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GIR

Global Investigations Review

ON THE HORIZON: INVESTIGATIONS IN 2018

French DPAs | Bias in monitorship | Grassley Bill | NPAs

GIR

Global Investigations Review

The Practitioner's Guide to Global Investigations

Second Edition

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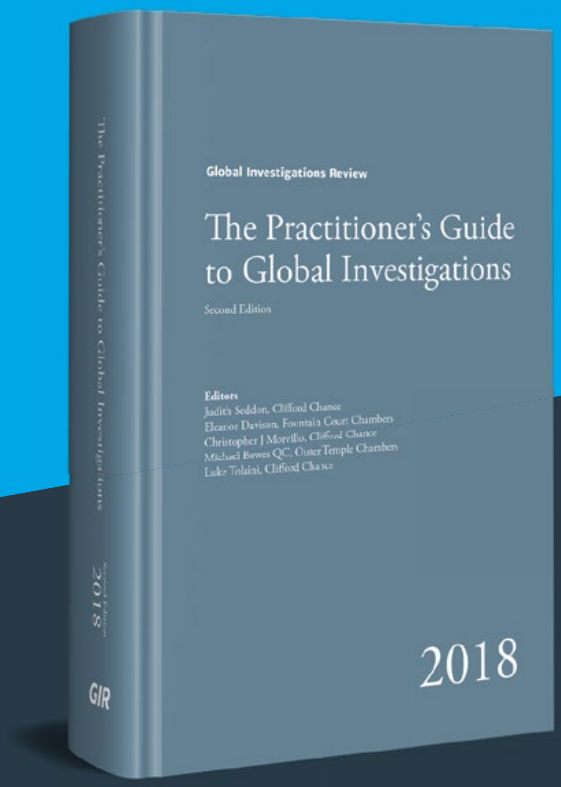

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Editorial

Global Investigations Review celebrated its fourth birthday in February. On Valentine's Day 2014, after more than a year of preparation, we officially launched the GIR website. That day, we published a review of the previous "year in investigations", including the passage of Brazil's Clean Companies Act, the coming into force of the UK Bribery Act, the surge in US and UK Libor enforcement, and China's GSK investigation.

We also published launch stories covering the UK Serious Fraud Office's Rolls-Royce investigation and BNP Paribas setting aside US$1.1 billion for alleged US sanctions violations.

Back then, we had a hunch that "the law and practice of international investigations" – as the GIR strapline puts it – was a fast-growing specialism in need of a community hub. We aimed to provide news and events for that community, a physical and virtual meeting point for investigations specialists around the world.

Fast forward four years: Operation Car Wash has stormed through Brazil, taking down many of the country's leading politicians and business people; Rolls-Royce has settled a multilateral corruption investigation via a £497 million deferred prosecution agreement with the Serious Fraud Office; and BNP Paribas has the dubious honour of having the highest ever penalty for sanctions violations – at £8.8 billion.

Our hunch was correct. GIR now boasts a readership of private practice lawyers, in-house counsel, government agencies and other investigations specialists that stretches around the world – testament, we believe, to the growing cross-border nature of investigations and increasing cooperation between jurisdictions.

Which brings us to this issue of GIR magazine, in which we look to the year ahead. From somewhat esoteric privilege disputes in Europe, to heavy-handed corruption crackdowns in the Middle East, it's this internationality that runs through the heart of this issue's cover story, "On the horizon – investigations in 2018". Read, enjoy – and do let us know what you think.

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FCPA prosecutor starts family white-collar boutique

By Dylan Tokar

Edmund "Ned" and Bruce Searby.
Courtesy of Searby LLP

A veteran defence lawyer who served on President Donald Trump's transition team has joined forces with his cousin, a recent member of the Department of Justice's Foreign Corrupt Practices Act (FCPA) unit, to launch a white-collar boutique.

The new firm is a partnership between Edmund "Ned" Searby, 53, a former partner at BakerHostetler in Cleveland, and Bruce Searby, 49, who left the FCPA unit in December. Searby LLP, as the firm will be called, will have offices in Washington, DC, and Cleveland.

Joining the Searbys will be another seasoned white-collar litigator, Mark V Jackowski, who will serve as of counsel at the firm.

All three lawyers have extensive experience in government prosecuting white-collar crime. Jackowski and Bruce Searby are recipients of the DOJ's prestigious Director's Award.

Edmund recently served as a member of Donald Trump's DOJ transition team, where he worked under Brian Benczkowski, the administration's nominee to head the agency's criminal division.

Before joining the DOJ's FCPA unit in 2016 as part of a major expansion of the foreign bribery team under Assistant Attorney General Leslie Caldwell, Bruce Searby was a lawyer at Paul Weiss Rifkind Wharton & Garrison. He also served as an assistant US attorney in Los Angeles, where he helped prosecute the first FCPA case in the media and entertainment industry, involving Hollywood film producer Gerald Green and his wife, Patricia Green.

"Three people that go back a long way"

For the Searbys, its their first time working together in a professional capacity. In an interview, the two said they've been kicking the idea around for years. The opportunity to finally do it was one of the reasons he decided to leave the FCPA unit when he did, Bruce said.

"It's three people that go back a long way with each other," said Edmund.

Edmund and Jackowski are long-time partners who met in the 1980s at the US Attorney's Office for the Middle District of Florida.

At the time, Jackowski, a former US Securities and Exchange Commission lawyer with a legal masters degree in taxation from New York University, was a member of the Organized Crime Drug Enforcement Task Force (OCDETF). He was tasked with prosecuting one of the Justice Department's most high-profile white-collar cases of the era, the massive money laundering scheme by the Bank of Credit and Commerce International (BCCI). Then a legal clerk, Edmund was brought on to help draft briefs during pretrial litigation.

The prosecution was a rocky one. Jackowski, along with another prosecutor, indicted six of the bank's employees and later secured a plea deal with BCCI. But the team was understaffed, and soon faced criticism for moving too slowly.

Jackowski was ultimately hauled before a Senate subcommittee where he was questioned by former Senator John Kerry. While he admitted they lacked some resources, Jackowski remained largely unphased. Recalling a pretrial hearing where he faced 23 BCCI lawyers, he told the subcommittee it was "a fair fight".

