

Fraud fighters

Global economic gloom as highlighted an increasing need and desire to bridge cultural gaps in the fight against international corporate malfeasance. **Azadeh Khalilizadeh** compares the US and European traditions and reports on moves towards greater co-operation and harmonisation

In the aftermath of the global financial crisis, increasing pressure has mounted on countries to co-operate in the fight against international corporate fraud.

Despite a wide body of law and various cross-border initiatives, fundamental procedural and cultural differences are obstructing the mutual assistance and the spotlight now is on how to achieve consistent access to justice for companies with multi-jurisdictional subsidiaries in Europe and the US.

Financial crime puts a tremendous burden on companies and international regulators. Compounded by the economic crisis, countries are waking up to the fact that operating in a jurisdictional silo will be ineffective when a global solution is essential.

Global dominos

According to the international managing director of Epiq Systems, Greg Wildisen, before the financial crisis legal practitioners generally subscribed to the view that 'individual countries had individual problems'. Epiq specialises in legal practice software and Mr Wildisen oversees the company's global electronic discovery business. He maintains that there is now greater awareness that the legal profession is operating in a global economy with a domino effect. 'The judiciary has woken to this and are taking a global approach,' he says.

And according to Keith Oliver, the senior partner and head of civil fraud and commercial litigation at London-based law

firm Peters & Peters, whenever there is a financial crash, inevitably regulators look at tightening across the board. 'There is a sea change in the way in which criminal fraud is being investigated and prosecuted,' he comments.

There are numerous European organisations currently working to untangle fraud. Mr Oliver claims that with increased globalisation international bodies are now collaborating to tackle financial crime, with more mutual legal assistance and memoranda of understanding across different national and international borders. 'There is more sharing of information and cross-border communication,' he says.

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A recent example of European countries joining forces to combat international crime came when the EU Emission Trading System (ETS) fell victim to fraudulent traders for 18 months, resulting in a staggering €5 billion loss in national tax revenues. At the end of 2009, Europol, the EU's 11-year-old law enforcement agency, announced as an immediate measure to prevent further losses that France, the Netherlands, the UK and most recently Spain, have all changed their taxation rules regarding these transactions.

With the support of several member states – including Belgium, Denmark, France, the

Netherlands, Spain and the UK – Europol has launched a specific project to collect and analyse information to identify and disrupt the organised criminal structures behind these fraud schemes.

Join forces

The biggest player to assist with collaborative European efforts is Eurojust, an EU organisation dedicated to the effectiveness of national authorities' efforts in dealing with the investigation and prosecution of cross-border and organised crime. Operating in full swing since the terrorist attacks in the US on 11 September 2001, Eurojust has worked towards signing co-operation agreements allowing the exchange of judicial information and personal data. Agreements have been concluded with Europol, Norway, Iceland, the US, Croatia, Switzerland, the former Yugoslav Republic of Macedonia and the European Anti-fraud Office (known by its French construction OLAF). Liaison prosecutors from Norway and the US are permanently based at Eurojust.

OLAF has also worked hard to protect the financial interests of the EU, fighting fraud, corruption and any other irregular activity, including misconduct within the European institutions.

Co-operation agreement

At the beginning of last October, Eurojust and Europol signed an agreement to enhance co-operation between the two bodies in fighting serious forms of international crime. The agreement now governs modalities for closer and increased co-operation, as well as provisions for the exchange of general and personal data, in accordance with Eurojust's and Europol's data protection rules.

With the international spotlight now on bribery and corruption, countries are collaborating via the Organisation for Economic Co-operation and Development's (OECD's) convention on

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combating bribery of foreign public officials in international business transactions, which has been ratified by 38 countries.

'In terms of the nitty gritty of cases, co-operation on international issues is, of course, key to dealing with issues of corruption,' comments fraud tracing specialist lawyer Tepo Din of London-based law firm Stephenson Harwood. 'In terms of legislation, the OECD convention appears to have encouraged significant change.'

Although collaborative efforts are in place, the inherently different legal foundations of countries across Europe are still preventing effective co-operation. 'There will always be differences of law,' Mr Din says. 'This is inevitable.'

Daniel Soulez Larivière, founding partner of Paris-based law firm Soulez Larivière, says the procedures are 'extremely different' between countries, especially the French system. His experience representing foreign-based clients before the French courts and conversely, representing French clients abroad, has given Mr Soulez Larivière keen insight into the marked differences between countries. 'The Belgian, Italian and French systems are very different from England and Germany,' he says.

