ALLEN & OVERY

European White Collar Crime Report

Views on the key developments across Europe

Q2 2017

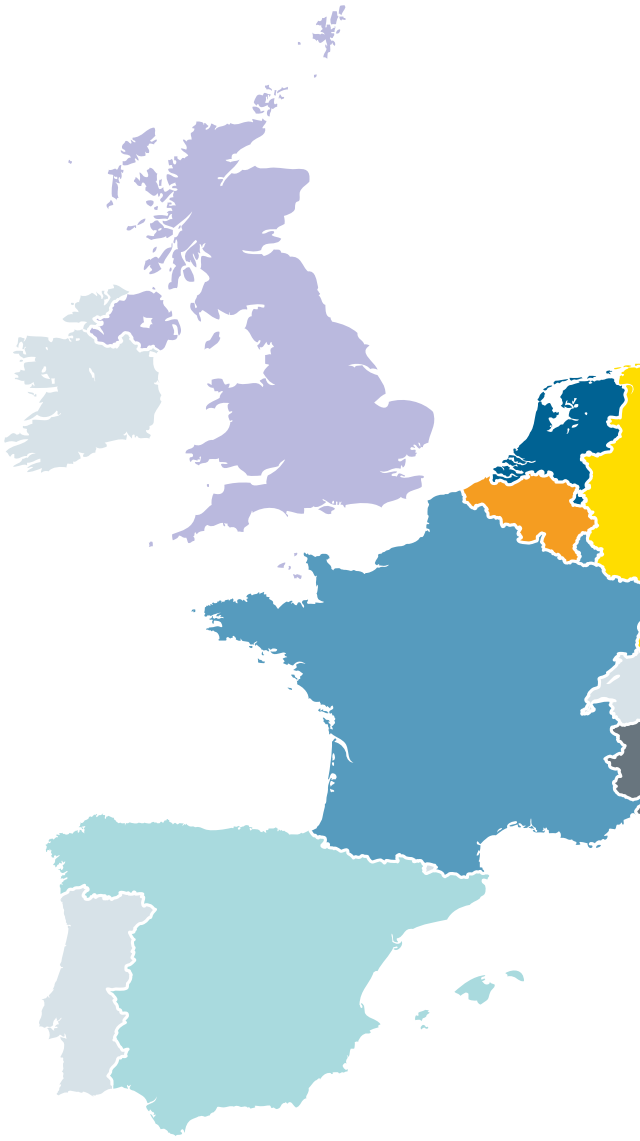
Europe at a glance

Across Europe, law makers are steadily expanding the circumstances in which companies can be found liable (whether criminally or otherwise) for the criminal conduct of their employees and other representatives. In many jurisdictions, companies are having to grapple with a lack of guidance and certainty as to how they can mitigate the risk of this liability arising.

The fight against money laundering features high on the agenda of most European jurisdictions. Implementation of the Fourth EU Money Laundering Directive (MLD4) and expansions to the scope of existing money laundering offences and confiscation powers have occupied many jurisdictions.

The prosecution of taxation offences is now a sufficiently recurring white collar theme to justify its own section in this report.

Finally, we may be seeing the very early signs of corporate criminal settlements (whether by deferred prosecution agreement or otherwise) gathering pace.



UK

Financial Conduct Authority (FCA) signals possibility of using criminal powers to prosecute anti-money laundering (AML) failings. Serious Fraud Office (SFO) faces uncertain future; government confirms no increase to SFO budget; more charges and investigations by SFO for offences of bribery and corruption; SFO closes investigation into liquidity auctions held by Bank of England in 2007/2008; new offences introduced for failing to prevent facilitation of tax evasion; insider dealing investigations on the rise; Criminal Finances Act receives Royal Assent; English High Court narrows scope of litigation privilege in relation to criminal inquiries; deferred prosecution agreement (DPA) and separate civil penalty regime now available for breach of financial sanctions.

FRANCE

New obligation on corporates to prevent and detect corrupt practices comes into force; reforms to dual prosecution of market abuse by French regulatory/criminal authorities and new settlement mechanism for market abuse cases operating smoothly in practice; harsh penalties and bail conditions imposed in tax-related proceedings; European Court of Human Rights (ECHR) upholds civil penalty imposed on French media for publishing contents of criminal file prior to public hearing; first attempts by French criminal authorities to negotiate a French-style DPA prove unsuccessful.

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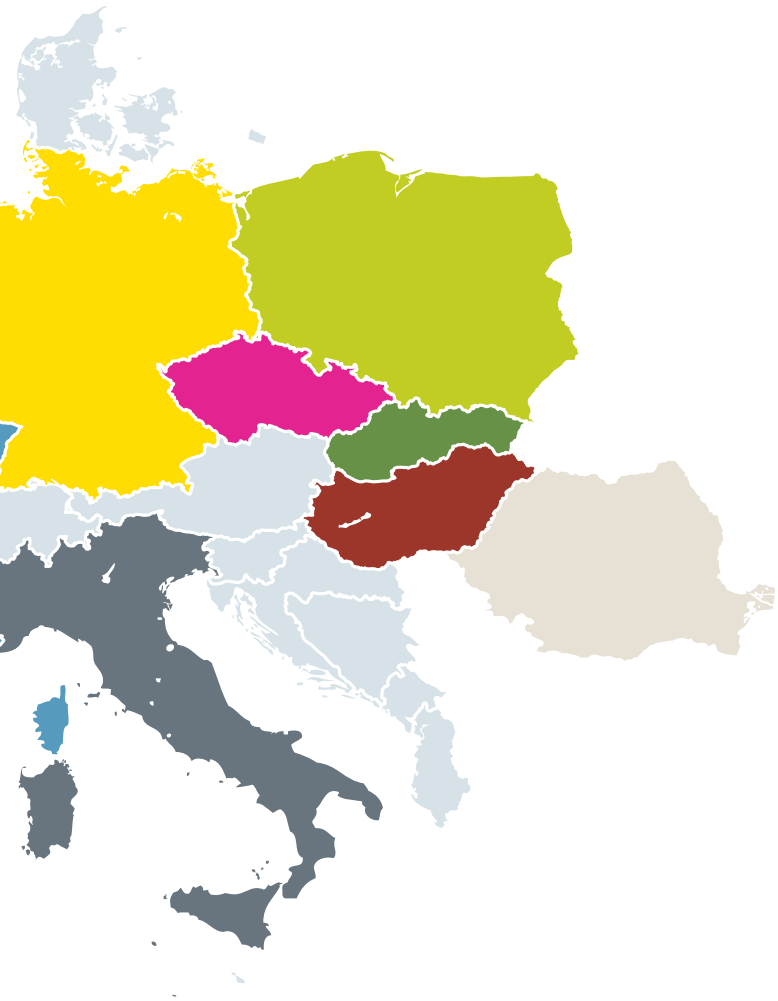
Certain developments concerning active matters involving clients of Allen & Overy may not be included in this report.



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SPAIN

Spanish Court exonerates company for criminal offences of employee; Spanish Association for Standardisation provides helpful guidance on how companies can avoid criminal liability under Spanish law for crimes committed by employees.

GERMANY

Continued investigations into insider dealing; more trials for bribery and corruption; expansion of circumstances in which courts can order disgorgement of ill-gotten gains; reports that a criminal settlement is being contemplated with Deutsche Börse CEO; continued public attention on "cum-ex deals".

ITALY

Expansion of offence of corruption in the private sector; courts authorise dual criminal and administrative prosecution of market abuse; Criminal Code and Code of Criminal Procedure amended to bring greater order to criminal prosecution process; Parliament directs government to formulate proposals for regulating collection of wiretap evidence.

BELGIUM

Belgian Supreme Court clarifies the legal requirements of influence peddling; the fight against economic and financial crime set as Belgian prosecution priority; prosecutors lift moratorium on criminal settlements.

NETHERLANDS

Increase in notifications of unusual transactions; expansion of money laundering offences; financial and economic crime to be firmly "dealt with".

POLAND

Legislation permits confiscation of an entire enterprise; Polish Financial Intelligence Unit reports dramatic increase in reports of assets potentially related to terrorist financing; intensification of response to tax-related offences; high profile investigation opened into share price manipulation; Poland opts out of European Public Prosecutor; Polish Anti-Corruption Authority pursues a number of high profile investigations; record settlement is concluded in relation to collusive bidding scheme.