In 2016, the BCCI case became the subject of a movie starring Bryan Cranston called the *The Infiltrator*. The case was supervised by Robert Mueller, who now acts as special counsel in the DOJ's investigation into Russia's interference with the 2016 presidential election.

After law school, Edmund returned to the US attorney's office, becoming the youngest federal prosecutor in the state of Florida, and eventually joined the OCDETF. Later, he and Jackowski would reunite again to serve on the independent counsel team overseeing the investigation of former Secretary of Housing and Urban Development Henry Cisneros, who was charged with lying to the FBI during background checks about payments he made to a former mistress.

A gap in the market

The Searbys said they saw a need in the legal market for a small boutique firm that could represent executives and middle market companies without running into conflict checks or running up huge fees.

"What we believe we're bringing that's unique is the ability to work cost effectively and intimately with clients, while providing the type of substantive expertise that's typically found at a much larger firm," Edmund said.

The three lawyers' experience spans a large range of white-collar matters, from FCPA to antitrust, healthcare and securities fraud. Cross-border matters in particular will be a focus, they said.

Seddon to join Ropes & Gray

By Waithera Junghae

Judith Seddon at the launch of The Practitioner's Guide to Global Investigations in January 2017.

Ropes & Gray has hired Clifford Chance partner Judith Seddon as co-head of its international risk practice in London.

Seddon will join Ropes & Gray after a decade at Clifford Chance where she began her practice as a senior associate before being promoted to partnership in 2014. "I was approached and thought actually this is a really wonderful opportunity to build the practice," Seddon said.

Seddon's start date is still being negotiated. She will lead Ropes & Gray's international risk and government enforcement practice alongside Amanda Raad. Seddon said she and Raad plan to expand Ropes & Gray's white-collar practice in London. "But we're not going to rush into it," she said. "Once I get there we'll assess what we need and how we approach it."

In an emailed press release on 15 January, Raad said Seddon is the "perfect fit" for the firm.

Seddon joined Clifford Chance in September 2008 after 13 years at Russell Jones & Walker (now Slater and Gordon). Seddon said she is leaving Clifford Chance because it is the right time in her career to move.

At Clifford Chance, Seddon worked on a number of landmark cases, including advising Barclays on UK Serious Fraud Office (SFO) and Financial Conduct Authority investigations into £322 million in advisory fees paid by the bank to secure money from the Qatar Investment Authority to avoid a UK government bailout in 2008. The SFO charged Barclays in June with two counts of conspiracy to defraud by false representation and a third count of providing unlawful financial assistance over the Qatar matter.

Clifford Chance's representation of Barclays ended in February 2016 after the bank handed over documents to the SFO it had previously claimed were privileged.

In an emailed statement, a Clifford Chance spokesperson, said: "We thank Judith for her contribution to the firm and wish her well in her future career.

New York state assistant solicitor general returns to Allen & Overy

By Clara Hudson

Andrew Rhys Davies has returned to Allen & Overy as a partner in its litigation practice following a two-year stint as assistant solicitor general for the office of the New York Attorney General.

Allen & Overy announced in a press release on 8 January that Davies will rejoin the firm in its New York office, from where he will represent clients in regulatory investigations as well as in trial and appellate litigation. Davies will focus on securities and financial services.

Davies said in the press release: "Over the past two years, I've had the privilege of working alongside truly talented and exceptional professionals at the New York Attorney General's Office.

"I'm now honored to once again have the opportunity to rejoin my former colleagues at Allen & Overy and contribute to the firm's growing presence in the US."

Davies spent almost two decades at Allen & Overy, where he made partner in 2007. According to Davies's LinkedIn profile, he began at the firm as a trainee in 1997 before rising through the ranks. During those years, Davies represented both companies and individuals in state and federal regulatory investigations.

Davies also spent less than a year as a consultant at Morgan Stanley from late 2009 to early 2010 before returning to Allen & Overy, according to his LinkedIn profile.

Tim House, a senior partner at Allen & Overy and global head of dispute resolution, said in the press release: "We welcome Andrew back at a time of innovation and growth for the firm, and I know he will serve as an invaluable partner in our New York litigation practice as we continue to expand our footprint in the US."

The New York Attorney General's Office did not immediately respond to a request for comment.

Allen & Overy recently hired Scott Robson in London, who joined the firm as its global head of eDiscovery in October 2017. Robson, who was hired to help the firm develop its use of electronic data, was previously an executive director in the forensic technology and discovery services group at EY.

Latham & Watkins beefs up banking investigations team

By Michael Griffiths

Addleshaw Goddard has recruited Deutsche Bank's former head of litigation and regulatory enforcement in Hong Kong, and Hogan Lovells' co-head of global financial services litigation in London has joined Latham & Watkins.

Latham & Watkins said on 15 January that Catherine McBride, former head of litigation and regulatory enforcement at Deutsche Bank, has joined its white-collar practice in Hong Kong. The firm announced the following day that it had hired Hogan Lovells London partners Andrea Monks and Jon Holland, who were Hogan Lovells co-heads of global financial services litigation.

McBride joined Latham & Watkins as a partner in the firm's white-collar defence and investigations practice in Hong Kong, after spending over two decades at consultancies or in-house. McBride had been at Deutsche Bank since 2012. Before that, she was legal counsel at KPMG in Hong Kong.

McBride left London to take up the position at KPMG. In London, she had been legal counsel at EY and, before that, a senior associate at Linklaters.

The firm highlighted McBride's experience in investigations before regulatory authorities in both Hong Kong and the UK. Cathy Palmer, global chair of Latham & Watkins' litigation and trial department, said in a statement that "with Catherine's arrival we have the ability to provide extraordinarily deep contentious regulatory advice as well as Hong Kong, US and English commercial law advice to our bank, private equity and corporate clients".