Cultural attitudes

A more fundamental issue, notes Mr Din, is differing cultural attitudes. For instance, there is a wide disparity between international approaches to 'facilitation fees', which are generally relatively small payments for routine matters. 'In some countries, what would be classed as a corrupt payment in the US or UK, or may even be illegal in that country, remains a part of normal business,' he says. 'Where there is less of a compliance culture, it will be much more difficult to get effective co-operation and/or evidence.'

According to the business crime and regulation partner at London-based law firm

Addleshaw Goddard, Elizabeth Robertson, another huge problem is that there are limited memoranda of understanding on an international basis as to who should be lead prosecutor and increasingly importantly who should get the penalties. 'It is extremely difficult to achieve a global criminal settlement as Siemans has discovered,' she says, referring to the German industrial giant's agreement in December 2009 to pay more than €395m in Germany and \$800m in the US to settle long-standing corruption charges. 'Also the defendant corporation has no voice in this process,' she adds.

National self-interest

Kasra Nouroozi, partner and head of dispute resolution at fellow London law firm Mishcon de Reya, says although there is some systematic approach to international collaboration, there are barriers of politics and national self interest. 'There is a culture of tight control as seen in countries such as Switzerland,' he says, pointing to the recent row involving the US tax authorities demanding that Swiss bank UBS offer up details of US citizen account holders. In that case the US courts did not want to wait for a lengthy appeal process by some UBS clients who were fighting against the bank data transfer.

Mr Nouroozi notes the ineffective co-operation by the Swiss banks was a motivating factor for Switzerland not being invited to G20 discussions. 'It brought them to their knees,' he says.

Yves Klein, a fraud specialist partner at Geneva-based law firm Monfrini Crettol & Associés, says the main difference between the continental and Anglo-Saxon systems is the place of the victim of fraud in the criminal investigation. According to Mr Klein, in the Swiss legal system – in common with those in France, Belgium, Italy, Germany, Luxembourg and Liechtenstein – the victim of the fraud may participate in the proceedings

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and the investigation as the 'party suing for damages'.

Doing so, he says, 'allows the victim and its lawyers to truly interact with the magistrates during the investigation, gaining access to the file and using the information and documents it contains to initiate criminal or civil proceedings in other jurisdictions to trace the crime proceeds.'

'The victim of the fraud is entitled to the proceeds of forfeiture orders and may obtain decision on damages directly from the criminal court, at relatively low legal expense.'

By contrast, says Mr Klein, in Anglo-Saxon legal jurisdictions the role of the victim is 'barely recognised'. He continues: 'Consequently, the only solution is to bring civil proceedings, which are very efficient. Their disadvantages are the high cost of the legal proceedings and that many continental jurisdictions do not recognise the effect of such orders, or [if they do] only under specific circumstances.'

According to Mr Klein, often in multi-jurisdictional fraud litigation the victim's attorneys will have to juggle criminal proceedings conducted in continental jurisdictions and civil proceedings conducted in an Anglo-Saxon jurisdiction.

Mutual assistance

The co-operation between European countries to solve corporate fraud cases is still based on mutual assistance law. But Mr Klein says this implies that months may lapse between the moment when a magistrate from country 'A' requests information from country 'B'. He explains: 'One further disadvantage of

mutual assistance is that the magistrate in country B does not know the background of the case in detail and may have difficulties in identifying what is relevant or not.'

According to Epiq Systems's Greg Wildisen, tackling data privacy on an international scale is a 'huge minefield'. He says: 'Europe has quite a broad body of law on what can and can't be done in terms of privacy protection. It is not consistent between countries.'

Spain is another good example, highlights Eurasia operations vice-president Robert Brown of California-based risk mitigation and business solutions provider First Advantage. Unlike the US or UK, Spain focuses on the privacy of the individual over the rights of the corporation, Mr Brown explains. Consequently, the regulations make it difficult

for countries such as the UK or the US to co-operate.

'Spain has strict laws on privacy,' adds Mr Wildisen. 'For example, if a UK company has a Spanish subsidiary and there is a potential fraud, investigators entering and taking data out of the Spanish jurisdiction have the potential to be arrested.' However, Mr Brown notes an improvement, with Spain beginning to recognise the problems of data privacy.

Accessing data

When it comes to accessing data to tackle fraud on an international level, Mr Wildisen highlights liability as being a conflicting issue across jurisdictions, especially between the US and European countries. 'Complying with European laws and co-operating with the US presents a legal challenge that is not easy to solve,' he says.

