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Expert Analysis

Double Jeopardy: Coordinating Cross-Border Corruption Investigations

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While the G20 was meeting this June in Mexico, the B20 Working Group on Improving Transparency and Anti-Corruption presented its recommendation to its respective governments.¹ The B20's paper addressed the lack of coordination among global anti-corruption enforcement authorities, which results in unfair treatment of companies under investigation in multiple jurisdictions and may discourage companies from voluntarily disclosing potential corruption offenses and cooperating with investigators.

Given the nature of foreign bribery, it is common for multiple countries' enforcement authorities to assert jurisdiction over a single instance of bribery. As more nations dedicate resources to investigating corruption, companies are increasingly subject to overlapping investigations. The burdens imposed on such companies are often not just duplicative, but at times in conflict.

The B20 note that such investigations violate the widely recognized—but too infrequently applied—principle of “ne bis in idem”²—more commonly referred to in Anglo-American legal regimes as double jeopardy: the tenet that no one should be punished twice for the same offense.

The purpose of the B20 paper is not to paint multinational companies as victims, nor to challenge the necessity of robust anti-corruption enforcement. The proposals derive instead from the desire to create incentives for companies to cooperate fully in regulators' efforts, recognizing that the lack of international coordination and the threat of duplicative punishment deters, rather than encourages, companies from reporting instances of corruption.

This article explores how double jeopardy is applied in analogous contexts and suggests a legal framework to be applied to parallel anti-corruption investigations.

Double Jeopardy

At least 50 national authorities have recognized the double jeopardy principle,³ which has been incorporated into numerous international treaties and conventions.⁴

EU Approach. In the European Union, the Schengen Convention provides that an individual or entity cannot be prosecuted by different EU member states for the same criminal offense: “[a] person whose trial has been finally disposed of in one Contracting Party may not be prosecuted in another... for the same acts...”⁵

Article 50 of the Charter of Fundamental Rights of the European Union (2010 O.J. C 83/02) also provides: “No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union...”

This rule, however, only becomes operative when a defendant has been acquitted, convicted, or, under the Schengen Convention, when the matter has otherwise been resolved or settled. It does not prevent multiple states from conducting parallel investigations of the same conduct.

The EU implemented a Framework Decision (FD) in November 2009 directing member states to comply by June 15, 2012.⁶ (Council Framework Decision 2009/948/JHA). When a member state believes that there may be parallel proceedings, it must contact the other member states to confirm. States must consult in order to reach a “consensus” on a solution to mitigate the adverse consequences arising from the parallel proceedings. If the member states cannot reach agreement, the matter shall, “where appropriate,” be referred to Eurojust, a European body that supports cooperation between authorities.

U.S. Approach. While the Fifth Amendment to the U.S. Constitution guarantees that no person shall “be subject for the same offense to be twice put in jeopardy of life or limb,” the U.S. Supreme Court interprets this clause to proscribe only multiple prosecutions by a single sovereign.⁷ It does not prevent the federal government from punishing an offender previously prosecuted by a U.S. state or foreign country.

Nevertheless, the U.S. Department of Justice has adopted internal policies directing federal prosecutors to consider double jeopardy principles. The Justice Department's general approach, known as the “Petite Policy,” is to decline to prosecute a defendant who has previously been convicted (or acquitted) in state court of charges arising from the same conduct.⁸ The Petite Policy, however, creates no substantive rights on the part of criminal defendants and is subject to numerous exceptions.

The Justice Department's policy is not to bring an enforcement action where a foreign authority is better situated to investigate and prosecute the conduct.⁹ In determining whether to defer to the foreign authority, the Justice Department considers: (i) the strength of the other jurisdiction's interest in prosecution; (ii) the other jurisdiction's ability and willingness to prosecute effectively; and (iii) the adequacy of the sentence or legal consequences of a potential conviction in the other jurisdiction.