Jon Holland will join Latham & Watkins after 31 years at Hogan Lovells, where he most recently served as co-head of global financial services litigation in partnership with Marc Gottridge from the firm's New York office. Holland has acted in UK SFO investigations into the manipulation of the Libor and foreign exchange markets. Monks, meanwhile, has represented clients in financial regulatory investigations, asset tracing matters and has assisted firms with money laundering compliance. The firm hasn't decided on a start date for the pair.

Hogan Lovells and Deutsche Bank did not respond to requests for comment.

Catherine McBride at GIR Live Hong Kong 2017

Michael Carroll

K2 Intelligence hires managing director in New York

By Michael Griffiths

K2 Intelligence has hired former New York City Department of Investigation deputy commissioner Michael Carroll as managing director in its construction and real estate services team within the investigations and disputes practice.

Carroll joined the firm on 2 January from the Department of Investigation (DOI), an anti-corruption agency, and has over a decade of experience managing fraud and bribery investigations in the construction industry.

At the DOI, he led 11 investigative squads, and oversaw criminal investigations into financial fraud, bribery and political corruption.

In particular, he oversaw the agency's vendor integrity unit, where he directed integrity monitors hired by the DOI to inspect multibillion-dollar construction projects. The DOI appoints monitors as a preventative measure on large construction projects, as well as to oversee specific contractors with integrity issues.

Speaking to GIR, Carroll said he joined K2 because he had built a relationship with the firm when it carried out work for the DOI.

Snežana Gebauer, head of K2's US investigations and disputes practice, added that K2 was keen to hire Carroll after frequently reporting to him during K2's time as integrity monitor.

The parties previously worked together when the DOI hired the firm as an integrity monitor in 2012 to oversee construction projects following Hurricane Sandy.

Carroll called it a "feel-good monitorship" to be a part of, as the construction was focused on building shelters for those displaced by the disaster.

At K2 Carroll will help clients develop anti-corruption compliance programmes, and will work on similar integrity monitorships within the construction and real estate team.

"Every time there's state money involved in a project, people are going to try and take advantage – that's why these monitors are so important," he said.

Carroll first joined the DOI in 2004, and served in a number of positions over the past 13 years, including as chief investigator and as inspector general before rising to deputy commissioner in 2015, according to K2's press release.

The DOJ was not available to comment.

FCA's director of investigations joins private practice

By Waithera Junghae

Brown Rudnick has hired FCA director Jamie Symington as a partner in its international disputes practice in London.

Symington is to join Brown Rudnick after nearly 17 years at the UK Financial Conduct Authority (FCA) and its predecessor the Financial Services Authority (FSA), the Financial Times reported on 20 December. Symington will join the firm in early 2018, GIR understands.

For the past two years, Symington has served as the FCA's director of investigations for wholesale conduct and unauthorised business, reporting directly to the agency's head of enforcement, Mark Steward. Steward joined the FCA in 2015.

At the FCA, Symington led the agency's investigation of Barclays over the £322 million of advisory fees paid by the the bank to secure money from the Qatar Investment Authority to avoid a UK government bailout in 2008. The FCA's investigation of the deal began in 2012, but was placed on hold to make way for a UK Serious Fraud Office (SFO) investigation into the same matter.

The FCA reopened its investigation in March 2017, but announced two months later that it would delay a decision on the matter until it had reviewed thousands of "significant documents" turned over by Simmons & Simmons, the law firm representing Barclays in the case. Barclays and four of its former executives were charged by the SFO in June.

Symington joined the FSA as a manager in 1999 and in 2008 he was appointed as the agency's head of wholesale enforcement. Soon after the FSA was replaced by the FCA in April 2013, Symington became the head of retail enforcement at the new authority.

During his time at the FSA, Symington brought a case against John Pottage, the chief executive of UBS's UK wealth management business. The FSA fined Pottage £100,000 for failing to put in place proper procedures to prevent his subordinates from making unauthorised trades between. However, the Upper Tribunal overturned the FSA's decision in April 2012, ruling that Pottage had taken reasonable steps to prevent the misconduct.

In the wake of the *Pottage* decision, the FCA developed its Senior Manager's Regime to make prosecuting high-ranking executives easier. A number of commentators have said decisions such as *Pottage* gave the regime impetus.

At Brown Rudnick, Symington will join former FSA colleague Peter Bibby, who was the agency's head of enforcement between 1998 and 2002. Bibby, who joined Brown Rudnick in 2013, is part of the firm's white-collar defence and government investigations practice in London.

Symington will advise financial services firms and individuals facing investigations from regulators including the FCA at the firm.

The FCA declined to comment.

K&L Gates hires London partner

By Clara Hudson

K&L Gates has recruited former Willkie, Farr & Gallagher counsel Paul Feldberg as partner in its investigations, enforcement and white-collar practice.

Feldberg, who joined K&L Gates on 22 January, is a former UK Serious Fraud Office (SFO) prosecutor and was most recently UK counsel at Willkie Farr.

Feldberg said he looks forward to joining K&L Gates because of its global team, mentioning London-based head of investigations Christine Braamskamp in particular. He said that his experience at the SFO brings him insight into "how a prosecutor may view a set of facts and how that litigation may progress, should the matter proceed".

At Willkie Farr, Feldberg advised companies and individuals in matters relating to fraud, corruption, money laundering, sanctions and insider trading, according to K&L Gates' press release. He also advised clients who were subject to SFO investigations.

Prior to Willkie Farr, Feldberg was at Fulcrum Chambers from 2010 until 2013, according to his LinkedIn page.

Feldberg was a counsel at the SFO from 2006 to 2010. While there, he was one of the lead prosecutors on the investigation into defence company BAE systems. In 2010, BAE systems agreed to pay US$400 million to UK and US authorities after pleading guilty to arms export violations, fraud and making false statements about its FCPA compliance programme related to contracts in Saudi Arabia, the Czech Republic and Tanzania.

According to K&L Gates' press release, Feldberg has conducted internal investigations across jurisdictions for companies in a variety of sectors, ranging from financial institutions to oil and gas companies. He has also advised clients on potential sanctions stemming from the World Bank, the European Bank for Reconstruction and Development and the European Investment Bank.

K&L Gates' managing partner for Europe and the Middle East, Tony Griffiths, said in the press release: "Paul is joining a growing international team and enhances the services we provide across the full range of risks faced by businesses."