CZECH REPUBLIC

OECD reports the Czech Republic's strong determination to improve the manner in which it combats foreign bribery and makes recommendations for strengthening efforts to detect, investigate and prosecute foreign bribery; continued expansion of corporate criminal liability; Supreme Court confirms admissibility of wiretap evidence in bribery case.

SLOVAKIA

Continued expansion of corporate criminal liability.

ROMANIA

Focus on implementing MLD4.

HUNGARY

Focus on implementing MLD4; Hungary opts out of European Public Prosecutor.

EU WIDE

Deadline for implementing MLD4 has passed; new EU directive on criminalisation of money laundering proposed by European Commission; European Public Prosecutor office to be established.

Anti-money laundering and proceeds of crime

– **The UK FCA raises the possibility of using its criminal powers to prosecute firms or individuals for particularly serious or repeated anti-money laundering failings**: The FCA's business plan for 2017/2018 states that financial crime and anti-money laundering is a cross-sector priority for the FCA and that it is prepared to use its criminal powers to prosecute firms and individuals for poor AML compliance and controls. The FCA is also focused on establishing the Office for Professional Body AML Supervision (OPBAS). OPBAS will become a "supervisor of supervisors" with responsibility for setting out how professional body AML supervisors should comply with their obligations under the new Money Laundering Regulations and ensuring they do so, with the power to penalise any breaches of the new Regulations. The FCA aims to have OPBAS operating on an "initial basis" by the end of 2017.

– **UK makes significant amendments to its AML and proceeds of crime regimes by enacting the Criminal Finances Act**: The Act received Royal Assent on 27 April 2017. It will come into force at a date to be confirmed by further statutory instrument (expected to be autumn 2017). Key changes include:
  – New disclosure orders in money laundering investigations. These expand powers already available in confiscation or fraud proceedings to money laundering investigations and potentially expand the circumstances in which a third party (eg a bank) may be required to disclose information.
  – Unexplained Wealth Orders (UWOs). A UWO is an order granted by the High Court at the application of an enforcement authority relating to specific property. A UWO requires the respondent to explain the nature and extent of their interest in the property and how they obtained the property, failing which the property will be presumed to be subject to civil recovery. UWOs are only available in relation to respondents who are politically exposed persons or suspected to have been involved in serious crime (or connected to someone who is).
  – Amendments to the Suspicious Activity Report (SAR) regime. There is now an express provision allowing Proceeds of Crime Act (POCA) regulated firms to share information with each other where there is a suspicion of money laundering. The Act also allows the National Crime Agency (NCA) to extend the "moratorium period" which prevents dealing in property that is the subject of an SAR from one month to six months (albeit in monthly increments) in the event that the NCA has initially declined consent to a transaction proceeding.
  – Expansion of the definition of "unlawful conduct" under POCA's non-conviction recovery powers to include property obtained by a gross abuse of human rights.

– **German legislation expands circumstances in which the judiciary can order disgorgement of ill-gotten gains**: On 1 July 2017, new legislation on the confiscation and deprivation of ill-gotten gains in criminal cases comes into force. The legislation expands the circumstances in which a court can impose confiscation orders. Previously, confiscation was only available in certain limited cases of organised crime. Now, confiscation can be ordered in relation to any object or money that was acquired from or used for the purpose of committing an unlawful act. The sum to be confiscated will be valued at the "gross sum". No deductions will be made to reflect expenditure incurred to obtain the object or money.

– **The 26 June 2017 deadline for implementing the MLD4 has now passed**: See *A closer look* section for more detail.

ACTIONS

– **Keep an eye out for the implementation date of the UK Criminal Finances Act.**

– **Consider updating internal SAR guidance to reflect the new information-sharing powers in the UK (it may also be a useful opportunity to refer to the NCA's updated SAR guidance).**

– **Proposed European Directive on countering money laundering by criminal law**: On 8 June 2017, the European Council published the proposed text. The Council and the European Parliament will enter into negotiations on the final text as soon as the latter has decided on its position. The final text will not apply in the UK, Ireland or in Denmark. The key proposals include:
  – A uniform definition of the criminal activities which constitute predicate offences for money laundering, including tax crimes.
  – Harmonisation of the key money laundering offences (eg the conversion, transfer, concealment, disguise, acquisition, possession or use of property derived from criminal activity).
  – Confirming the extra-territorial effect of the money laundering offences and including inciting, aiding and abetting and attempting a money laundering offence as a criminal offence.
  – Clarifying that a conviction for the predicate offence is not a prerequisite for a conviction for money laundering.
  – Outlining a number of aggravating circumstances for Member States to consider in the event a money laundering offence is committed. For example, where the offence was committed within the framework of a criminal organisation.
  – Confirming that companies (and other legal persons) can be held liable for conduct committed for their benefit.
– **Netherlands expands range of money laundering offences**: Since 1 January 2017, a person who acquires or possesses an object that directly originates from any crime committed by this person can be held criminally liable for the criminal offence of "simplified money laundering".
– **Notifications of unusual transactions on the increase in the Netherlands**: The Netherlands Financial Intelligence Unit (FIU) has reported receiving a total of 417,067 notifications of unusual transactions in 2016 (up 25% on 2015) of which 53,533 transactions (up from 40,959 in 2015) with a net value of EUR4.6 billion were declared suspicious, which is twice the amount for 2015.
– **Polish legislation authorises confiscation of an enterprise**: From 27 April 2017 an enterprise which was used to commit a crime or to hide the proceeds of a crime can be confiscated from its owner. The same law has also introduced a rebuttable presumption that assets obtained by the enterprise up to five years prior to the offence constitute the proceeds of crime. This presumption applies to offences committed prior to 27 April 2017.
– **Polish Financial Intelligence Unit reports dramatic increase (208.6%) in reports of assets potentially related to terrorist financing**: The report also highlighted a significant increase in "analytical proceedings" (12.5%) and in the value of frozen assets (18.4%).

– **Ensure transactional teams are aware of the increased risk of delay from the longer SAR moratorium period in the event that the NCA initially declines to consent to a transaction proceeding.**
– **Recognise that local implementation of MLD4 varies across European jurisdictions. Monitor implementation dates of local law in each applicable jurisdiction and keep risk assessments up to date.**

A closer look: *The deadline for implementing MLD4 has been and gone*

The Fourth EU Money Laundering Directive (known as MLD4) entered into force in June 2015. MLD4 seeks to enhance the prevention, detection and investigation of money laundering and terrorist financing and bring the EU's framework into line with the standards of the Financial Action Task Force. As a minimum harmonising Directive, MLD4 outlines basic standards and leaves the specifics of implementation to each Member State. Member States had until 26 June 2017 to implement MLD4.

MLD4 represents an evolution of the existing law rather than a complete overhaul. The key changes are as follows:

- **Tax crimes** – the definition of "criminal activity" has been extended to include tax crimes in the list of predicate offences. For the first time in some European jurisdictions, tax evasion can now give rise to a money laundering offence.
- **Customer due diligence (CDD)** – MLD4 has removed the automatic right to apply simplified due diligence (SDD) to certain customers. Firms will instead be required to justify why SDD is appropriate.
- **The gambling sector** – under the previous Directive, only casinos were designated "obliged entities" subject to the Directive. All providers of gambling services are subject to the requirements of MLD4, but Member States are given the ability to exempt certain providers in low-risk circumstances.
- **One-off transactions** – under the previous Directive, CDD need only be applied where a one-off transaction was one in a series amounting to EUR15,000. Under MLD4, this level has been reduced to EUR10,000.
- **List of high risk third countries** – MLD4 empowers the European Commission to adopt delegated acts to identify high risk third-country jurisdictions which have strategic deficiencies in their national anti-money laundering and counter-terrorist financing regimes. This has led to a list of high risk third countries which are subject to enhanced due diligence (EDD).
- **Beneficial ownership** – corporates and other legal entities will be required to maintain information concerning their beneficial ownership. In each Member State, this information will be held in a central register accessible to institutions (including banks) who can demonstrate a legitimate interest in the information.
- **PEPs** – the definition of a Politically Exposed Person (or PEP) has been extended to include domestic PEPs and senior figures in international organisations. MLD4 requires enhanced due diligence (EDD) to be conducted on both domestic and foreign PEPs.
- **Risk assessments** – there is a heavy focus in the Directive on a risk-based approach to preventing money laundering, including the requirement for a risk-based approach to be applied to all phases of the CDD process. In addition, MLD4 requires the European Commission to publish EU-wide risk assessments. Member States are also required to carry out bi-annual risk assessments of their exposure to money laundering and terrorist financing. Such risk assessments must be documented, up to date and available to other Member States.
- **Record-keeping** – under the previous Directive, obliged entities were required to retain evidence and records of customers and transactions for a period of at least five years. Under MLD4, they must be kept for a period of five years, with the possibility to extend that period for a further five years where necessary and proportionate.
- **Harmonised, minimum sanctions** – Member States are required to impose appropriate measures and sanctions for breaches of AML obligations, achieving a minimum European standard in relation to certain provisions, including CDD, reporting obligations, record-keeping and internal controls. In relation to financial penalties for legal persons, a maximum of EUR5m or 10% of annual turnover has been imposed.
- **Cooperation** – there is a real emphasis in MLD4 on the need for cooperation across the EU. Section 3 contains various provisions on the need for cooperation nationally (between policy makers, Financial Intelligence Units (FIUs), supervisors and other competent authorities), cooperation with the European Supervisory Authorities and cooperation between FIUs and/or the European Commission.

The below table summarises the status of MLD4's implementation in various Members States:

	MLD4 implementation status
Belgium	Not yet implemented. The Belgian Anti-Money Laundering Act of 11 January 1993 is in the process of being replaced in its entirety. It is anticipated that the new Act will be introduced and voted on by the Federal Parliament during the course of autumn 2017.
Czech Republic	Effective from 1 January 2017. Amendment No. 368/2016 Coll. to Act No. 253/2008 Coll., on Selected Measures against Legalisation of Proceeds from Crime and Financing of Terrorism.
France	Not yet fully implemented. Order No. 206-1635 of 1 December 2016 yet to be ratified by French Parliament.
Germany	Effective from 26 June 2017. Money Laundering Act (*Geldwäschegesetz*).
Hungary	Effective from 26 June 2017. Prevention and Combating of Money Laundering and Terrorist Financing Act.
Italy	Effective from 4 July 2017 but will be further implemented via specific second level regulations in forthcoming quarters. Legislative Decree No. 90/2017 was published in the Official Gazette on 19 June 2017 and entered into force on 4 July 2017.
Netherlands	Not yet implemented. Provisions regarding the ultimate beneficial ownership register will be implemented in a separate Act.
Poland	Not yet implemented. Ministry of Finance has presented a new draft Act on Counteracting the Introduction into Financial Circulation of Property Values Derived from Illegal or Undisclosed Sources and on Counteracting the Financing of Terrorism, which is due to replace the previous act of the same name. It could take several months of parliamentary work before it is enacted.
Romania	Not yet implemented. The draft law on prevention and combating money laundering and terrorism financing has been finalised by the Office for Prevention and Combating Money Laundering. It will now be sent to the competent authorities in order to obtain the necessary endorsements before sending it to the Parliament.
Slovakia	Not yet implemented.
Spain	Not yet implemented.
UK	Effective from 26 June 2017. Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017.

Taxation

– **UK introduces new offence of failing to prevent facilitation of tax evasion**: See *A closer look* section for more detail.

– **Harsh penalties and record bail amounts have been imposed in French tax-related matters**:

  – The 32nd Chamber of the Paris Criminal Court has imposed unprecedented penalties in tax evasion related matters. These cases involved former French politically exposed persons (such as Serge Dassault, former MP, and Jérôme Cahuzac, former Minister of Finance), as well as high-net-worth individuals (such as Arlette Ricci, heir of the Ricci designer house). These individuals were prosecuted, inter alia, on the ground of money laundering of tax evasion proceeds. The penalties involved in these prosecutions evidence the willingness of French criminal judges to set new standards of sentencing in tax-related matters (ie non-suspended imprisonment penalties, increased amounts of fines, asset forfeitures).

  – The ECHR has recently upheld the EUR1.1bn bail imposed on UBS AG in the criminal investigations referred to as the "Swiss leaks". The ECHR based its decision principally on the ground that the bail was a temporary measure which did not compromise the presumption of innocence, and that French courts had established the bail amount by making reference to the investigation's findings, the offences and facts, the amounts of damages and fines which UBS AG could be liable to pay if convicted, and to its actual financial resources (ie bail must be proportionate). UBS AG has been referred to trial before the Paris Criminal Court on grounds of illicit solicitation and aggravated money-laundering of tax evasion proceeds. Its French affiliate, UBS France, has been referred to trial for aiding and abetting the alleged offences committed by the parent.

– **Poland intensifies response to tax-related offences**:

  – It is now an offence to undermine the credibility of an invoice. Acts captured by the new offence include: (i) using a falsified invoice as if it were authentic; (ii) forging or altering an invoice in order to affect the level of tax liability or tax refund; (iii) fraudulently certifying an untrue statement that may be relevant in determining the level of tax liability or content of a tax return. The severity of the penalties depends on the value of the invoice(s) in question. Penalties include imprisonment from six months to 25 years (25 years' imprisonment may be imposed if the gross value of the invoice exceeds PLN10m).

  – Liability under the Polish VAT Act and Fiscal Criminal Code has also been strengthened. For example, as of 1 January 2017 the Polish VAT Act punishes the use of so-called "blank VAT invoices" (invoices which do not reflect any actual transactions). Taxpayers who have reduced their VAT liability through the use of such blank invoices will be obliged to repay the deducted amount and to pay an additional penalty, equal to the amount claimed on the blank invoice.

– **Continued public attention in Germany on "cum-ex deals"**: The German Parliament has set up a committee of inquiry to investigate certain tax practices known as "cum-ex deals". The committee submitted its 800-page final report on 23 June 2017. The report assumes that the "cum-ex deals" were used to receive tax refunds in excess of the amount of taxes that were actually paid. The report considers the practices as illegal and the general public is furious, especially due to the alleged substantial damage to the German tax revenues. The precise damage resulting from "cum-ex deals" is hard to establish but various sources have estimated illegal tax refunds ranging in the EUR25bn area. There are multiple court proceedings pending and the subject continues to attract great media attention.

ACTIONS

– Commence work to scope and implement "reasonable prevention procedures" for the purposes of the new failure to prevent tax evasion offences in the UK. Initial steps could include reviewing existing training, policies and any particularly high risk business/intermediary relationships.

A closer look: *The Criminal Finances Act introduces a new corporate criminal offence of failure to prevent the facilitation of tax evasion*

The Criminal Finances Act 2017, which received Royal Assent on 27 April 2017, contains the largest expansion of UK corporate criminal liability since the Bribery Act 2010. The Act creates a new strict liability criminal offence of failing to prevent the facilitation of tax evasion by "associated persons". The offence has extra-territorial effect and will catch foreign firms and foreign tax evasion (as well as UK firms and UK tax evasion). Firms need to undertake thorough risk assessments to inform the creation of prevention policies and procedures to benefit from the only defence – that of having 'reasonable' prevention procedures in place.

Corporate facilitation of tax evasion

The Criminal Finances Act 2017 incorporates two "failure to prevent facilitation" offences – one for domestic tax evasion and one for evading foreign taxes. A company commits an offence if it fails to prevent an "associated person" from committing a UK or foreign tax evasion facilitation offence (a TEFO). Facilitating in this context broadly means criminally assisting others (eg clients) to evade taxes. The "associated person" must be acting in their capacity as an associated person of the company (so the offence would not be committed, for example, if the associated person was acting in a personal capacity).

There is already a criminal offence of facilitating UK tax evasion, but it is difficult to hold companies liable for this offence under the existing rules for attributing individuals' criminal conduct to a company. The Act makes it much simpler to attach criminal liability to a company by focusing on the controls that the company has in place to prevent associated persons from facilitating tax evasion.

Another big change is the creation of the offence for failing to prevent the facilitation of foreign tax evasion. There is, however, a dual criminality requirement – both the tax evasion and the facilitation must each be an offence under both the relevant foreign law and English law. Accordingly, the offence will not apply in relation to foreign tax crimes committed in jurisdictions with more onerous tax criminal laws than the UK's, if the conduct would have fallen short of being criminal in the UK.

