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General Chapters:

Country Question and Answer Chapters:

Past the Tipping Point: International Cooperation and Competition in Cross-Border Investigations

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"Global" or "cross-border" regulatory investigations are not new. Historically, the field has been led by agencies from the United States, such as the Department of Justice ("DOJ") and the Securities and Exchange Commission ("SEC"). Authorities in Europe, the Middle East, Asia and Latin America have often cooperated with U.S.-led investigations by providing access to information and evidence, either informally or through formal mechanisms such as bilateral or multilateral mutual legal assistance treaties or memoranda of understanding.[1] On occasion, non-U.S. agencies have also brought their own enforcement or regulatory actions related to self-identified misconduct or problematic conduct flagged by the U.S. authorities.

In recent years, however, a clear trend has emerged. International cooperation in cross-border investigations has increased markedly, and non-U.S. regulators, particularly those in Europe and Asia, have played a more prominent role in advancing such investigations and leading their own. Senior law enforcement and regulatory officials in the U.S. and around the world have noted the change. In June 2013, Mythili Raman, then the Acting Assistant Attorney General for the DOJ's Criminal Division, said that the DOJ is "cooperating with foreign law enforcement on foreign bribery cases more closely today than at any time in history".[2] Her remarks were echoed by Jeffrey Knox, the Chief of the Fraud Section of the DOJ's Criminal Division, who recently emphasised "how much international cooperation and attention to anti-corruption has just exploded in the last several years".[3] Likewise, the SEC's Enforcement Director, Andrew Ceresney, remarked in November 2013 that "[o]ver the past five years, [the SEC] experienced a transformation in [its] ability to get meaningful and timely assistance from [its] international partners".[4] Ceresney said he was personally working on an investigation that involved "cooperation from a country that has never before provided any meaningful assistance" to the SEC.[5]

U.S. coordination with European and other authorities that employ aggressive investigative techniques — dawn raids, for instance — maximises pressure on entities and individuals that are the subjects of cross-border investigations. It also raises potential concerns. For example, authorities outside the U.S. may not honour assertions of privilege that would be respected in the U.S.,[6] or they may collect evidence in ways that raise constitutional concerns in the U.S. Similarly, aggressive prosecutorial tactics and the threat of outlandish fines in the U.S. often force firms into a catch-22, whereby they must choose between satisfying U.S. authorities' demands for documents and other information and potentially breaching local data protection laws and and other privacy regulations.

In addition to providing more meaningful cooperation to U.S. authorities in recent years, European and Asian regulators now frequently initiate and lead their own investigations, regardless of any U.S. action, including where the conduct in question occurs outside their own borders. For example, the U.K. Bribery Act of 2010 broadly empowers Britain to prosecute foreign companies for failing to prevent bribery occurring outside the U.K., as long as the company carries on even part of any business within the U.K.[7] As global regulators jostle for position, an investigation in one jurisdiction can easily spread to others. Regulatory competition can also amplify parallel proceedings, increasing the pace and complexity of investigations, the likelihood of charges or other regulatory action, and the severity of sanctions. In sum, the trend of international cooperation and assertiveness translates into a more perilous regulatory environment for international firms. Recent investigations and enforcement actions relating to anti-corruption, economic sanctions, rate rigging and tax evasion illustrate these trends.

Anti-Corruption Enforcement

Ongoing investigations of alleged bribery at British pharmaceutical giant GlaxoSmithKline plc ("GSK") epitomise recent trends in global investigations. In July 2013, investigators from the Chinese Ministry of Public Security publicly accused senior officials from GSK's China operation of bribing doctors, officials and others to bolster drug sales and prices in China.[8] GSK initially denied the allegations, stating that an internal investigation failed to substantiate them, but weeks later acknowledged that certain GSK executives appeared to have broken Chinese law.[9] Less than two months later, the DOJ reportedly opened a parallel investigation into whether GSK violated the U.S. Foreign Corrupt Practices Act ("FCPA").[10]

In May 2014, Chinese officials charged the former head of GSK's China unit, Mark Reilly, a British national, and dozens of others with running a "massive bribery network".[11] Britain's Serious Fraud Office ("SFO") then launched its own criminal inquiry, and has stated that it is working together with Chinese authorities.[12] Such Chinese/British cooperation is unprecedented.[13] In the U.S., the DOJ continues to investigate allegations of bribery by GSK in China, and the SEC has opened its own investigation. Meanwhile, allegations of bribery have also emerged in Syria, Iraq, Jordan, Lebanon and Poland.[14]