K&L Gates made a handful of prominent hires in the US and UK in 2017. A former assistant US attorney in South Carolina, Matthew Hubbell, joined the firm as partner in its Charleston office in November. In March, the firm recruited the former senior litigation counsel for billionaire property developer Vincent Tchenguiz, Clarissa Coleman, as partner in its London office.

Willkie Farr & Gallagher did not respond to a request for comment.

Norton Rose adds white-collar partner in London

By Clara Hudson

Pamela Reddy

Norton Rose Fulbright has hired Pamela Reddy, a former Simons Muirhead & Burton partner, to bolster its corporate and white-collar crime team in London.

Reddy joined Norton Rose on 4 December after two and a half years at her previous firm. She has been a criminal lawyer for the past two decades, representing clients in cross-border criminal investigations, according to an emailed press release.

Reddy told GIR she looks forward to working on cross-jurisdictional cases with the firm's white-collar crime teams around the world, particularly in the US. She said she wanted to join the firm because of its "dedicated criminal law team", mentioning in particular partner Neil O'May.

"The firm saw me as someone with the right hands-on specialist criminal experience and expertise, which is the only way to deliver the right advice to clients in these difficult situations. [The team's] aim is to represent both companies and individuals in these increasingly complex prosecutions," she said.

Prior to working at London-based Simons Muirhead & Burton, Reddy was a partner at Hodge Jones & Allen from 2001 to 2015, where she rose to head of the firm's business crime team in 2009, according to her LinkedIn page.

Some of the firm's representative work includes acting for at least seven banks in connection with Libor and Forex investigations. Reddy herself is currently acting in a UK Serious Fraud Office (SFO) prosecution of Euribor manipulation and an investigation into Libor manipulation, according to the press release.

The firm is also representing one of the defendants in the SFO's prosecution of former Tesco executives, and has clients involved in separate SFO investigations linked to Petrofac and Rolls-Royce.

Earlier this year, the firm hired partner Etelka Bogardi in its Hong Kong office. Prior to joining Norton Rose Fulbright, Bogardi was senior counsel at the Hong Kong Monetary Authority (HKMA) for three years.

Simons Muirhead & Burton did not comment on the move.

Eight partners leave Quinn Emanuel

By Waithera Junghae

Eight Quinn Emanuel partners, including the co-chair of the firm's white-collar crime practice, have left the firm to form litigation boutique Selendy & Gay.

New York-based partners Philippe Selendy and Faith Gay left Quinn Emanuel Urquhart & Sullivan to set up the new firm, according to reports on 19 January. Six other New York-based partners – Christine Chung, Jennifer Selendy, David Elsberg, Andrew Dunlap, Maria Ginzburg and Sean Baldwin – have also left Quinn Emanuel to join the boutique.

The departures mean Quinn Emanuel has lost two prominent white-collar crime partners – Gay and Chung.

Gay, who joined Quinn Emanuel in 2006, was the co-chair of the firm's white-collar practice. Before joining Quinn Emanuel, Gay was a partner at White & Case between 2001 and 2006. She previously served as a federal prosecutor in the US Attorney's Office for the Eastern District of New York between 1990 and 1993.

Gay represented Russian-owned property company Prevezon in a last-minute settlement with New York prosecutors on 12 May 2017. The US$5.9 million civil agreement was reached just three days before Prevezon was due in court to answer money laundering charges tied to a US$230 million tax fraud scheme linked to corrupt Russian officials.

The US Department of Justice alleged that the tax fraud was first uncovered by Sergei Magnitsky, a Russian lawyer for investment company Hermitage Capital. Prevezon and the US Department of Justice are currently embroiled in a legal battle over the terms of the 12 May settlement.

Before joining Quinn Emanuel in 2009, Chung worked as a senior trial attorney at the International Criminal Court, leading investigations into countries including Uganda and the Democratic Republic of the Congo. Chung previously served as a federal prosecutor at the US Attorney's Office for the Southern District of New York between 1991 and 2003.

Chung was part of the Quinn Emanuel team advising Turkish gold trader Reza Zarrab in a US sanctions and money laundering case. Zarrab pleaded guilty to conspiring to evade sanctions and agreed to testify against Mehmet Atilla, deputy chief executive of Turkey's largest state-owned bank, Türkiye Halk Bankası.

In an emailed statement, Quinn Emanuel's founding partner, John Quinn said: "We of course respect our valued colleagues' decision to take their practice to a smaller platform, but we do not expect these departures to have any significant impact on our practice or our revenue," he said.

In the same statement, Peter Calamari, the managing partner of Quinn Emanuel's New York office said: "It is a sign of our firm's maturity and great success that over the years we have seen individual lawyers in a number of our offices go off to start their own firms."

Krieg leaves Shepherd and Wedderburn for Fieldfisher

By Waithera Junghae

Rolls-Royce's former chief compliance officer has moved to Fieldfisher to focus on data privacy and cybersecurity matters.

Judy Krieg joined Fieldfisher as a partner on 15 January after two years at Shepherd and Wedderburn where she advised clients on compliance and investigations related to the US Foreign Corrupt Practices Act, the UK Bribery Act and UK anti-money laundering rules.

At Fieldfisher, Krieg will continue her focus on financial crime, but will also advise clients on data protection and privacy matters. She is currently studying part-time for a Master's degree in computer science, specialising in software and systems security. She said she was doing so to keep up with rapid developments in technology.

Krieg said she joined Fieldfisher because of its top-rated data privacy and corporate crime practices.

"[The firm] has all of the ingredients necessary to take on the evolution if not revolution of corporate crime and compliance", Krieg said.

Pointing to the rise of cryptocurrencies such as bitcoin, Krieg said increasingly technology is being used to carry out financial crimes including money laundering. Because of this, Krieg said, financial crime and cybercrime can no longer be seen as separate types of misconduct.

"They are inextricably linked," she said. "That's why I wanted to build my practice with an emphasis on both."

