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When Internal FCPA Investigations Go Abroad

Know the foreign rules before beginning.

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FOREIGN PUBLIC CORRUPTION has become a hot topic in board rooms and executive suites. Why? Because of record settlements in a string of high profile cases, such as Daimler, BAE, KBR and Siemens.[1] The Department of Justice has also raised the heat further by prosecuting individuals, not just companies, for Foreign Corrupt Practices Act violations and by using the kind of tactics, such as undercover agents, taped conversations and stings, typically used in organized crime and narcotics cases.[2] And the Securities and Exchange Commission recently created a specialized line unit to handle FCPA cases.

Given this increased governmental activity, U.S. companies faced with FCPA risk will increasingly seek to assess their potential exposure by turning to counsel to conduct internal investigations. But internal FCPA investigations pose unique challenges for lawyers, investigators and clients.

Since much of the conduct in question occurs overseas, issues that otherwise do not exist in domestic investigations must be addressed. Specifically, what privilege laws will apply with regard to the attorney-client communications taking place in foreign jurisdictions? How will U.S. courts approach foreign laws on privacy and data protection applicable to information not otherwise protected by privilege?

This is a new world for many U.S. lawyers. In this article we provide a number of practical suggestions for those about to undertake cross-border investigations.

High Value of Internal Investigations

The Daimler and Siemens cases illustrate how an internal investigation may mitigate FCPA exposure.

Daimler entered into a deferred prosecution agreement with the Justice Department in which it admitted making millions in payments to foreign government officials in 22 countries between 1998 and 2008. Under the terms of the agreement, which took into account the company's cooperation with the government, Daimler agreed to a $93.6 million criminal fine, and $91.4 million civil fine to settle a parallel SEC FCPA investigation.

But that catalogue of payments was not discovered by Justice Department or SEC sleuths. Rather, Daimler, in order to secure cooperation credit, conducted an internal investigation, turned over the results of that investigation to the government, and put in place an FCPA compliance monitoring program in an effort to avoid future recurrences.

And how much cooperation credit can a company receive from the government? Recently, the Justice Department provided a hint.

Siemens conducted an extensive, world-wide internal investigation into corrupt payments made on behalf of Siemens to public officials in a variety of countries, and produced the results to the Justice Department and other regulators. Justice Department Criminal Division Chief Lanny A. Breuer, in a May 26, 2010 speech to compliance professionals, said that Siemens wound up receiving a penalty "67 to 84 percent less than what it otherwise could have faced had it not provided extraordinary cooperation and carried out such extensive remediation."[3]

If the figure is taken at face value, the government is actively incentivizing public companies to conduct internal investigations.

Attorney-Client Privilege Applicability

U.S. companies often task lawyers to take the lead in internal investigations in order to maintain the attorney-client privilege, thereby potentially protecting confidential business information.

This mechanism is well understood in the United States, because legal communications between lawyer and client are subject to the attorney-client privilege. And in corporate contexts, it usually matters little whether the lawyer in question is inside or outside counsel.

Not so abroad: many foreign countries do not regard communications between in-house counsel and company employees to be privileged.[4]

Recently in the European Union, the Advocate General of the European Court of Justice (AG) delivered an opinion on April 29, 2010, in the closely watched privilege case, *Akzo Nobel Chemicals Ltd v. European Commission*.[5] The AG disappointed foreign and in-house lawyers by upholding the existing EU rule that those lawyers cannot have privileged communications with their corporate clients. And while AG opinions are not binding, they tend to have great influence on the EU Court of Justice, the EU's court of last resort in matters of EU law.[6]

The issue in *Akzo* was the treatment of e-mail printouts between a company's managers and in-house counsel. The documents had been seized by the European Commission from company offices in the United Kingdom during the course of an anti-competition investigation. The lower court (the Court of First Instance) held that the documents were not privileged, and the AG agreed.

The AG premised her opinion on the principle that, in the EU, the privilege extends only to "a communication with an independent lawyer, that is to say with a lawyer who is 'not bound to the client by a relationship of employment.'"[7] Citing prior European Court of Justice precedent from 1982, *AM&S v. Commission*,[8] the AG concluded that in-house lawyers who are paid by a company do not satisfy that requirement.

The AG concluded further that communications with foreign outside lawyers also are not privileged because "[i]n many cases, it would not even be possible to ensure that the third country in question has a sufficiently established rule-of-law tradition which would enable lawyers to exercise their profession in the independent manner required."[9] And the issue is not limited to EU; China also limits the applicability of the attorney-client privilege.[10]

How does this evidentiary rule affect an internal investigation involving the FCPA, where a company may be asked to disclose the results of its investigation to the Department of Justice and/or the SEC in order to obtain cooperation credit? It means that counsel need to be sensitive that inquiries in EU countries may not be afforded the kinds of privilege protections typically found in U.S. internal investigations.