Meaning of "associated person" very wide

The definition of an "associated person" is wide. The new offence envisages firms potentially being held criminally responsible for the acts not just of employees, but also agents, or any entity providing a service for it or on its behalf in the UK or overseas (eg a foreign tax adviser, offshore accounting firm, broker, trustee or company director service provider, nominee service provider and notary).

UK and foreign companies in the frame

The UK tax offences will catch UK and foreign firms.
The foreign tax offence will catch UK firms, and also foreign firms if: (i) the foreign firm carries on business in the UK; or (ii) some or all of the facilitation happens in the UK.

This means that firms with UK branches will be caught by these new rules to the same extent as UK firms, even if there is no other nexus with the UK: so a U.S. firm will be caught by these rules if its Singaporean employee working in Hong Kong commits a tax evasion facilitation offence for an Australian client simply because it has a London branch.

Strict liability – subject to one defence

For a company, the new offence is one of strict liability, subject only to the defence of having "*such prevention procedures as it was reasonable in all the circumstances to expect [it] to have in place*" or it was not reasonable to expect the firm to have such procedures in place.

This concept will be familiar to those involved with implementing "adequate procedures" in the context of the Bribery Act 2010. The UK government has stated that it expects "rapid implementation" with companies expected to have a clear timeframe and implementation plan on entry into force of this new offence (confirmed to be 30 September 2017).

Draft HMRC Guidance provides some worked examples and six guiding principles for designing prevention procedures.

Market offences

– **Two UK traders acquitted of LIBOR related conspiracy charges**: On 6 April 2017 Stylianos Contogoulas and Ryan Reich were acquitted by a jury of conspiracy to defraud charges in relation to alleged manipulation of U.S. dollar LIBOR at Southwark Crown Court following a retrial. At their original trial in 2016, the jury had returned guilty verdicts for three co-defendants but were unable to reach a verdict in their cases.

– **UK SFO appeals directly to the public for evidence of allegedly fraudulent investment scheme**: The SFO has opened an investigation into allegedly fraudulent investments in storage pods made by the Capita Oak Pension and Henley Retirement Benefit schemes and others. The SFO has publicly requested that investors in these schemes complete a detailed 51-question questionnaire relating to their investments (including the availability of supporting documents and their willingness to give evidence in court). This public appeal for evidence reflects the approach adopted by the SFO in recent investigations into fraudulent investment schemes.

– **Insider dealing investigations on the rise in the UK**: According to data recently obtained through a freedom of information request submitted by Bloomberg News, the FCA commenced 70 insider dealing investigations in 2016 (more than double of that for any other year in the last decade) and has opened at least 23 insider dealing investigations so far this year.

– **UK SFO closes investigation into the conduct of liquidity auctions held by the Bank of England during the financial crisis in 2007 and 2008**: The focus of the investigation was whether assistance had been provided to certain financial institutions to enable them to bid successfully for available funding, to the possible detriment of other institutions. The Bank of England referred the matter to the SFO in November 2014 following its own internal investigation. The SFO has now concluded that there was no evidence of criminality.

– **The Central Criminal Court has made confiscation orders against two final defendants who were convicted of offences following one of the FCA's largest investigations into unauthorised activity**: The FCA's investigation, known as Operation Cotton, led to eight convictions and the confiscation of GBP2,195,496 from all eight defendants. Between July 2008 and November 2011, an unauthorised collective investment scheme was operated through three companies which cold-called potential investors and offered agricultural land that the companies had bought for minimal amounts, as well as land the companies did not own. More than GBP5m was extracted from investors to buy land at a vastly inflated price on the false promise of a substantial profit, which never materialised. The judge has directed that all sums confiscated from the defendants be paid by way of compensation to the victims. Those who have suffered a quantifiable loss should expect to receive just over 40% of the capital amount owed to them.

– **Reforms to dual prosecution of market abuse by French regulatory and criminal authorities and new settlement mechanism for market abuse cases operating smoothly in practice**: Since the enactment of Law No. 2016-819 in June 2016 (the MAR reform) the dual prosecution of market abuse by French regulatory and criminal authorities, is prohibited. The French Financial Markets Authority (*Autorité des marchés financiers*, AMF) and the National Financial Prosecutor (*Procureur de la République Financier*, PNF) must now coordinate and consult with each other, before either the AMF (regulatory proceedings) or the PNF (criminal prosecution) may notify market abuse charges against any legal or natural person. This new procedure which prevents parallel proceedings is now fully operative and working smoothly in practice. The MAR reform also introduced a mechanism for settling market abuse investigations with the AMF, by entering into an administrative settlement agreement (*composition administrative*). Settling MAR allegations with the AMF does not amount to admission of responsibility or to a sanction. The AMF has been willing to engage in this administrative settlement process.

– **Italian courts uphold dual criminal and administrative prosecution of market abuse**: Italian Companies and Stock Exchange Commission (CONSOB) continues to initiate parallel proceedings on the assumption that, for the time being, the dual track system is considered constitutional under Italian law. See *A closer look* section for more detail.

– **German investigations continue into insider dealing:**
  – The Deutsche Börse CEO is under investigation for insider trading. The investigation centres on whether the CEO had inside information when he bought shares worth EUR4.5m in Deutsche Börse in December 2015 – only weeks before it became public that Deutsche Börse was engaged in merger talks with the London Stock Exchange.
  – The German Financial Supervisory Agency (*Bundesanstalt für Finanzdienstleistungsaufsicht,* BaFin) has launched an investigation into the insider trading of Hugo Boss stock. Hugo Boss' stock price dropped by 20% in February 2016 after the company had forecast a loss of profits. A routine analysis of the stock movements by BaFin led to the discovery of apparent irregularities in the days leading up to and after the price drop.

– **Polish authorities open high profile investigation into share price manipulation**: Roman Karkosik, the majority shareholder in the Boryszew chemical group and one of the most famous figures in the Polish capital markets is under investigation for the alleged manipulation of shares in Krezus S.A., a company listed on the Warsaw Stock Exchange. Karkosik, together with two of his associates, is accused of having unduly inflated the traded volume of the company's shares. This is the second market manipulation case which the public prosecutor has lodged against the businessman. In the first case, Karkosik is accused of having inflated the share price of Boryszew in an alleged attempt to secure the company's place on the WIG20 index, which lists the largest and most traded companies on the Warsaw Stock Exchange. Both cases have been referred to trial.

A closer look: *Italian courts uphold dual criminal and administrative prosecution of market abuse*

In November 2016, the Grand Chamber of the ECHR held that the prosecution and punishment of two taxpayers under parallel criminal and administrative systems did not violate the right not to be tried or punished twice protected by the European Convention on Human Rights: *A & B v Norway*. In the Court's view, a "dual track" system was permissible provided the two parallel proceedings were "*sufficiently connected in substance and in time*".

The Grand Chamber's decision partially overruled an earlier decision of the ECHR in *Grande Stevens and Others v Italy* which had expressed concerns with the Italian dual track system for prosecuting market abuse. Italian courts have now upheld that system in light of the Grand Chamber's decision:

– In December 2016, the Milan Criminal Court permitted the criminal prosecution of an individual who had already been subject to administrative sanctions for market abuse by the Italian Companies and Stock Exchange Commission (CONSOB).
– In March 2017, the Bologna Court of Appeal upheld administrative penalties imposed by CONSOB on two individuals notwithstanding that a criminal case for market abuse was still pending against them.

Despite these decisions, the legitimacy of the Italian dual track system remains uncertain. In 2016, the Italian Constitutional Court requested that law makers formulate a set of rules that clearly set out the relationship and interaction between criminal authorities and CONSOB in cases of market abuse. To date, the Italian Parliament has not accepted this invitation. For now, CONSOB, seemingly emboldened by two court victories, continues to commence parallel proceedings on the assumption that the dual track system is compliant with Italian law.

Bribery and corruption

– **Italy expands the offence of private sector corruption**: Penalties have also been increased. See *A closer look* section for more detail.