At Fieldfisher, Krieg will also advise companies on the EU's General Data Protection Regulation (GDPR), which comes into force on 25 May. The GDPR, which was adopted by the EU in April 2016, will strengthen data privacy rights and protections for all EU citizens.

Judy Krieg

Krieg was Rolls-Royce's chief compliance officer between May 2011 and January 2014. In 2013, the engineering company uncovered bribery in Indonesia and China. Rolls-Royce paid US$800 million in January 2017 to settle UK, US and Brazil foreign bribery investigations. After Rolls-Royce, Krieg became director of risk and compliance at UK broker Willis between February and August 2014, before taking a career break. Krieg moved to Shepherd and Wedderburn in 2016.

The firm did not respond to a request for comment.

Karen Seymour

Karen Seymour moves in-house at Goldman Sachs

By Kelly Swanson

Prominent Sullivan & Cromwell partner Karen Seymour is leaving the white-shoe New York firm to join Goldman Sachs Group as co-general counsel and partner.

Seymour will join existing general counsel Greg Palm in advising Goldman Sachs on all legal matters affecting the investment firm's operations worldwide, according to a 19 December press release from Goldman Sachs. She starts next month.

"Karen's joining me as co-general counsel is a home run for Goldman Sachs and for me personally," Palm said. "More than 25 years ago, I similarly joined the firm as a partner and co-general counsel, and my hope is that she enjoys her time here as much as I have and do."

At Sullivan & Cromwell, Seymour specialised in commercial litigation, white-collar criminal defence and internal investigations, and previously served as co-managing partner of the firm's litigation group. Seymour led negotiations for BNP Paribas in its 2014 US$8.83 billion settlement with the US government for conspiring to process transactions through the US financial system on behalf of entities in sanctioned countries including Sudan, Iran and Cuba.

She joined the firm in 1987 and has worked alongside her husband, white collar criminal defence lawyer Sam Seymour, also a partner at Sullivan & Cromwell. The couple don't work together on cases, but between them have represented banks in six of the seven largest sanctions settlements, *The Wall Street Journal* reported in 2014.

Seymour has also served as an assistant US attorney for the Southern District of New York, stepping away from Sullivan from 1990 to 2004. As chief of the office's criminal division in 2004, she capped her public career as lead prosecutor in the *Martha Stewart* insider-trading case in 2004.

Seymour joins other Big Law attorneys who have departed in the last year for in-house general counsel jobs, including Claudius Sokenu, who left Shearman & Sterling for oil and gas company Tesoro in May; and Jeremy Levin, who left Baker Botts for BAE Systems in late 2016.

Seymour did not respond to requests for comment.

Morvillo joins Orrick

By Clara Hudson

Orrick is expanding its white-collar practice with the acquisition of East Coast boutique Morvillo.

Orrick announced on 18 December that Morvillo's seven partners and 15 litigators will join the firm in January 2018 to double the size of its East Coast securities litigation and white-collar practice.

Richard Morvillo, a partner at Morvillo and a former US Securities and Exchange Commission (SEC) enforcement division branch chief, said he originally approached a friend at Orrick to find a lateral partner move before "the tides turned" and the firm began pursuing Morvillo. He also said that, at 69, "it seemed like a good time for my younger partners to consider the long term".

The New York and Washington, DC-based boutique was opened five years ago by Richard, Scott and Gregory Morvillo, the brother and two sons of prominent white-collar lawyer Robert Morvillo. Robert Morvillo made a name for himself when he co-founded New York firm Morvillo Abramowitz Grand Iason & Anello, where he defended numerous high-profile clients, including Martha Stewart in an insider trading case.

Another white-collar lawyer in the Morvillo family, Christopher Morvillo, is a partner at Clifford Chance in New York. Morvillo is the co-editor of *The Practitioner's Guide to Global Investigations*.

Morvillo focuses on white-collar criminal investigations and FCPA matters, particularly related to the financial sector. Richard Morvillo said the team brings Orrick a clutch of experienced former government lawyers and prosecutors, including Scott Morvillo, a former federal prosecutor in the US Attorney's Office for the Eastern District of New York (EDNY), and Amy Walsh, a former chief of the Business and Securities Fraud Section in the same office. Walsh is also currently the court-appointed monitor for JP Morgan following its 2015 settlement with the US Department of Justice over improper practices in signing mortgage payment documents for bankruptcy courts.

Other Morvillo partners that will move to Orrick include Andrew Morris, Daniel Nathan and Ellen Murphy. Also joining Orrick are Morvillo counsel Henry "Pete" Putzel, Jason Somensatto and Savannah Stevenson.

Morvillo has handled matters for numerous high-profile clients over the years, including Wells Fargo Securities and several executives in the Fifa investigation.

Morvillo represented senior executives in the US SEC investigation into the hedge fund Och-Ziff Capital Management Group for alleged FCPA violations. Och-Ziff became the first hedge fund to resolve FCPA violations in a US$413 million settlement in 2016, following allegations that its top executives cleared bribes that were paid to officials in Africa.

Patrick Otlewski

King & Spalding making big push in Chicago

By Kelly Swanson

Another former federal prosecutor from the US attorney's office in Chicago has joined King & Spalding's new base in the Windy City, the firm announced on 8 January.

Assistant US attorney Patrick Otlewski is the third former prosecutor from the Northern District of Illinois to join the now seven-person team at King & Spalding in Chicago. Former assistant US attorney Patrick Collins joined the firm in October.

Zachary Fardon, former US attorney for the Northern District of Illinois, started the firm's Chicago office in September after stepping down from his position following Attorney General Jeff Sessions's request for the resignation of top district federal prosecutors who had been appointed under President Barack Obama.

Fardon previously told GIR Just Anti-Corruption that the Chicago office plans to grow "carefully and deliberately" with an emphasis on hiring attorneys who "care about Chicago and the community here." Having led a dozen cases to trial returning guilty verdicts in all, Otlewski fits that bill.

"In his seven years at the US attorney's office, Patrick led some of its highest profile investigations and prosecutions and achieved an incredible record of success," Fardon said in the January press release. "I am very excited to work with him again, and especially for the contributions he will make to the momentum of our new Chicago office."

