting corporates.
- In Belgium, a draft law has been introduced (*Proposition de loi/Wetsvoorstel*) that will make it more likely that corporates and individuals will be jointly liable under the criminal law for the same underlying conduct. As Belgian law currently stands, the interplay between the criminal liability of corporate entities and the criminal liability of individuals is complex and often means that only the person (corporate or individual) who has committed the most material wrongdoing is convicted of the offence.
- The SFO has also publicly expressed its scepticism of corporate claims to legal privilege and its concern that internal investigations have the capacity to interfere with its ability to compile evidence of criminal conduct within corporates. The English High Court has dismissed a legal challenge to the SFO's refusal to allow company lawyers to attend SFO interviews of company employees.
- In January 2015, a District Court in the Netherlands ruled that an internal investigation report drafted by a Dutch law firm did not attract lawyers' legal privilege. Prior to the decision, the prevailing view was that an investigation conducted by lawyers to gather relevant facts for litigation and/or advise a client would be privileged. The decision (which was based on highly unusual facts) has been heavily criticised. It has also sparked a widespread debate in the media and by politicians on the use of legal privilege, particularly by corporations.
- In its 2015 Summer Budget, the UK Government announced plans to set up within HM Treasury a new Office of Financial Sanctions Implementation (**OFSI**) and legislate to increase penalties for sanctions breaches. OFSI will be tasked with providing *"a high quality service to the private sector, working closely with law enforcement to help ensure that financial sanctions are properly understood, implemented and enforced*." The OFSI is expected to be operational by the beginning of April 2016.
- Fifty additional prosecutor's positions have been created at the National Financial Prosecution Office in France (**PNF**) (the national body dedicated to investigating complex cases related to market offences, tax fraud and serious financial crime). In July 2015, the Head Prosecutor declared one of the PNF's primary objectives to be increasing the speed of prosecutions.
- In Belgium, prosecutors are focusing more intensively on financial intermediaries when investigating and prosecuting fraud matters. While it is often difficult for them to pursue the actual fraudsters (who may be abroad, difficult to locate or have no traceable assets), the entities who make transactions possible are generally well-established companies. Charges are typically based on aiding and abetting, or on failures in know-your-client (**KYC**) due diligence.
- Tax evasion (including the tax treatment of "Cum Ex dividend trades") continues to be a focus of German prosecutors. Reports to tax authorities for false tax declarations have increased. A number of high-profile individuals have received sentences of imprisonment for tax fraud. In September 2015, 300 tax investigators searched a foreign bank's premises in Germany in connection with allegedly unpaid taxes of up to €450 million.

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