Another notable anticorruption investigation triggered by authorities outside the U.S. involved Siemens AG, the German electronics and engineering conglomerate. In November 2006, German police carried out a series of dawn raids on Siemens and its employees. Thereafter, the DOJ and the SEC launched parallel

investigations, working together with German authorities.[15] The combined investigations uncovered corrupt payments in numerous countries, including Iraq, Argentina, Venezuela, Bangladesh, China, Israel, Nigeria, Russia, Vietnam and Mexico. In December 2008, Siemens reached a joint settlement with the DOJ, the SEC and the Office of the Prosecutor General in Munich. Together with a previous partial settlement with the Office of the Prosecutor General, Siemens paid a total of $1.6 billion in fines and disgorgement to resolve the matter.[16]

International cooperation in the anticorruption arena is set to continue, as more jurisdictions implement and begin to prosecute violations of laws modelled on or similar to the FCPA. For example, Brazil's Clean Company Act went into effect at the beginning of 2014.[17] In Canada, on May 23, 2014, Nazir Karigar, the first person charged under Canada's Corruption of Foreign Public Officials Act, was sentenced to three years in prison in connection with a conspiracy to bribe an Indian Cabinet Minister and Air India officials to secure a multi-million-dollar supply contract for facial recognition software.[18] More recently, the Royal Canadian Mounted Police charged two Americans and a British national for their alleged roles in the same conspiracy.[19]

Economic Sanctions

The trend toward international cooperation and regulatory assertiveness can also be seen in the economic sanctions realm. Various countries and international bodies have long imposed sanctions that prohibit or restrict trade with other countries or persons for political reasons or to achieve some policy objective. In the last few years, however, regulators and law enforcement officials have begun to enforce economic sanctions much more aggressively. This is especially true in the U.S., but other countries have provided significant cooperation and begun to pursue their own enforcement objectives.

The recent action against HSBC Holdings plc and HSBC Bank USA N.A. (together, "HSBC") exemplifies the trend of aggressive economic sanctions enforcement and international cooperation. HSBC disclosed in February 2012 that it was cooperating with investigations by the DOJ and the U.S. Treasury Department's Office of Foreign Asset Control ("OFAC") concerning potential money laundering and sanctions violations relating to transactions involving Iran.[20] In July 2012, a U.S. Senate investigation found that HSBC's anti-money laundering ("AML") controls were weak, particularly at its Mexico affiliate, and that key data was stripped out of records of transactions with sanctioned countries, including Iran, North Korea and Sudan.[21] Soon after the Senate's findings were made public, Mexico's National Securities and Banking Commission fined HSBC $28 million for failing to respond adequately to suspicious transactions,[22] and South Korea's Financial Supervisory Service announced that, based on U.S. developments, it would also investigate whether HSBC facilitated money laundering.[23] Argentine officials also fined HSBC for money laundering violations on at least two occasions in 2012 ($6 million and $16 million, respectively).[24]

On August 25, 2012, the New York Times reported that HSBC had contacted the DOJ in an effort to obtain a settlement, and that the Manhattan District Attorney's Office ("DA") was also investigating potential sanctions violations by the bank.[25] In December 2012, HSBC reached settlements involving the DOJ, the Treasury Department (including OFAC, the Financial Crimes Enforcement Network ("FinCEN") and the Office of the Comptroller of the Currency ("OCC")), the Manhattan DA, the Board of Governors of the Federal Reserve System ("Federal Reserve") and HSBC's home regulator, the Financial Services Authority ("FSA"), for compliance and AML failures that caused at least $881 million in drug proceeds to be laundered and approximately $660 million in transactions with sanctioned entities to be processed through HSBC. Under the terms of the settlement, HSBC entered into a deferred prosecution agreement with the DOJ for violations of federal AML and sanctions laws, and with the Manhattan DA for violating state law by falsifying the records of New York financial institutions; undertook certain AML and compliance enhancements; replaced most of its senior management; clawed back bonuses given to senior AML and compliance officers; deferred bonuses for senior managers during the term of the DPA; and paid over $1.9 billion, including $665 million in civil penalties ($500 million to the OCC and FinCEN and $165 million to the Federal Reserve) and forfeiture of $1.256 billion in ill-gotten gains (which also satisfied a $375 million assessment by OFAC).[26]