The prosecution of the infamous Chicago street gang known as the Hobos is the case Otlewski says he is most proud of. In August 2017, the boss of the Hobos street gang was sentenced to 40 years in prison in a prosecution led by Otlewski.

Otlewski is particularly excited to be reunited with Fardon, whom he also worked with in private practice at Latham & Watkins.

Freshfields hires former Düsseldorf prosecutor

By Michael Griffiths

Freshfields has made its first lateral hire in Germany in over a decade by poaching a former Düsseldorf prosecutor from a German boutique.

Freshfields Bruckhaus Deringer announced on 15 December that Simone Kämpfer will join the firm's dispute resolution team in Düsseldorf on 1 February 2018. Kämpfer will join Freshfields from German criminal defence firm Thomas Deckers Wehnert Elsner, where she has been a partner since 2007.

Prior to moving into private practice, Kämpfer worked as both a prosecutor and spokesperson for the Düsseldorf public prosecutor's office from 1998 to 2007. From 2000, she worked in the office's economic crime section and specialised in prosecuting financial misconduct.

Freshfields' managing partner in continental Europe, Helmut Bergmann, said in a statement that the firm decided made the rare lateral hire because Kämpfer is an "extraordinary lawyer" who "will give further impetus to our successful criminal law and investigation practice in Germany and worldwide".

At Deckers Wehnert Elsner, Kämpfer represented one of eight Deutsche Bank executives who were charged in 2015 with conspiring to evade taxes while trading carbon emissions certificates. In 2016, six of the executives were fined and received two years' probation over the matter, with a former head of division sentenced to three years' prison.

Freshfields has added several other former prosecutors to its investigations practice this year. Most recently, the UK Serious Fraud Office's (SFO) former joint head of bribery and corruption, Ben Morgan, joined the firm's London office as a partner in September 2017.

Morgan led the SFO's investigation into UK engineering company Rolls-Royce, which ended with the company agreeing a £497 million deferred prosecution agreement – the largest in the UK to date – to resolve allegations that company employees bribed officials in multiple countries. The company simultaneously agreed a US$170 million settlement with the US Department of Justice (DOJ) and a US$26 million settlement with Brazil's Federal Prosecution Service over the matter.

In March 2017, Freshfields hired Brent Wible as counsel in its Washington, DC office. Wible was an assistant chief within the fraud section at the US DOJ's Criminal Division and also served as senior counsel to US President Barack Obama.

Thomas Deckers Wehnert Elsner did not respond to a request for comment.

Nardello recruits former US prosecutor in Atlanta

By Clara Hudson

Nardello has hired former assistant US attorney Steven Grimberg as managing director and US general counsel to help clients investigate cybercrime.

Grimberg, who joined the firm's Atlanta office on 2 January, spent 12 years at the US Department of Justice (DOJ). Grimberg said one of the reasons he joined Nardello was to work with Mark Ray, a former FBI agent. Ray joined Nardello in September, and will work with Grimberg on cybersecurity issues.

Grimberg partnered with Ray at the DOJ's Cyber Crime Unit in Atlanta, which often collaborated with investigators from the FBI. Grimberg developed and led the unit, which was created in 2016.

The pair led investigations at the DOJ and FBI into the malware SpyEye, which caused over US$1 billion in losses to individuals and financial institutions worldwide. Until it was dismantled by the FBI, SpyEye was used by a global network of cybercriminals to steal funds by infecting over 50 million computers.

Grimberg prosecuted the case against SpyEye's developers, Russian national Aleksandr Panin and Algerian national Hamza Bendelladj. In 2016, Panin and Bendelladj received a combined sentence of 24 years in prison.

At Nardello, Grimberg and Ray will help prevent cyber incidents for clients by reviewing their computer networks or conducting table top exercises. These exercises simulate a cyber incident on a company's computer systems to help identify gaps in its response – "almost like a fire drill," Grimberg said.

At the DOJ, Grimberg was a trial attorney for five years before rising to assistant US attorney and deputy chief of the economic crimes section in 2010. He investigated and prosecuted cases relating to fraud, embezzlement, corruption, insider trading, tax evasion and computer hacking. He was also the national security cyber specialist for the DOJ, and acted as its first point of contact in Atlanta for cyber-related threats with national security implications.

Grimberg said that cybercrime is particularly "pernicious" as it's such a low-cost crime for perpetrators – "all you need to commit such a crime is a computer with an internet connection," he said.

"It is so easy for someone to commit the crime, yet it can cause such a tremendous amount of harm to the victims," he said.

Dan Nardello, CEO of the firm, said in a press release that Nardello was particularly interested in hiring Grimberg because he is a "proven leader" after developing the cyber crime unit and supervising approximately 25 prosecutors at the US attorney's office.

Nardello said: "Steve's legal acumen, coupled with his deep understanding of complex financial fraud investigations and crisis management experience in the cybercrime arena will be a tremendous addition."

Former DOJ money-laundering chief joins Navigant

By Michael Griffiths

Clay Porter, the former head of the US Department of Justice's (DOJ's) banking integrity unit, has joined Navigant as head of investigations.

Navigant announced on 8 January that Porter had joined the firm's Washington, DC, office on 3 December, thereby ending his seven-year stint as chief of the US DOJ's banking integrity unit that sits within the money laundering and asset recovery section. Porter will lead Navigant's global investigations team that is part of its broader global investigations and compliance practice.

At Navigant, Porter will oversee the consultancy's anti-bribery, anti-corruption, forensic accounting and financial investigations teams, as well as handling money laundering, asset recovery and sanctions matters. It's a role the firm says fits with the experience Porter gained at the DOJ.

Among the matters Porter handled was the US$227 million deferred prosecution agreement the agency agreed with UK bank Standard Chartered in 2012. The DOJ and the New York County District Attorney's Office alleged Standard Chartered conspired to violate the US International Emergency Powers Act by illegally shifting millions of US dollars through the US financial system on behalf of sanctioned Iranian, Sudanese, Libyan and Burmese companies. Porter co-led the matter with assistant US attorney from the US Attorney's Office for the District of Massachusetts, George Varghese.