– **More charges and investigations in the UK for offences of bribery and corruption**:

  – The SFO has expanded its investigation into Unaoil by opening related investigations into the activities of Petrofac PLC and KBR Inc's United Kingdom subsidiaries for suspected offences of bribery and corruption. The United States Department of Justice and Securities and Exchange Commission have also been investigating the activities of KBR Inc and Unaoil.

  – The SFO has charged FH Bertling and five individuals with pre-Bribery Act corruption offences. The offences relate to the award or retention of freight forwarding contracts relating to a North Sea oil exploration project between January 2010 and May 2013.

– **France imposes obligation on large corporates to prevent and detect corrupt practices (as part of a suite of anti-corruption measures)**: From 1 June 2017, certain companies are bound to take all necessary measures to prevent and detect acts of corruption or influence peddling committed in France or abroad. See *A closer look* section for more detail. This obligation is part of a suite of anti-corruption measures introduced by law No. 2016-1691 on 9 December 2016 (referred to as the "Sapin II Law"). Other measures include the creation of a French anti-corruption agency (vested with significant investigative and enforcement powers, including fines of up to EUR200,000 for individuals and EUR1m for corporates and the power to compel the implementation of an anti-bribery and corruption (ABAC) compliance programme.)

– **Belgian Supreme Court clarifies the legal requirements of influence peddling**: Two senior officials of Belgacom (now Proximus), the Belgian telecommunication operator (which exercises a public service mission), were prosecuted for passive public corruption and influence peddling. They were accused of using their influence with a subsidiary of Belgacom to sell real estate on favourable terms to a private limited liability company in exchange for the manager of the private limited company lobbying politicians for Belgacom's benefit in future negotiations. The issue before the Court was whether the offence of influence peddling required that the influence (here, procuring the sale of real estate to a private company) forms part of a public function. The Belgian Supreme Court ruled that the offence of influence peddling was not so limited. It simply required that the influencer exercises a public function, albeit the influence could exceed the scope of that public function.

– **OECD recommends that Czech Republic strengthens efforts to detect, investigate and prosecute foreign bribery**: Its report expresses concern that there have been no prosecutions for foreign bribery in the 17 years since the Czech Republic ratified the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. This is a cause for concern, especially considering the export-oriented nature of the Czech economy, which includes high-risk sectors for bribery such as machinery and defence. However, the report also highlights the Czech Republic's determination to improve the manner in which it combats foreign bribery by employing several existing practices and/or tools to greater effect (including foreign requests for legal assistance, the use of non-financial forms of evidence, joint investigative teams with foreign authorities and central registries for bank accounts and beneficial ownership information). OECD recommendations for the Czech Republic include: (i) making adequate analytical resources available for investigating foreign bribery cases; (ii) supporting efforts by those outside the financial sector to detect and report suspicions of money laundering related to foreign bribery; (iii) strengthening whistleblower protections for employees; and (iv) adopting legislation to safeguard the independence of the prosecution authorities. The report also recommends that steps are taken to clarify the new exemptions introduced by recent amendments to the Act on Criminal Liability of Legal Entities which enable a legal entity to avoid liability for the criminal acts of its management or members of the supervisory board where the Company has taken all the efforts "justly required" of it to prevent the commission of such acts. In particular, the report recommends that the Czech authorities engage closely with the private sector to *"raise awareness of the exemption and adequate compliance measures"*.

ACTIONS

– **Companies falling within the scope of the French Sapin II Law should conduct a "gap analysis" of their existing anti-bribery and corruption compliance programme against the specific requirements of the Sapin II Law.**

– **Check whether anti-bribery and corruption policies that apply in Belgium reflect the broader definition of influence peddling adopted by the Supreme Court.**

– **Check whether anti-bribery and corruption policies that apply in Italy reflect the broader legal definition of private sector corruption.**

– **Subscribe to the Polish Anti-Corruption Authority newsletter to follow developments in corruption and bribery investigations cba.gov.pl/pl/panel**

– **More trials in Germany for offences of bribery and corruption**:
  – A former department head at Berlin Brandenburg Airport was convicted for accepting a EUR150,000 bribe from a subcontractor in exchange for allowing the subcontractor's claims for additional payments of EUR25m to pass through review without any checks. The former official was sentenced to imprisonment for three and a half years and ordered to pay a fine equivalent to a bribe he had received. Two further former employees of the subcontractor were also convicted. They received probationary sentences of one year and eleven months, and one year and three months, respectively.
  – A former Siemens AG board member faces a new trial in connection with the Siemens bribery matter. Siemens AG agreed in 2008 to pay more than USD1.3bn to settle corruption probes in the United States and Germany. The former board member stood trial for fraud for allegedly helping to order the payment of bribes totalling USD14.2m in Latin America and for allegedly failing to close out a USD35m slush fund. Initially acquitted in 2014, the Prosecution Office appealed the decision in 2014. In September 2016 the Federal Court of Justice overturned the lower court's decision to acquit the former board member of fraud charges regarding the slush fund. It cited the lower court's failure to correctly consider the evidence given during the trial by adhering to an unreasonably high standard of proof when adjudicating the case. The Federal Court of Justice has now referred the case back to a different chamber of the lower court for trial.

– **Polish Anti-Corruption Authority (Central Anti-Corruption Bureau – CBA) pursues a number of high profile investigations**:
  – Former board members and top managers of state-owned Polish chemical giant Grupa Azoty Zaklady Chemiczne Police S.A. (Grupa Azoty) have been detained in connection with a fraud investigation. The investigation relates to a range of allegedly fraudulent economic decisions that gave rise to significant damages to Grupa Azoty and caused detriment to Polish economic interests. One such decision involved the investment of USD20m in open-cut mining in Senegal and the entry into corresponding service contracts. According to the Polish Anti-Corruption Authority, the former management of Grupa Azoty was aware that the service contracts would not be performed from the moment they were entered into.
  – Two employees of a logistics department in a company which is part of Polska Grupa Zbrojeniowa S.A., a Polish defence industry giant, have been detained and charged with accepting illegal commissions while negotiating sales contracts for military equipment.
  – The Polish government appointed the Verification Commission for Reprivatisation to examine irregularities in the process of reprivatising several properties in Warsaw that were nationalised by the communist regime after the Second World War.
  – The Polish Anti-Corruption Authority is already pursuing more than 50 investigations into properties in Warsaw being of interest to the housing and construction industry and businessmen. Among the detainees were former officials of the Capital City Hall, lawyers, and the former Deputy Director of the Property Management Office of the City of Warsaw. Recently, the civil court in Warsaw invalidated the contract under which the original owner transferred the ownership of high-value premises to the official in the Warsaw City Hall for a price significantly lower than the market value of the property.

A closer look: *New obligation for French companies and affiliates to prevent and detect corrupt practices comes into force under Sapin II law*

As of 1 June 2017, certain companies (and their top-level managers) are bound to take all necessary measures to prevent and detect acts of corruption or influence peddling committed in France or abroad. The obligation applies to: (i) French corporates comprising at least 500 employees and whose yearly turnover exceeds EUR100m; (ii) affiliates belonging to groups whose personnel exceeds 500 employees, whose parent company is headquartered in France and whose "consolidated" turnover exceeds EUR100m; and (iii) top-level managers of such companies.

This new obligation requires that corporates implement a robust anti-bribery and corruption (or ABAC) compliance programme. This must include eight minimum measures, namely, a code of conduct appended to the company's internal regulations (*règlement intérieur*), a whistleblowing mechanism (and related "speak-up" directions), a risk mapping of the company's exposure to corrupt practices, auditing procedures for the company's counterparties, accounting procedures, mandatory training for officers and employees, disciplinary procedures, and internal auditing procedures to assess the adequacy and proper implementation of the compliance programme.

The newly created French anti-corruption agency will be responsible for supervising compliance with this new obligation. The Agency's Enforcement Committee will have powers to compel companies and their managers to implement the compliance programme prescribed by the Sapin II Law and to impose administrative fines (of up to EUR200,000 for individuals and to EUR1m for companies).

Although non-compliance with the obligation is an administrative matter, any action taken by the Enforcement Committee could be relevant to any criminal investigations that may be taking place into actual instances of alleged bribery or corruption. We anticipate that investigating judges and prosecutors will be looking closely into the ABAC programmes implemented by all legal persons (either as the subject of an investigation or an employer of the subject of the investigation) in order to assess their potential criminal liability. The existence and adequacy of a company's ABAC compliance programme can also influence the size of any civil or criminal penalties imposed.