International Bodies. International bodies, including the United Nations and the Organization for Economic Cooperation and Development, have issued relevant guidance. Article 42(5) of the UN Convention Against Corruption (2004) provides that if a state learns that another is conducting an investigation, prosecution, or judicial proceeding regarding the same conduct, then the authorities “shall, as appropriate, consult one another with a view to coordinating their actions.” Article 4.3 of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (2011) provides that when more than one party has jurisdiction over an alleged offense, the parties “shall, at the request of one of them, consult with a view to determining the most appropriate jurisdiction for prosecution.”

Antitrust Enforcement

Antitrust enforcement authorities are more advanced in establishing mechanisms to mitigate the risk of double jeopardy.

Cooperation. The United States and the EU have entered into a formal cooperation agreement relating to antitrust matters requiring that each consider the interests of the other when determining whether to initiate an investigation and what penalty to seek.

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Although the European Commission and individual EU member states can both enforce EU antitrust law, the European Competition Network facilitates which authority is best placed to investigate in order to avoid duplication.

Penalties. The European Commission (EC) has discretion to set the appropriate geographical scope for calculating antitrust fines, giving it the flexibility to impose a fine based solely on European (and not worldwide) sales of a company whose violation affected multiple jurisdictions. In the *Marine Hose* case, the fines were assessed on European sales.¹⁰

The Office of Fair Trading, the UK's competition regulator, has published guidelines that require it to take into account fines previously imposed by the EC or any other EU member state competition authority.¹¹

Self-Reporting and Cooperation. Antitrust authorities also have been at the forefront of promoting leniency policies that encourage self-reporting. The Justice Department will not charge a company that is the first to report cartel activity, provided that certain conditions are met.¹² In the EU, if a company discloses cartel behavior and satisfies certain factors, it is entitled to a 100 percent reduction in its fine.

The merits of these programs include: encouraging voluntary disclosure of potential unlawful conduct leading to authorities discovering otherwise undetected violations; rewarding cooperation; and weakening cartels.

For multijurisdictional investigations, these programs are most effective if authorities coordinate, as a grant of leniency to a defendant from one authority is considerably less attractive without a guarantee of the same treatment in other jurisdictions.

Precedents

Double jeopardy principles have been recognized in recent anti-corruption enforcement efforts.

In 2006, Statoil agreed to pay a USD \$10.5 million fine, which was reduced by the USD \$3 million paid to Norwegian authorities to settle a bribery case arising out of the same conduct.¹³

In 2007, the Justice Department imposed a fine of USD \$800,000 pursuant to a non-prosecution agreement with Akzo Nobel for bribery violations, with the fine to be waived in full if Akzo Nobel paid an equivalent fine to Dutch authorities.¹⁴

In 2011, the Justice Department agreed to a deferred prosecution agreement with DePuy's parent, Johnson & Johnson, for alleged corruption. The Serious Fraud Office (SFO), the prosecution agency set up by the UK government to deal with serious and substantial business crime, and the lead prosecutor on bribery, "concluded that a prosecution was...prevented in [the UK] by the principles of double jeopardy" because the Justice Department had already issued a criminal sanction for the same conduct.¹⁵ The SFO imposed a civil recovery order.

The SFO and Justice Department also collaborated on a global settlement with British Aerospace (BAE).¹⁶ The SFO director stated that when BAE pleaded guilty in the United States to offenses relating to corruption in Central and Eastern Europe, "[u]nder the UK law of double jeopardy, it was no longer possible for the SFO investigation relating to Central and Eastern Europe to continue."¹⁷

In the *Innospec* case, the U.S. and UK authorities consulted the company to determine what penalty it was able to pay, and negotiated with each other on how to split the total penalty.¹⁸

Proposal for Enforcement

Building on the B20 paper, the G20 countries should agree on a global framework for the coordination of anti-corruption efforts that could be modeled along the following lines:

- All interested authorities should confer to determine which authority is best suited to conduct the investigation. A single national authority should then investigate and prosecute.
- Various factors should be considered, including:
 - The site of the conduct;
 - The nationality of the defendant and victims;
 - The location of witnesses and evidence;
 - Available resources;
 - The ability to obtain evidence;
 - Whether one investigation has advanced substantially ahead of others;
 - Whether the defendant has pledged to cooperate with any authority;