Porter's position at the DOJ wasn't his first in US public service, however. From 2001 to 2004, Porter was an assistant US attorney for the Brooklyn District Attorney's Office in New York state. He left the role for an associate position at Clifford Chance in New York, where he stayed for a year before joining Skadden Arps Slate Meagher & Flom, also as an associate, according to his LinkedIn profile.

Navigant's global head of investigations and compliance Ellen Zimiles – a former assistant US attorney for US Attorney's Office for the Southern District of New York – said in a statement that Porter has a "unique and valuable perspective into the government's expectations as to what constitutes an effective and comprehensive compliance programme for financial institutions and multinational corporations".

Zimiles has also crossed paths with Standard Chartered, as she was appointed its independent monitor in 2012. While Zimiles was only originally appointed for two years, she uncovered a significant amount of additional suspicious transactions from the bank's UAE and Hong Kong branches. This led the bank to enter into a US$300 million settlement with the New York Department of Financial Services and Zimile's monitor period was extended by two years.

Navigant is also home to former UK government enforcer Robert Dedman. Before joining Navigant's London office in March 2017, Dedman was head of regulatory action at the Bank of England.

Navigant did not respond to a request for comment.

Richard Jereski

Guidepost Solutions hires US Department of Commerce Investigator

By Michael Griffiths

US consultancy Guidepost Solutions has hired Richard Jereski, a former US Department of Commerce special agent, as a managing director.

Guidepost Solutions announced in an 18 January statement that Jereski, 50, joined the firm on 2 January as a managing director in the firm's Washington, DC investigations practice. Jereski's move to Guidepost Solutions is his first foray into private practice after over 20 years in US government agencies.

The majority of Jereski's investigations experience comes from his 14 years at the US Department of Commerce. From 2003 to 2017, Jereski worked on licensing and sanctions enforcement at the office of export enforcement within the Commerce Department's Bureau of Industry and Security.

In that role, Jereski assisted prosecutors with investigations into FCPA and US International Economic Emergency Powers Act matters, and often worked alongside the US Department of the Treasury's Office of Foreign Assets Control (OFAC).

At Guidepost Solutions, Jereski will continue to advise companies on compliance with US law. "I will do a lot of the same work I did for the government but from the private sector: assisting EU companies comply with US regulations and helping US companies with FCPA compliance," he told GIR.

Jereski said that US government bodies handling sanctions enforcement are increasingly encouraging companies to self-police when it comes to foreign trade regulations. "Doing so allows government authorities to put resources into real crime, not just policing mistakes," he said.

Guidepost Solutions' CEO Julie Myers Wood said in a statement that Jereski has "deep expertise on trade compliance and customs issues" and that the firm's clients "will greatly benefit from his experience investigating complex regulatory matters".

ON THE HORIZON: INVESTIGATIONS IN 2018

From privilege wrangles in Europe to corruption investigations in the Middle East, GIR speaks to leading investigations lawyers around the world on what to expect from the coming year

Clara Hudson, **Roger Hamilton-Martin** and **Michael Griffths** report

Talk of increased international cooperation progressed from excited chatter in recent years to a dull roar by the end of 2017, setting up 2018 as a year filled with increasingly crowded investigations and more joint settlements.

Last year concluded with Singapore-based oil rig manufacturer Keppel Offshore & Marine agreeing a US$422 million trilateral anti-bribery settlement with Singaporean, Brazilian and US authorities. It was the first of its kind for Singaporean authorities, but Singapore wasn't the only jurisdiction to open its arms to coordinated enforcement actions last year.

Swedish Telecoms company Telia resolved bribery allegations with a US$965 million settlement in September, US$457 million of which went to Swedish prosecutors and the US Securities and Exchange Commission (SEC) and US$548 million was handed to Dutch prosecutors and the US Department of Justice (DOJ).

Investigations continued to be collaborative in 2017 with new relationships forming between authorities: Guernsey and Hong Kong began investigating suspect transfers from UK bank Standard Chartered; France, the UK and US are working together on an anti-bribery investigation into European aerospace company Airbus; and Italian and Indian prosecutors are cooperating on a continuing Indian investigation into Italian helicopter company AgustaWestland, now called Leonardo Helicopters.

Some jurisdictions have already made clear their intentions to play a bigger role on the world investigations stage in 2018. Argentina introduced corporate criminal liability in November 2017; the Australian parliament will debate a bill introducing DPAs; and China began 2018 by broadening the definition of commercial bribery.

Meanwhile, a series of high-profile cyberattacks in the second half of 2017 focused minds on the threat of data breaches ahead of the implementation of two strict data protection regulations in 2018. While both the EU's General Data Protection Regulation and the New York Department of Financial Services cyber-protection regulations have been long anticipated, 2018 will be the year that they finally come into force.

Privilege will continue be a hot topic in 2018. The Constitutional Court in Germany will rule on whether prosecutors can use documents seized from Jones Day in 2017 as part of an investigation into German car manufacturer Volkswagen, and the Court of Appeals of England and Wales will hear Eurasian Natural Resources Corporation's challenge against the UK High Court's interpretation of litigation privilege.

International cooperation: for better or worse?

While enforcement agencies around the world are likely to improve cooperation over the coming year, lawyers say that disagreements between jurisdictions could harm negotiations.

Marnix Somsen, head of De Brauw Blackstone Westbroek's corporate criminal defence practice in New York, said that while enforcers might "push for cooperation" there is a risk that such agencies become competitive in multiparty settlements – meaning higher fines for companies.

There are many reasons why authorities would lock horns in multiparty negotiations due to politics or prestige, Somsen said. To win a significant portion of the fine for their jurisdiction, he said, enforcement agencies tend to push for a higher fine overall.

"If multiple parties are at the table, they will all want to have a piece of the pie" he said.

In November, the US DOJ announced that it is considering proposals to improve coordination with foreign authorities and ensure that companies do not make "duplicative and unwarranted payments".