And, assuming that the company will contemplate turning information gathered abroad

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over to the government to obtain cooperation credit, how will this foreign privilege rule be viewed in the United States? It depends.

To determine whether foreign law rules apply, U.S. courts most commonly invoke the "touching base" test, which provides that if the communications touch base in the United States, then U.S. law will apply.[11] On the other hand, if the communications do not make contact with the U.S., courts may apply the law of the jurisdiction that has the greatest interest in whether the communications are held to be confidential.[12]

In the absence of touching base in the United States, therefore, companies seeking to preserve privilege will need to rely on outside counsel who are independent of the company.

Privacy/Data Protection, Labor Laws

Many countries establish different and stricter standards for the protection of personal information than what is found in the United States.[13]

For instance, the EU's Data Privacy Directive,[14] which has been incorporated into the laws of many nations, requires consent to use personal data and limits its transmission. And within in the EU, works councils afford to workers the right to information and consultation on company decisions.[15]

How will privacy and data protection laws be viewed in the United States? The U.S. Supreme Court provided some guidance in *Societe Nationale Industrielle Aerospatiale v. U.S. District Court*.[16] The United States is a signatory to the Hague Convention on Taking of Evidence Abroad in Civil or Commercial Matters,[17] which provides rules for resolving privilege issues with respect to communications involving other Convention member states. The Hague Convention allows parties to litigation in signatory states the right to "refuse to give evidence insofar as he has a privilege or duty to refuse to give the evidence (a) under the law of the state of execution; or (b) under the law of the state of origin."

Societe Nationale provides factors to be considered in determining the applicability of foreign privacy laws under the Hague Convention.[18] Referring to this balancing test as a "comity analysis," the opinion sets out the following elements:

- the significance of the evidence requested to the litigation at hand;
- the level of detail in the request;
- whether the evidence came from the United States;
- the ability to get the information from other sources or means of procurement;
- interests of the United States in compliance or the interests of the other state in noncompliance.[19]

In practice, it appears that the last factor, the balancing of national interests, receives the greatest attention. U.S. courts have considered the nature and intent of the statute and whether it was enacted to protect information from use in foreign litigation or whether there is a genuine national interest in keeping such information secret.[20] U.S. courts appear more likely to assert U.S. interests in disclosure when federal statutory rights and liabilities are in question.[21]

Tips for Cross-Border Investigations

Given potentially substantial limitations on the attorney-client privilege, as well as data access and distribution, counsel and their clients must have a clear understanding as to what can and cannot be obtained in foreign jurisdictions. Here are a few tips.

- Review the laws of privilege, employee rights and data protection in all jurisdictions potentially involved in the investigation.
- Undertake that review before commencing the investigation in the foreign jurisdiction.
- Involve local counsel, to develop an understanding of local laws, customs and culture.
- Use outside counsel licensed in the local jurisdiction to conduct the investigation, and to preserve privilege claims.
- Recognize that there may be conflicts of law between jurisdictions, and in some areas (such as the EU) more than one set of laws may apply in any given area.

Since **much** of the **conduct** during an internal FCPA investigation **occurs overseas**, what **privilege laws** will apply to attorney-client communications taking place in foreign jurisdictions? How will U.S. courts approach **foreign laws** on **privacy** and **data protection** applicable to information not otherwise protected by privilege?

- Recognize that labor laws and employee rights vary from jurisdiction to jurisdiction, and that employees may have greater due process and disclosure rights than exist in the United States.
- Do not assume that the privilege, labor and data protection laws of foreign jurisdictions will be in line with U.S. law.
- Do not lose sight of the fact that the absence of privilege and disclosure of communications in one jurisdiction may result in the loss of privilege and disclosure of communications in other jurisdictions.
- In the event that government regulators are aware of the internal investigation, consider educating them on the foreign rules ahead of time, lest they be later surprised by a course of conduct during the internal investigation dictated by those foreign rules.

By knowing the rules before leaving the United States, counsel may reduce the risk of inadvertent mistakes, and may avoid some of the more obvious pitfalls one encounters in cross-border internal investigations.

Since the amount of credit a company receives from the government can be affected by the quality and effectiveness of the internal investigation carried out, counsel should do everything possible to ensure a good result. Knowing the foreign rules before going should therefore be at the top of everyone's checklist.