The newly created French anti-corruption agency will shortly be issuing guidance that details the expectations of the regulator and seeks to assist companies to bring their ABAC compliance programmes, systems and controls into line with the new Sapin II Law requirements.

A closer look: *Italy expands the offence of private bribery*

For many years, Italy's anti-corruption legislation has been criticised for its failure to meet European standards. In December 2016, the Group of States against Corruption report emphasised the need for Italy to enhance its legislation concerning corruption in the private sector. In response, Italy enacted Legislative Decree No. 38 of 15 March 2017 (the Decree).

The Decree, which entered into force on 14 April 2017, has expanded the scope of the criminal offence of private sector corruption and introduced tougher penalties for such offences. In particular:

– The offence now applies to any individual performing a managerial function within a company. Previously, only those who had been formally invested with directorial or auditing functions under Italian law were capable of committing the offence.

– The offence now covers offers of and requests for bribes (regardless of whether the bribe is in fact paid/received). Previously, the offence of private sector corruption required a bribe to be paid (although offers/requests could be charged as a less serious attempt offence).

– The offence no longer requires proof of damage to society.

– A temporary prohibition on performing a corporate managerial role has been added to the sanctions available upon conviction for an offence of private sector corruption.

– The penalty quotas have been increased across the board for companies found liable for private sector corruption offences committed within their organisations.

Prosecution attitudes and resources

– **UK SFO faces uncertain future and government confirms there will be no increase in SFO budget**: The Conservative Party pledged in its manifesto to incorporate the SFO into the NCA. It is unclear whether the Conservative Party will proceed with this proposal in light of its inability to secure an outright majority at the general election in June. In any event, it appears unlikely that the SFO will receive an increase in its core funding. Following debates in the House of Commons on 7 February and 18 April 2017, the Solicitor General reported that the Director of the SFO, "*is satisfied that the funding his office receives is sufficient to carry out investigations and prosecutions*". See *A closer look* section for more detail.

– **English litigation privilege even harder to claim in criminal inquiries**: The English High Court has confined the circumstances in which a company can claim litigation privilege over communications made in the course of a criminal investigation (and documents evidencing such communications). See *Director of the Serious Fraud Office v Eurasian Natural Resources Corporation Limited* [2017] EWHC 1017. In order to claim privilege over such communications, a company will need to show, among other things, that:
  – It knew at the time of the communication that it had a problem which made criminal prosecution a real prospect.
  – The dominant purpose of the communication was to conduct adversarial criminal litigation, not avoid it.

  In practice, it may be very difficult for companies to satisfy these requirements, particularly at the early stages of an internal investigation. Given recent limitations on the scope of legal advice privilege, corporates face an increased risk of having to disclose investigation reports, notes of witness interviews and other investigation-related materials (whether to investigators or third parties in civil proceedings). Eurasian Natural Resources Corporation Limited has sought permission to appeal the ruling.

– **ECHR upholds imposition of financial penalty on French media for reporting details of criminal proceedings**: The ECHR held that the French Courts' decision imposing civil liability on French newspaper Le Point, under section 38 of the 1881 Freedom of the Press Act, for having published documents arising out of criminal proceedings in the Bettencourt case, before any public hearing had taken place, did not infringe Article 10 of the European Convention on Human Rights (freedom of speech). The court found, in particular, that the interests put forward by the French government in that case, namely protecting the defendants' due process rights in a criminal lawsuit and safeguarding the proper administration of justice, were legitimate interests which warranted a reasonable interference with the right to freedom of speech.

– **Fight against economic and financial crime set as Belgian prosecution priority**: The Belgian College of Prosecutors General, which is responsible for determining Belgian criminal policy, has set the following four key criminal policy priorities: (i) fight against terrorism; (ii) fight against cyber criminality; (iii) fight against human trafficking; and (iv) fight against economic and financial crime, including tax fraud. In relation to tax fraud, the Public Prosecutor's Office wishes to promote closer coordination with the Belgian tax authorities to determine the most effective way to punish tax fraud, as tax law violations must be prosecuted by either the Public Prosecutor or the tax authorities, but not both (the so-called *una via* principle).

– **Czech Supreme Court confirms admissibility of wiretap evidence in criminal cases**: The Supreme Court of the Czech Republic held in a high-profile bribery case concerning a member of a local government and MP, David Rath, that wiretaps can be used as evidence in criminal cases. The High Court in Prague had acquitted Rath along with other defendants because it did not find sufficient justification for the use of wiretaps. The Minister of Justice, Rober Pelikán, however, filed a complaint for breach of law which was upheld by the Supreme Court of the Czech Republic, accepting the justification for the wiretap order. The case has been referred back to the first instance court.

ACTIONS

– **Do not assume that the documentation of an internal investigation will be privileged under English law. Before initiating an internal investigation that may relate to the UK, it is more important than ever to carefully consider how the investigation will be documented.**

– **Consider whether existing compliance policies and procedures that apply in Spain reflect the standards of UNE 19601.**

– **Italy reforms Criminal Code and Code of Criminal Procedure to bring greater order to criminal prosecution process**: Key reforms include: (i) a suspension of criminal limitation periods for a period of no more than 18 months following a conviction (either at first instance or upon appeal); and (ii) a requirement for a prosecutor to transfer a case to the General Prosecutor no later than three months after expiration of the deadline for preliminary investigations.

– **Italian Parliament directs government to formulate proposals for regulating collection of wiretap evidence**: Parliament has asked that greater protection be given to the privacy rights of individuals subject to a possible wiretap.

– **20 Member States reach political agreement on establishment of new European Public Prosecutor's Office**: The European Public Prosecutor will be tasked with investigating and prosecuting criminal cases affecting the EU budget, such as corruption or fraud with EU funds, or cross-border VAT fraud. It will be independent of Member States and existing EU institutions. The European Parliament will have to consent to the creation of the European Public Prosecutor before it can become effective. Denmark, Hungary, Ireland, Malta, Netherlands, Poland, Sweden and the UK have not joined this initiative.

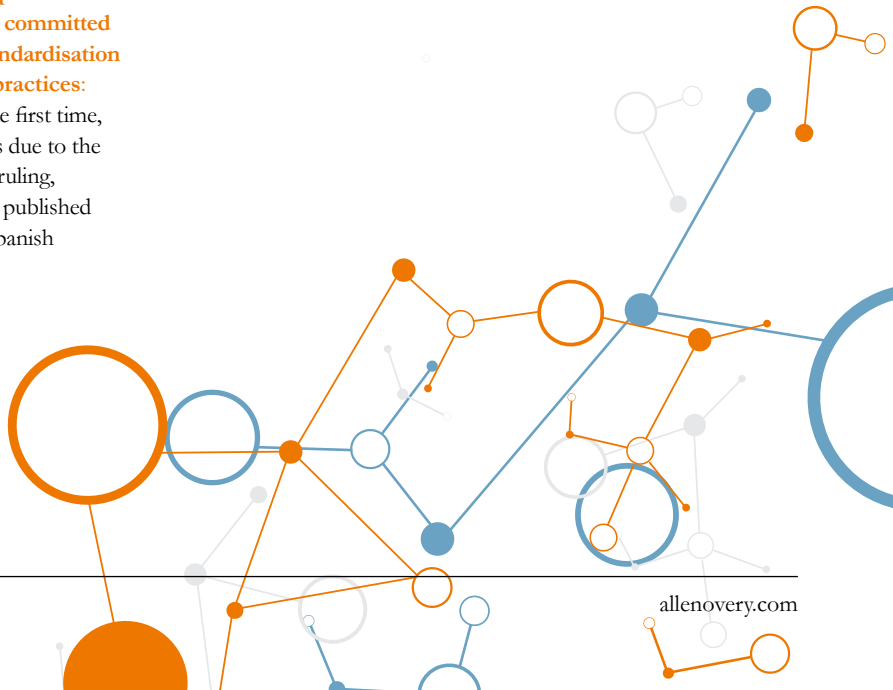
– **Financial and economic crime to be firmly "dealt with" in the Netherlands**: The annual overview of the budget expenses of the Dutch government announced that financial and economic crime should be "firmly dealt with". In this respect, we note that last year the Dutch Public Prosecutor's Office (DPPO) announced it would increasingly focus on the facilitators of money laundering, such as financial institutions and external auditors.

