

International Co-operation in Investigations

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In recent years, the rise of multi-jurisdictional investigations and corresponding multi-jurisdictional settlements has changed the enforcement landscape. Notable examples include the tri-lateral settlements of Odebrecht and Rolls-Royce, at the end of 2016 and beginning of 2017, respectively. More recently, Airbus has been under the scrutiny of the UK Serious Fraud Office (“SFO”), France’s Parquet National Financier (“PNF”) and the US Department of Justice (“DOJ”). But why the rise in co-operation, and what does it mean for the future of investigation and enforcement?

The globalisation of financial crime

Two main factors are contributing to the increasingly international nature of crime. Firstly, the criminal conduct itself is becoming more global, routinely spanning a number of countries; and secondly, the government is reaching further when legislating in this field, creating more offences with extra-territorial effect.

The international nature of criminal conduct, driven by the international nature of business, has profoundly affected the criminal landscape. The increasing globalisation of corruption and financial crime has been evident for some time. Increasing international trade, coupled with the rise in technology and the ease of communication and travel have made the world a much smaller place than it once was. This, in turn, has resulted in an uptick in criminal conduct which is not simply confined to one jurisdiction.

Aside from the spread of more “traditional” financial crimes such as bribery, new developments in the nature of criminal activity mean that cross-border crimes are increasingly common. A prime example of this is cybercrime. Instances of cyberattacks have skyrocketed in recent years – notable examples include the notorious Panama and Paradise Papers – yet many of these attacks originate outside the jurisdiction of their target, hampering investigation. Co-operation is needed between the investigating enforcement agency and the agencies which may, in practice, have far better access to the necessary evidence.

Moreover, the advent of new legislation designed to place the burden on companies to prevent crimes associated with them, regardless of where in the world they are perpetrated – the so-called

“failure to prevent” offences – is expanding the government’s enforcement reach. For example, the government’s guidance on the Criminal Finances Act 2017 (which introduces offences of failure to prevent facilitation of tax evasion) states its basis as being a desire to not let tax evasion in foreign jurisdictions go unpunished due to a lack of resources. The extra-territoriality of these offences represents the government’s recognition that crime is often no longer confined within one border.

International co-operation

Cross-border criminal activity is an obvious catalyst; but the ways in which agencies interact with each other have changed considerably in recent years. While traditionally cross-border legal assistance would have been in the form of a cumbersome mutual legal assistance treaty, investigators are increasingly embracing more informal ways of communicating with each other: messaging apps such as WhatsApp have been used in high profile investigations to ask questions and share information quickly and efficiently¹. Quarterly meetings of the OECD in Paris facilitate face-to-face meetings between prosecutors, while the DOJ and SEC have also played their part in fostering international co-operation by providing training sessions to prosecutors from around the world on how they conduct investigations.

Brexit

Clearly there is scope for Brexit to dampen this evolving spirit of co-operation. David Green CB QC, the outgoing head of the SFO, has suggested in recent months that Britain’s departure from the EU could affect useful mechanisms for international co-operation such as European Arrest Warrants, mutual recognition of confiscation orders and Britain’s membership of Europol. Clearly, losing access to these tools will slow down the transfer of information and ease of interaction between UK authorities and those on the continent, and alternatives will need to be found to maintain international co-operation.

However, it is not all doom and gloom: as discussed, prosecutors are finding increasingly innovative ways to interact without relying on formal channels. It is unlikely that co-operation will simply cease on Brexit. To date, it is the SFO’s relationship with agencies such as the DOJ that has had the most impact. Multi-jurisdictional investigations and enforcement are here to stay, and will get ever closer as relationships develop and connections become stronger.

¹ Speaking at GIR Live in Washington, D.C. last year, Eduardo El Hage of Brazil’s Federal Prosecution Service (“MPF”) reported that his team would communicate with French prosecutors via WhatsApp regarding the current investigation into bribery allegations surrounding the 2016 Rio Olympic Games.