The FSA agreed to assist the Federal Reserve with supervising HSBC's compliance with the settlement, noted that it had coordinated and worked closely with U.S. authorities, and required HSBC to employ an independent monitor to oversee compliance with U.K. AML and sanctions requirements.[27]

Rate Rigging

A medley of rate rigging investigations and enforcement actions by regulators in various countries highlights the increasingly global nature of investigations, as well as the degree to which coordination and competition between agencies maximises pressure on firms that are subject to investigation. In early 2011, the press reported the existence of investigations by U.S. regulators, including the DOJ, the SEC and the Commodity Futures Trading Commission ("CFTC"), as well as Japanese authorities, of banks' potential manipulation of Libor, a key interest rate benchmark that underpins hundreds of trillions of dollars of derivatives.[28] Other regulators around the world subsequently opened their own investigations, including the FSA, the Monetary Authority of Singapore ("MAS"), Switzerland's Financial Market Supervisory Authority ("FINMA"), the Australian Securities and Investment Commission ("ASIC"), the Hong Kong Monetary Authority ("HKMA"), various state attorneys general in the U.S., and competition authorities in various jurisdictions, including Europe, South Korea and Canada.[29]

To date, global regulators have reached settlements worth billions of dollars in cases relating to Libor and Euribor, a similar benchmark, including with Barclays Bank PLC ("Barclays") ($450 million total settlement with the DOJ, the CFTC and the FSA), UBS AG and UBS Securities Japan Co., Ltd. ("UBS") ($1.52 billion total settlement with the DOJ, the CFTC, the FSA and FINMA), The Royal Bank of Scotland plc and RBS Securities Japan Limited ($1.14 billion total settlement with the DOJ, the CFTC, the FSA and the European Commission ("EC")), ICAP Europe Limited ($87.4 million total settlement with the CFTC and the FCA), Rabobank ($1.07 billion total settlement with the DOJ, the CFTC, the U.K. Financial Conduct Authority (the "FCA," a successor agency of the FSA) and the Dutch Public Prosecution Service), Deutsche Bank AG ($983.7 million settlement with the EC), Société Générale S.A. ($604.7 million settlement with the EC), JPMorgan Chase & Co. ($108.4 million settlement with the EC), Citigroup Inc. ($95 million settlement with the EC), RP Martin Holdings Limited and Martin Brokers (UK) Limited ($2.4 million total settlement with the CFTC, the FCA and the EC) and Lloyds Banking Group plc and Lloyds Bank plc ($369 million combined settlement with the DOJ, the CFTC and the FCA).[30] It is difficult to know whether these eye-popping penalties are the result of principled calculations of ill-

gotten gains, or whether they are products of competition and duplication on the part of multiple prosecuting agencies.

Libor-related investigations and prosecutions continue, and competition between regulators has increased the pace and occasionally altered the nature of enforcement proceedings. For example, in December 2012, following several years of investigation, U.S. authorities reportedly sought to question a British trader, but the SFO, which began its investigation much later, in July 2012, denied the DOJ's request. The SFO then arrested the trader on fraud charges. The DOJ retaliated by filing a sealed complaint against the trader, although he is unlikely to be extradited to the U.S. if he settles with the SFO, given the U.K.'s double jeopardy rules.[31] It has been reported that the DOJ and the SFO subsequently reached an informal agreement to divide up Libor cases against individuals, but continued tension could be seen as recently as early 2014, when the SFO pressed charges against a former Barclays trader who was cooperating with the DOJ, as well as three former Barclays traders who were based in the U.S.[32]

Global regulators are also investigating possible manipulation of other financial benchmarks, including in the world's largest financial market, the roughly $5-trillion-a-day foreign exchange ("FX") market. In June 2013, Bloomberg reported that traders at prominent global financial firms were front-running client orders and manipulating the WM/Reuters currency rates used to set values in the FX market, and that the FCA was reviewing the conduct.[33] In October 2013, media reports suggested that other regulators had opened parallel inquiries, or were at least monitoring other regulators' investigations, including the DOJ, the CFTC, Germany's Federal Financial Supervisory Authority ("BaFin"), the MAS, the HKMA, FINMA, the Swiss Competition Commission, and the Competition section of the EC.[34] FX probes have continued to spread, including, in the U.S., to New York's Department of Financial Services ("DFS"),[35] the SEC[36] and two federal banking regulators, the Federal Reserve and the OCC.[37] Various agencies inside and outside the U.S. have also reportedly launched or are considering probes of other benchmarks, including gold and silver fixes (the CFTC, BaFin and the FCA),[38] as well as benchmarks for interest rate swaps (the CFTC and the FCA)[39] and crude oil (the Competition section of the EC, the Federal Trade Commission, the CFTC and the FCA).[40]