– **Spanish court confirms that adequate compliance plans can protect companies from criminal liability for crimes committed by their employees, and Spanish Association for Standardisation provides detailed guidance as to compliance best practices**: In a ruling on 11 May 2017, a Spanish Court has, for the first time, exonerated a legal entity for the crimes of its employees due to the quality of its compliance programme. Shortly after the ruling, the Spanish Association for Standardisation (AENOR) published guidelines to facilitate corporate compliance with the Spanish Criminal Code. See *A closer look* section for more detail.

– **Czech Republic and Slovakia deal with continued expansion of corporate criminal liability**:

  – From 1 December 2016, the number of criminal offences in the Czech Republic for which a company can be found criminally liable increased from 84 to 270. At the same time, the law has softened the strict liability nature of corporate criminal liability. Whereas previously a company was prima facie liable for the acts of certain representatives, it is now able to discharge itself from liability if it has made all the efforts that could reasonably be required of it to prevent the commission of the offence. In order to avail itself of such a defence, a company will need to demonstrate, among other things, that it: (i) delivers periodic training to employees and senior management; (ii) has internal systems in place to detect misconduct; and (iii) continuously assesses the risks of it being used to commit crime.

  – From 1 January 2017, the number of criminal offences in Slovakia for which a company can be found criminally liable increased from 55 to 78. The vast majority of the newly added criminal offences relate to white collar crime and financial/economic criminal acts. Further expansion is anticipated. Unfortunately, the law is yet to resolve a number of open questions. There is still uncertainty over the circumstances in which actions of natural persons will be attributed to a company. There is also a lack of detailed guidance on the measures companies can take to avoid criminal liability.



A closer look: *Is it the end of the road for the UK Serious Fraud Office?*

The Conservative Party pledged in its manifesto to incorporate the SFO into the NCA. As Home Secretary, Theresa May twice tried unsuccessfully to restructure the SFO. In 2011, she proposed sending the SFO's investigators to the NCA and its prosecutors to the Crown Prosecution Service. In 2014, reports surfaced of her seeking to roll the SFO into the NCA. The Conservative government's inability to secure an outright majority at the general election in June and the absence of any reference to the pledge in the Queen's Speech has cast uncertainty over whether and/or how the government delivers on this pledge.

One possibility is that the SFO becomes housed within the NCA's Economic Crime Command unit (ECC). The ECC is presently tasked with the broad objective of reducing the impact of economic crime (including the financing of serious and organised crime). It is made up of a number of primarily intelligence-oriented units including the International Corruption Unit, UK Financial Intelligence Unit and Economic Crime Intelligence Unit. Of the five principal divisions within the NCA, the ECC's areas of interest are most closely (albeit not perfectly) aligned with those of the SFO.

It is premature to assess the likely impact of any threatened changes to the SFO model. A central question will be whether the investigation and prosecution of white collar crime is rendered more or less effective by the changes. Unlike the SFO, the NCA does not currently have any power to prosecute the commission of criminal offences. Concerns have already been raised that incorporating the SFO within the NCA will dilute the SFO's potency (by co-mingling the investigation and prosecution of serious and complex economic crime with the vast array of other activities currently performed by the NCA) and compromise its independence (by subjecting its work to the political direction of the Home Secretary). On the other hand, it is possible that, like many mergers, the incorporation of the SFO into the NCA gives rise to cost savings and economies of scale that make more resources available for the fight against white collar crime. The NCA's resources already dwarf those of the SFO.

A restructuring of the SFO will raise a number of practical questions. For example: how much of the erstwhile SFO will survive within the NCA; will the "Roskill Model" of investigators and prosecutors working together from the start of a case continue; and how will existing SFO investigations be handled under the new regime? Perhaps the biggest question will concern the future of deferred prosecution agreements. To date, the SFO has been the chief architect of the DPA regime. It is the only prosecuting authority to have concluded a DPA and, aside from the Director of Public Prosecutions, is the only prosecuting authority permitted to do so under the Crime and Courts Act 2013. If the SFO is to disappear within the NCA, law makers will need to consider who should be entrusted with the survival of the DPA regime (if it is intended to survive at all).

A closer look: *How do corporates avoid liability in Spain for the crimes of employees?*

Under the Spanish Criminal Code, a company is criminally liable for offences committed by its employees for the company's benefit (whether direct or indirect) unless the company can demonstrate that it had an adequate compliance plan to prevent the commission of such offences. For the first time, a Spanish court has formally exonerated a company for the criminal conduct of its employees due to the quality of its compliance programme.

On 11 May 2017, the *Audiencia Nacional* ruled that Deloitte was not criminally liable for the actions of an employee who had fraudulently misrepresented the financial statements of a company. Although the 250-page ruling provides welcome confirmation that an adequate compliance programme will protect a company from criminal liability, it contains limited detail of what that programme should look like in practice.

Helpfully, AENOR has recently published standard guidelines (the UNE 19601) to assist companies in addressing the risks of criminal conduct within their organisations. Compliance with these standards does not guarantee that a company will escape liability (that is for a court to determine on a case-by-case basis). However, it will be accorded considerable weight by a court or prosecutor, particularly if an external third party has audited and verified compliance. Six key points from the UNE 19601 guidance are as follows:

- The criminal risks of the company should be identified, analysed and evaluated.
- Sufficient financial resources should be allocated to achieve the objectives of the compliance plan.
- Procedures should be adopted to detect conduct which could potentially entail criminal liability.
- Breaches of the compliance plan should result in disciplinary action.
- A dedicated person/body should be appointed to supervise and monitor the fulfilment of the compliance plan. That person/body should have sufficient authority and independence to effectively discharge its responsibilities.
- The compliance plan should be embedded within the culture of the company.

The above points are not an exhaustive summary of the UNE 19601 standards. Specialist advice should be sought on the content of any given compliance programme.

Settlement

– **Another DPA for the UK SFO**: Tesco Stores Limited has entered into a DPA with the SFO. Details of the settlement cannot be reported pending the trial of three individuals.The DPA only relates to the potential criminal liability of Tesco Stores Limited and does not address whether liability of any sort attaches to Tesco plc or any employee, agent, former employee, or former agent of Tesco plc or Tesco Stores Limited.

– **UK financial sanctions breaches can be dealt with by a DPA (as well as civil penalty regime)**: From 1 April 2017, criminal breaches of financial sanctions are capable of being the subject of a deferred prosecution agreement. A civil penalty regime has also been introduced for dealing with UK sanctions breaches. From 1 April 2017, the UK Office of Financial Sanctions Implementation (OFSI) has power to impose civil monetary penalties on individuals and entities for financial sanctions breaches (previously, such breaches were an exclusively criminal matter). Civil penalties can be imposed where a person has breached a financial sanction and they knew or had reasonable cause to suspect that they were committing a breach. The maximum civil penalty is the greater of GBP1m or 50% of the value of the funds or economic resources involved in the breach. The civil penalty regime applies to persons or activities with a UK nexus. OFSI has issued specific guidance on how it will consider compliance with financial sanctions and how it will approach the imposition of a civil financial penalty.

– **First attempts to negotiate a French-style DPA prove unsuccessful (*Convention judiciaire d'intérêt public*)**: French media recently reported that French criminal authorities failed to negotiate a *Convention judiciaire d'intérêt public* in relation to a significant money laundering investigation. The possibility of a French-style DPA was introduced by the Sapin II law. Companies investigated in connection with corruption, influence peddling, money laundering of tax evasion proceeds and related offences can enter into a new type of settlement (*Convention judiciaire d'intérêt public*) by agreeing to pay a criminal fine of up to 30% of the company's average turnover, to implement a compliance programme and to indemnify the identified victims. The availability of this French-style DPA is at the discretion of the prosecutor and investigating judge (if any) and requires ultimate approval by a judge. No admission of guilt is required and the DPA does not result in a criminal conviction or criminal record. The "attractiveness" of this DPA regime remains to be seen. Although it does not contemplate a criminal conviction, it requires that the company placed under investigation (*mise en examen*) acknowledges the facts and legal characterisation of those facts asserted by the Public Prosecutor. This may prove problematic if the same facts/conduct are the subject of investigations or enforcement proceedings in other jurisdictions.