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- The likely penalty; and
- The commitment of the authority to anti-bribery enforcement.
 - If the authorities cannot reach agreement, the matter should be referred to a tribunal. If no resolution is reached after such referral, the authorities should agree closely to coordinate their investigations.
 - If a single authority is designated, the other authorities should terminate or suspend their investigations.
 - If multiple authorities conduct parallel investigations, they should confer at the conclusion of the investigations on whether a single authority can be designated to prosecute the case.
 - If multiple authorities bring separate enforcement actions, they should ensure that any penalty takes account of penalties imposed by other authorities, so that the combined penalty does not exceed the

highest penalty set in any of the jurisdictions.

- The authorities should also try to distribute equitably any disgorged profits.

- Any dispute about allocation of monetary penalties between the authorities should be referred to a tribunal for resolution.

- Authorities should try to ensure uniformity in the availability of amnesty programs and discounts.

Such a framework would prevent companies from being punished twice for the same offense and would remove the disincentives to self-reporting that currently exist. As the B20 paper suggests, the eradication of corrupt business practices is in the best interest not just of consumers or governments, but also of multinational businesses themselves. The implementation of a formal framework will ensure that companies stay on the right side of the fight, knowing that their self-reporting of corruption and cooperation in ensuing investigations will be rewarded.

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1. B20 Task Force Recommendations, June 2012, pgs. 66-89. (G20 refers to the group of finance ministers and central bank governors from 20 major economies, 19 countries plus the European Union, that meet annually to discuss issues in global finance. The B20 is an event held annually at the G20 Summit focused on the views expressed from the international business community.)

2. Literally: "not twice in the same."

3. See, e.g., Article 103 of the Constitution of Germany; Article 39 of the Constitution of Japan.

4. See, e.g., Article 14(7) of the International Covenant on Civil and Political Rights; Article 8(4) of the American Convention on Human Rights.

5. Article 54 of the Convention Implementing the Schengen Agreement. This provision has several exceptions which are set forth in Article 55.

6. Information regarding member states' compliance with the FD will be available in a European Commission report due by Dec. 15, 2012.

7. See *Heath v. Alabama*, 474 U.S. 82 (1985).

8. See *U.S. Attorneys' Manual*, Chapter 9-2.031.

9. See id. at Chapter 9-27.240.

10. Commission of the European Communities, Case COMP/39406—Marine Hoses (Jan. 28, 2009), Recitals 416-428.

11. OFT's Guidance as to the Appropriate Amount of a Penalty, §2.20 (2004).

12. Justice Department, Antitrust Division, Corporate Leniency Policy, available at www.justice.gov/atr/public/guidelines/0091.htm.

13. Justice Department Press Release, U.S. Resolves Probe Against Oil Company that Bribed Iranian Official (Oct. 13, 2006).

14. Justice Department Press Release, Akzo Nobel Acknowledges Improper Payments Made by its Subsidiaries to Iraqi Government Under the U.N. Oil for Food Program, Enters Agreement with Department of Justice (Dec. 20, 2007).

15. SFO Press Release, DePuy International Limited ordered to pay \$4.829 million in Civil Recovery Order (Apr. 8, 2011).

16. SFO Press Release, BAE fined in Tanzania defence contract case (Dec. 21, 2010); Speech of Richard Alderman (Feb. 12, 2010), available at <http://www.sjberwin.com/newsdetails.aspx?mid=1&rid=1&lid=3&ctid=0&pid=2804>.

17. See Richard Alderman's answers to questions of Mike Koehler, Assistant Professor of Business Law at Butler University, available at www.scribd.com/doc/50759481/A-Conversation-With-Richard-Alderman-Regarding-BAE.

18. *Regina v. Innospec Limited* [2010] Lloyd's Rep. F.C. 462.