The ongoing rate rigging probes present the same issues of international regulatory cooperation and competition — and acceleration and amplification of parallel investigations — as the original Libor probes.[41] In February 2014, Britain's Treasury Select Committee urged the FCA to aggressively investigate potential FX manipulation.[42] The following month, the chief executive of the FCA implicitly criticised the pace at which Asian authorities were looking into FX manipulation, in contrast to U.S. and U.K. regulators.[43] Thereafter, HKMA announced that it was requiring several banks to conduct internal investigations, and ASIC and New Zealand's Commerce Commission announced their own probes.[44]

Another illustrative example of regulatory coordination and competition again involves U.S. and U.K. authorities. In early 2014, the DOJ conducted "voluntary" interviews with a number of U.K.-based currency traders with respect to possible FX manipulation. The FCA insisted on attending the interviews, and required that they occur "under compulsion", raising U.S. constitutional concerns in the event that any of the interviewees face prosecution in the U.S.[45] A few months later, the SFO launched its own criminal FX investigation, setting the stage for further competition with the DOJ over which agency will lead the investigation.[46]

Tax Evasion

Switzerland and the Swiss banking industry have long faced international pressure to soften bank secrecy laws and rein in alleged tax evasion by cross-border private banking clients. In recent years, critics have succeeded in rolling back Swiss bank secrecy through coordinated and parallel diplomatic, investigative and prosecutorial attacks. On the diplomatic front, for example, in 2009, member states of the G20 threatened to blacklist countries that are perceived as tax havens, including Switzerland, to induce them to sign agreements adopting international standards promulgated by the Organisation for Economic Co-operation and Development ("OECD") for the automatic transfer of information about cross-border clients.[47] In 2014, Switzerland agreed to adopt the OECD standards.[48] In the meantime, various countries have also negotiated their own bilateral agreements with Switzerland to obtain information regarding or back-taxes owed by cross-border clients.[49]

On the enforcement front, coordinated and parallel actions by regulatory and law enforcement authorities in a number of countries have inflicted significant pressure and harsh consequences on financial institutions with cross-border private banking businesses based in Switzerland. Notably, Swiss authorities have cooperated and even pursued their own enforcement actions in some cases. Actions against UBS illustrate the prevailing trend. In 2007 and 2008, a former private banker at UBS named Bradley Birkenfeld provided the DOJ, the Internal Revenue Service ("IRS") and the SEC with information regarding UBS' alleged facilitation of tax evasion by U.S. citizens, causing U.S. authorities to open investigations.[50] At the same time, the Swiss Federal Banking Commission ("SFBC") — a predecessor agency of FINMA — opened its own investigation, ultimately sanctioning UBS in December 2008 for failing to adequately manage legal and reputational risks associated with its U.S. cross-border business. The SFBC also provided administrative assistance to the SEC and the DOJ in connection with their investigations.[51] In February 2009, UBS reached a landmark settlement with the DOJ and the SEC, pursuant to which UBS entered into a deferred prosecution agreement, admitted to helping U.S. private banking clients evade taxes and paid a total of $780 million. To avoid a U.S. indictment of UBS, FINMA ordered UBS to hand over information about a limited set of U.S. cross-border clients.[52] In August 2009, UBS, the IRS and the Swiss government entered into another agreement, pursuant to which UBS provided information about additional U.S. clients.[53]