– **Belgian Prosecutors General lift moratorium on criminal settlement negotiations**: Uncertainty remains as to how prosecutors will address the concerns of the Belgian Constitutional Court which has declared certain aspects of the criminal settlement process to be unconstitutional. See *A closer look* section for more detail.

– **German news media reports that Public Prosecutor's office is considering a deal with the Deutsche Börse CEO in relation to alleged insider trading**: Although criminal settlements, as a prosecutorial tool, have been available under German law since 2010, there is only very limited data available on its proliferation among German criminal cases.

– **Record Polish settlement relating to collusive bidding scheme**: Two companies, Strabag and Mota-Angil Central Europe, paid the City of Tarnów PLN32m in damages for having colluded in securing a construction contract for a section of highway in South East Poland. The two companies settled their exposure shortly after the District Court in Kraków, in parallel criminal proceedings, accepted the pleas of 14 individuals who had roles in the collusive bidding process.

ACTIONS

– If you were involved in settlement negotiations in Belgium, or have a case that was heading towards settlement discussions before the Constitutional Court's decision, consider contacting your point of contact at the Public Prosecutor's Office to resume discussions. However, be aware that the settlement negotiations might require you to provide sufficient underlying information to the Public Prosecutor (such as figures or data which could enable the determination of a fine or confiscation amount), in order to apply the proportionality test required by the Constitutional Court. Also note that the Public Prosecutor may spontaneously start or revive the negotiations in the near future.

A closer look: *The resumption of criminal settlements in Belgium*

Ever since an act of 2011, out-of-court criminal settlements have been available for most financial, corporate and tax offences in Belgium. Many criminal settlements have been entered into with Public Prosecutors for white collar offences. In order to qualify for a criminal settlement, the Public Prosecutor must be of the opinion that the offence(s) do not deserve more than two years' imprisonment following conviction. The defendant must agree to indemnify the victim of the offence(s) and pay a lump sum of money (negotiated with the Public Prosecutor) in exchange for the charges being dropped. If settlement is reached after an investigating judge has been appointed or during trial, the settlement must be formalised in a written agreement, which is then approved by a judge. The criminal settlement presupposes no admission of guilt. However, it does imply an irrefutable presumption of civil fault towards the victim, which facilitates the victim's claim for damages in subsequent civil proceedings, if any.

The availability of this criminal settlement mechanism has recently been thrown into doubt. A landmark decision of the Belgian Constitutional Court of 2 June 2016 declared several provisions in the Belgian Code of Criminal Procedure relating to the criminal settlement process to be unconstitutional. The Constitutional Court was particularly concerned with the lack of judicial oversight over the substance of a settlement (such oversight being limited to verifying that the procedural preconditions for entering into a settlement had been met). The Court held that the approving judge should scrutinise the reasons leading the Public Prosecutor to enter into a settlement and the proportionality of the terms of the settlement in order to guarantee due process. However, it did not articulate the precise test that ought to be applied by an approving judge. In light of this uncertainty, the Belgian College of Prosecutors General imposed upon Belgian Public Prosecutors a standstill or moratorium on settlement negotiations pending the enactment of a law addressing the issues raised by the Constitutional Court. Despite the standstill rule, a few renegade courts approved criminal settlements in some parts of the country.

The remedial legislation has now been delayed due to a parliamentary inquiry into what the press has labelled "Kazakhgate". In particular, there are allegations that the 2011 Act was the product of a complex scheme of influence peddling involving Belgian and French politicians which sought to facilitate the settlement of a corruption and fraud case against a Belgian-Kazakh businessman who is said to be very well connected in Belgian and French political and business circles. The inquiry is pending and the new law was postponed by the government until the end of the inquiry.

The Prosecutors General have recently decided to lift the standstill rule, provided that the Public Prosecutors address the Constitutional Court's concerns. Although criminal settlements are now back on the table, it remains unclear how prosecutors will address the Constitutional Court's concerns in practice. A key question concerns the precise test that will be applied to assess whether a criminal settlement has validly been entered into.

This move from the Prosecutors General has led the government to put the remedial bill back on the agenda. The remedial bill is expected to require substantive control of the settlement agreement by the approving judge in the form of a proportionality test (ie the terms of the settlement must be proportionate to the seriousness of the offence). A new act is expected by autumn 2017.

– Remind yourself of your UK financial sanctions obligations by consulting the Office of Financial Sanctions Implementation's Financial Sanctions Guidance.

– Consider registering with OFSI's subscription list to receive all updates to UK financial sanctions

Looking ahead

Developments in Q3 and beyond

Date	Event
BELGIUM	
September 2017	New legislation for approval of criminal settlements expected to be enacted.
October 2017	Replacement of Belgian Anti-Money Laundering Act to reflect MLD4 expected to be presented to and voted on by Federal Parliament.
TBC	Substantial reform of Belgian Criminal Code and Criminal Procedure Code.
TBC	Replacement of the Belgian Act on the supervision of the financial sector and on financial services of 2 August 2002 to implement EU Market Abuse Directive and Regulation and create a new whistleblower procedure.
CZECH REPUBLIC	
1 July 2017	Sanction for failure to publicise a contract with a state-entity becomes effective. The obligation in place is to publicise all contracts exceeding an amount of CZK50,000 (ie approximately EUR1,850) in a public register. From 1 July 2017, a failure to do so will render the contract null and void.
1 January 2018	Register of beneficial owners of legal entities and trusts will be created by the Ministry of Justice and administered by the courts. The register will include beneficial owner's name, address, date of birth, nationality and basis of beneficial ownership (eg share in the company/receiving dividend from the company/other title).
TBC	Financial Analytical Institution to publish updated guidance on how to determine a "beneficial owner" for the purposes of MLD4.
TBC	Two bills for protection of whistleblowers are currently pending in the Czech Parliament.
FRANCE	
July-September 2017	Ratification of French implementation of MLD4 expected.
TBC	French Anti-Corruption Agency to publish guidance about relevant ABAC procedures and to conduct first onsite inspections.
GERMANY	
1 July 2017	Legislation on the confiscation and deprivation of ill-gotten gains in criminal cases comes into force.
HUNGARY	
30 September 2017	Deadline for financial institutions to review their policies in light of the new regulation implementing MLD4.
ITALY	
4 July 2017	Legislative decree on anti-money laundering to come into force.
TBC	Government to implement provisions prescribed by reform of Italian Criminal Code and Code of Criminal Procedure.
TBC	Government to formulate proposals for regulating collection of wiretap evidence.

Date	Event
POLAND	
July 2017	Publication of the government's objectives for the National Anti-Corruption Programme for 2017-2019.
28-29 September 2017	Sixteenth International Congress of Internal Control, Internal Audit, Anticorruption and Fraud Prevention organised by Polish Institute of Internal Control.
10-11 October 2017	Second National Conference on Money Laundering and Terrorist Financing, Warsaw.
TBC	Annual report of the Central Anti-Corruption Bureau for 2016.
TBC	Adoption of the act implementing MLD4.
ROMANIA	
TBC	Adoption of the act implementing MLD4.
SLOVAKIA	
September-November 2017	The Slovak Ministry of Justice is expected to submit a new draft law on the protection of victims of criminal offences.
1 October 2017	An amendment of the Criminal Code is expected to take effect which would, among other things, introduce a new criminal offence of deceitful liquidation and further fine-tune criminal offences related to bankruptcy procedure.
TBC	MLD4 will be implemented.
SPAIN	
TBC	Adoption of law implementing MLD4.
UK	
30 September 2017	New offence of failing to prevent facilitation of tax evasion comes into force.
September-November 2017	Remainder of Criminal Finances Act 2017 expected to come into force.
TBC	Government response to the call for evidence on changing corporate liability for economic crime. Options proposed include; (i) amendment of identification doctrine; (ii) strict (vicarious) liability offences; (iii) strict (direct) liability offences; (iv) failure to prevent as an element of the offence; and (v) regulatory reform on sector by sector basis.
EU WIDE	
October 2017	Adoption of the regulation establishing the Office of the European Public Prosecutor expected.
TBC	Adoption of the EU Directive on Criminalisation of Money Laundering.

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