For instance, in the US, companies are liable; however, in France, liability lies with individuals. 'This presents a problem where there is a French company with a US affiliate and a US court seeks e-mails from the French office,' explains Mr Wildisen. 'In the US, the in-box belongs to the company, but in France the in-box belongs to the individual.' In this situation, Mr Wildisen suggests it would be important for French and US courts to find a half-way point. 'Ultimately, common sense will prevail,' he forecasts.

There is a resounding opinion that the US imposes an overarching influence on financial crime and is the driving force behind the international community to take action.

'The US model is very well known worldwide,' says Daniel Soulez Larivière. 'The US procedure is extremely



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sophisticated. There is no doubt European treaties are reproducing the US model.'

According to Stephenson Harwood's Tepo Din, the US continues to lead the way with the Foreign Corrupt Practices Act 1977 (FCPA), the terms of which are also reflected in the OECD convention. 'Not only is the legislation strong, but the US prosecuting authorities continue to be aggressive in its use,' he says. In the international context a key point is that the FCPA has extra-territorial reach and, as such, covers foreign persons and firms in respect of certain activities. For practical purposes, this means that pretty much all multinationals that have any form of connection with the US have to pay very close attention to the terms of the FCPA.'

Plea bargaining

The US also continues to lead the way with its approach to plea bargaining. Peter Burrell, a dispute resolution partner at London-based global law firm Herbert Smith, highlights the US as being more 'sophisticated' when it comes to plea bargaining and settlements, a process that is still in its infancy in Europe. 'Some countries have compulsory self-reporting,' Mr Burrell says, 'while others have no formal plea bargaining system.'

He notes that there is no formal plea bargaining system in Austria, Belgium, the Czech Republic, Denmark, Finland, Greece, Hungary, Russia and Switzerland. 'Although in some of those jurisdictions there are alternatives to plea bargaining,' he says. 'For example, under Austrian law, while there is no formal plea bargaining, the prosecution can, however, refrain from going to trial if the defendant accepts certain conditions, referred to as "diversion".'

Yves Klein at Monfrini Crettol & Associés in Geneva agrees that the acceptance and extent of plea bargaining varies extremely from one country to the other, especially with respect

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to money laundering. 'Often one person is prosecuted in several jurisdictions in respect of the principal (or predicate) offence and in the subsequent money laundering offences that took place in several jurisdictions,' he explains. 'Consequently, that person will have to negotiate with several authorities.'

Mr Soulez Larivière remarks that in France there is no guilty plea available except for small offences and they still require the attentions of an investigative judge. However, he notes that France is making significant headway and will be introducing a guilty plea for larger offences. 'If the bill is passed, the investigative judge will disappear,' he predicts, pointing out that Germany has already adopted a bill introducing plea bargaining.

In May 2009, the German Bundestag passed a law amending the country's code of criminal procedure to regulate plea bargaining. Germany's new legislation is symbolic of the global trend towards embracing plea bargaining, with countries such as Russia, India, Taiwan, Australia and Argentina now adopting some form of the process.

Stiff penalties ahead?

But commentators fear that following the US model may result in a strict new culture of heavy penalties. Brendan Hawthorne, director of investigations and international risk at the consultancy Kroll, says although it seems the US model – and in particular, the FCC – is the template Europe aspires to, it is mainly about 'handing

out massive fines and heavy sentences'.

Adds Peters & Peters partner Keith Oliver: 'There are huge differences between the US model and our model. The US has extensive sentencing policies that are truly draconian. There is very little discretion compared with the sentencing guidelines in the UK.'

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'Brutal' bargains

Meanwhile, Mishcon de Reya's Kasra Nouroozi describes US plea bargaining as being 'brutal'. He explains: 'Most jurisdictions in Europe do not allow nationals to be extradited. Especially to places such as the US where the penalties are disproportionate.'

The US has increased its already vigilant approach to cracking down on financial fraud with a new taskforce created last December. Led by the Justice Department, the body is set to investigate and prosecute financial crimes and to combat future fraud. It reflects the Obama administration's reaction to the Justice Department losing a major criminal fraud case in New York against two managers from the now defunct investment bank Bear Stearns, whose hedge funds collapsed at the cusp of the financial crisis.

'We will be relentless in our investigation of corporate and financial wrongdoing and we will not hesitate to bring charges, where appropriate, for criminal misconduct on the part of businesses and business executives,' US Attorney General Eric Holder told a news conference. This year could see such increasingly aggressive tactics imposed by the US having a domino effect on Europe as the battle against fraudsters continues.

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