Other countries subsequently launched similar enforcement actions against UBS. For example, French authorities opened a criminal investigation and raided UBS offices in Paris and several other cities in 2012.[54] Thereafter, France's banking regulator, the Autorité de Contrôle Prudentiel ("ACP"), opened an investigation that ended in June 2013 with a €10 million fine against UBS for deficient controls against tax fraud and illegal sales practices.[55] The French criminal probe has widened, and in July 2014, French authorities ordered UBS to post bail of €1.1 billion.[56] Swiss authorities are reportedly cooperating with the French investigation.[57] German authorities have also launched criminal investigations of UBS. One was initiated in 2012 by prosecutors in the state of North Rhine-Westphalia, who acquired potentially stolen information identifying German account holders.[58] In July 2014, UBS settled that investigation for €300 million.[59] Another was launched in 2012 by prosecutors in the state of Baden-Wuerttemberg in response to suspicious funds transfers. It remains open.[60] In June 2014, Belgian prosecutors carried out raids and charged the head of UBS' Belgian unit with involvement in tax fraud and "organised crime".[61]

Like UBS, HSBC faces tax-related enforcement actions on multiple fronts. In 2008, an employee of HSBC's Swiss subsidiary named Hervé Falciani gave French authorities information purporting to identify tens of thousands of private banking clients.[62] The French reportedly provided authorities in select countries with information about their own nationals who appeared on Falciani's list, including Spain, Greece, the U.K. and the U.S. In April 2013, French authorities began formally investigating whether HSBC sold products that were designed to evade French taxes.[63] Belgian law enforcement officials are also investigating HSBC and carried out a series of raids in October 2013.[64] In March 2013, Argentine officials charged HSBC with helping third parties to engage in tax evasion and money laundering.[65] Finally, HSBC is reportedly one of more than a dozen banks under criminal investigation by the DOJ.[66]

Credit Suisse Group AG ("Credit Suisse"), too, has been the subject of investigations in various jurisdictions. In 2006, Brazilian authorities launched a probe that led to the arrests of more than a dozen Credit Suisse bankers.[67] Thereafter, in 2010, German prosecutors in the state of North Rhine-Westphalia acquired potentially stolen information identifying German account holders and began investigating whether Credit Suisse facilitated tax evasion.[68] Credit Suisse settled that matter for €150 million in 2011. Prosecutors in the German state of Rhineland-Palatinate launched a similar investigation in April 2013, which remains open.[69]

In February 2011, on the same day that German authorities raided the homes of Credit Suisse bankers in connection with the North Rhine-Westphalia investigation, federal prosecutors in Alexandria, VA indicted several Credit Suisse bankers for allegedly facilitating tax evasion.[70] In July 2011, it was reported that Credit Suisse itself was a target of the DOJ's ongoing criminal investigation.[71] In February 2014, the SEC initiated a related enforcement action against Credit Suisse for allegedly acting as an unregistered broker and adviser to its cross-border clients in the U.S. Credit Suisse settled the SEC action for $196 million.[72] The following month, New York's DFS began investigating whether Credit Suisse lied about engineering tax shelters.[73] Ultimately, Credit Suisse resolved the DOJ and DFS investigations in May 2014 by pleading guilty to conspiring to aid U.S. citizens in filing false tax returns and paying a total of $2.6 billion, including $1.8 billion to the DOJ, $100 million to the Federal Reserve and $715 million to the DFS.[74] As in the UBS case, FINMA initiated its own proceeding against Credit Suisse for failing to adequately manage legal and reputational risks associated with its U.S. cross-border business. In September 2012, FINMA required the bank to take corrective action.[75]

Other Swiss banks are likely to face coordinated or parallel enforcement actions by international regulators. In the U.S., for example, approximately a dozen Swiss banks are still the subjects of criminal tax evasion investigations by the DOJ.[76] Additionally, with the encouragement of the Swiss Federal Department of Finance, over 100 banks are reportedly participating in a voluntary disclosure programme announced by the DOJ in August 2013, pursuant to which many will likely pay substantial penalties and provide the DOJ with substantial information concerning clients and employees involved in their cross-border businesses in exchange for leniency in the ongoing U.S. probe.[77]

Conclusion

Increased cooperation and competition among regulators in different jurisdictions is the new normal in cross-border investigations. While there will continue to be occasional points of tension as enforcement authorities and governments pursue their own regulatory and political objectives in connection with such investigations, the coordinated enforcement efforts of the past few years represent a turning point. Having learned lessons, developed relationships and honed formal and informal means of sharing information, global regulators are better prepared — and more eager — to work together and move aggressively in an increasingly interconnected business world. International firms and defence attorneys would be wise to prepare for this brave new world.

Note

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