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1. *United States v. Daimler AG*, No. 10-CR063-RJL (D.D.C. filed March 22, 2010) available at http://www.justice.gov/criminal/fraud/fcpa/cases/daimler-ag.html; *United States v. BAE Systems PLC*, No. 10-CR035-RDB (D.D.C. filed Feb. 4, 2010) available at http://www.justice.gov/criminal/fraud/fcpa/cases/bae-systems.html; *United States v. Kellogg Brown & Root LLC*, No. 09-CR-071 (S.D. Tex. filed Feb. 6, 2009) available at http://www.justice.gov/criminal/fraud/fcpa/cases/kellogg-brown.html; *United States v. Siemens Aktiengesellschaft*, No. 08-CR-367-RJL (D.D.C. filed Dec. 12, 2008) available at http://www.justice.gov/criminal/fraud/fcpa/cases/siemens-aktiengesellschaft.html.

2. See, e.g., *United States v. Richard T. Bistrong*, No. 10-CR-021-RJL (D.D.C. filed Jan. 21, 2010) available at http://www.justice.gov/criminal/fraud/fcpa/cases/bistrongr.html (FCPA indictment of 22 defendants following FBI sting operation).

3. Prepared Remarks by Lanny A. Breuer, Assistant Attorney General, Criminal Division, U.S. Department of Justice, to Compliance Week 2010—5th Annual Conference for Corporate Financial, Legal, Risk, Audit & Compliance Officers, May 26, 2010, available at http://www.justice.gov/criminal/pr/speeches-testimony/documents/05-26-10aag-compliance-week-speech.pdf.

4. See, e.g., Lisa J. Savitt and Felicia Leborgne Nowels, "Attorney-Client Privilege for In-House Counsel Is Not Absolute in Foreign Jurisdictions" (summarizing privilege rules in various European and Asian nations). Metropolitan Corporate Counsel. Oct. 1, 2007, available at http://www.metrocorpcounsel.com/pdf/2007/October/18.pdf.

5. *Akzo Nobel Chemicals Ltd v. European Commission*, Case No. C-550/07 P, [2010], available at http://curia.europa.eu/jurisp/cgi-bin/gettext.pl?where=&lang=en&num=79899570C19070550&doc =T&ouvert=T&seance=CONCL.

6. The Advocate General explained her role in the EU *Akzo* case as follows: "The Advocate General's Opinion is not binding on the Court of Justice. It is the role of the Advocates General to propose to the Court, in complete independence, a legal solution to the cases for which they are responsible. The Judges of the Court are now beginning their deliberations in this case. Judgment will be given at a later date." Court of Justice of the European Union, Press Release No. 40/10 (April 29, 2010).

7. *Akzo Nobel Chemicals Ltd v. European Commission*, ¶54.

8. Case 155/79 *AM&S v. Commission* [1982] ECR 1575.

9. *Akzo Nobel Chemicals Ltd v. European Commission*, ¶190.

10. For instance, "lawyers in China have traditionally been required to place their allegiance to the state above loyalty to an individual client." Joseph Pratt, Comment, "The Parameters of the Attorney-Client Privilege for In-House Counsel at the International Level: Protecting the Company's Confidential Information," 20 NW. J. Int'l L. & Bus. 145, 162-164 (1999).

11. "[A]ny communications touching base with the United States will be governed by the federal discovery rules, while any communications related to matters solely involving [a foreign country] will be governed by the applicable foreign statute." *Golden Trade. v. Lee Apparel Co.*, 143 F.R.D. 514, 520 (S.D.N.Y. 1992) citing *Duplan Corp. v. Deering Milliken Inc.*, 397 F. Supp. 1146 (D.S.C. 1975). See Robert G. Morvillo and Robert J. Anello, "Attorney-Client Privilege in International Investigations," New York Law Journal, Aug. 7, 2008, available at http://www.law.com/jsp/cc/PubArticleCC.jsp?id=1202423585353.

12. *Golden Trade*, 143 F.R.D. at 521.

13. For a survey of foreign privacy protection laws, see "Obtaining Discovery Abroad," American Bar Association Section of Antitrust Law. (2d Ed. 2005).

14. Directive 95/46/EC.

15. For example, EU Works Council Directive 94/45/EC requires the creation of a European Works Council in any company with at least 1,000 employees, employing least 150 in two or more EU Member States.

16. 482 U.S. 522 (1987).

17. 23 U.S.T. 2555; T.I.A.S. 7444; 847 U.N.T.S. 231; 28 U.S.C. 1782.

18. This process has since been recorded in Section 442 of the Restatement (Third) of the Foreign Relations Law of the United States. "Obtaining Discovery Abroad," at 56.

19. See id.

20. See, e.g., *Reinsurance Co. of America v. Administratia*, 122 F.R.D. 517 (N.D. Ill. 1988), aff'd, 902 F.2d 1275 (7th Cir. 1990) (finding a genuine state's interest in non-disclosure, and ruling against requiring discovery).

21. See "Obtaining Discovery Abroad," at 58.