In September, the DOJ reached a globalsettlement with Swedish telecoms company Telia. Telia agreed to a first-of-its-kind settlement with US, Dutch and Swedish authorities to resolve allegations that its employees bribed officials in Uzbekistan. Telia agreed to pay US$548.6 million to be split evenly between the DOJ and the Dutch public prosecutor's office. The company also agreed to pay a US$457 disgorgement to be split between the US Securities and Exchange Commission, DOJ and Swedish authorities.

DOJ officials have indicated that more global settlements such as the Telia agreement are on the horizon.

Adam Lurie, head of Linklaters' litigation and government investigations practice in Washington, DC said that disputes among different authorities can complicate negotiations with companies.

He said: "We want to keep regulators aligned because it's not good for our clients if they're not. We don't want to have regulators in different countries fighting each other, or asking for conflicting information."

Lurie said communication between authorities is still vital as "it's that much more difficult when they're not talking".

Meanwhile, prosecutors themselves are seeing the benefits of informal communications. At GIR Live: DC in October, Eduardo El Hage of Brazil's Federal Prosecution Service (MPF) said he regularly communicates with French prosecutors over instant messenger WhatsApp.

Meetings, phone calls and text messages between French and Brazilian prosecutors drove the investigation into the Rio Olympics bribery investigation forward, according to El Hage. Essential discoveries, including 16 kilograms of undeclared gold in a Swiss safe, were the result of increased cooperation with other jurisdictions, he said. Brazilian prosecutors asked Switzerland to help them locate the safe through mutual legal assistance, and were surprised to receive a response in under 20 days.

However, El Hage said that while international cooperation was particularly fruitful in this investigation, he didn't expect this success to be the new norm.

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Argentina introduces corporate criminal liability

Argentina has passed anti-corruption laws that will introduce corporate criminal liability in 2018. The country passed the Corporate Liability Bill in November 2017 to hold companies accountable for transnational bribery schemes. Lawyers say the new legislation will provide Argentina with the tools to meet the best international practices.

The law will come into force on 1 March, enabling prosecutors to blacklist companies from public contracts for up to 10 years, and fine them up to five times the benefit obtained from a bribery scheme.

The law enables prosecutors to enter leniency agreements with companies. It also requires companies that want to bid for state contracts to adopt anti-corruption compliance programmes by 1 March.

Cristián Francos, a partner at Lewis Baach Kaufmann Middlemiss in Buenos Aires, said that while most multinationals in Argentina have compliance programmes to meet international standards, small and medium companies may be building anti-corruption programmes from the ground up.

"Some companies in Argentina are seriously thinking about it [anti-corruption compliance] for the first time" he said.

Francos said he was reluctant to think that prosecutors will make any leniency agreements this year, as the law won't be in effect for another few months. He said that there will be an adjustment period for judges and prosecutors to learn how to gauge corporate liability for the first time.

"It will take time until [the judges and prosecutors] get used to this new feature of the law," he said.

Francos said there may be increased co-operation between Argentinian prosecutors and their foreign counterparts once the law is enacted. He also noted that G20's 2018 summit, to be held in Buenos Aires, will boost its status among other countries.

Argentina also hopes to become a member of the Organisation for Economic Co-operation and Development (OECD), which put pressure on the country to enact the law. Argentina is at present a signatory of the OECD's Convention of Combating Bribery of Foreign Public Officials in International Business Transactions 1997.

Francos said he is "optimistic that the country is heading in the right direction," but it remains to be seen how effective the law will be.

He said: "The law is good – as long as you enforce it. We [Argentina] are masters at drafting laws, but when it comes to enforcement, we can be weak. We have to work within our institutions to improve that aspect."

> "Some companies in Argentina are seriously thinking about anti-corruption compliance for the first time."
>
> **– Christian Francos**

Australia to toughen up its enforcement powers

Three years after an Australian parliamentary committee described being under investigation by the country's financial enforcement authority as like "being hit by a lettuce leaf", the Australian government looks set this year to hand Australian enforcement agencies a few big sticks to wield.

The Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017 is ready to be introduced to the Australian parliament when it opens on 7 February. If passed, the bill will introduce deferred prosecution agreements (DPAs) to Australia as well as the crime of failing to prevent bribery.

Rani John, of DLA Piper in Sydney, told GIR that the introduction of DPAs will mark a"big shift in the [Australian] enforcement landscape for corporate crime". It appears that Australian investigative authorities are confident the bill will pass. In December 2017, the Australian Federal Police (AFP) and the Commonwealth Crown Prosecution Service released guidance on how companies should self-report foreign bribery under the new system.

Another bill before the Australian parliament is the Treasury Laws Amendment (Whistleblowers) Bill 2017. It enacts a number of recommendations from Australia's Parliamentary Joint Committee on Corporations and Financial Services, which recommended in September 2017 that Australia establish a whistleblower protection scheme and require Australian companies to enact a whistleblower policy.

As well as additions to Australia's enforcement powers, the new chairman of the Australian Securities and Investment Commission (ASIC) starts in February. Lawyers are eager to see if James Shipton – a former chairman of the Hong Kong Securities & Futures Commission – will temper his predecessor's aggressive approach.

Luke Hastings, regional head of dispute resolutions at Herbert Smith Freehills in Sydney, said former ASIC chairman Greg Medcraft was "very focused on enforcement" and that lawyers are "interested to see if Shipton will be as enforcement focused or dial it back a bit".

Shipton will be armed with tools his predecessor lacked, such as DPAs and the Banking Executive Accountability Regime – a version of the UK's senior manager's regime – which will come into force on 1 July 2017.

All of this action in Australia will be set against the backdrop of the Banking Royal Commission, which was announced by Prime Minister Malcolm Turnbull in November 2017 and is set to run until November 2018. While the report from the inquiry into misconduct within Australia's financial services industry won't be released until February 2019, Hastings told GIR that the commission "will continue to focus the minds of the financial services industry, and the press".

Shipton will be armed with tools his predecessor lacked, such as DPAs and the Banking Executive Accountability Regime.

Rising bribery risk in China

Since taking power in 2012, Chinese General Secretary Xi Jinping has embarked on a ferocious anti-corruption purge that has caught up hundreds of thousands of officials and a number of private sector companies.

Now, new legislation means companies operating in China need to watch out for a further boost in bribery enforcement in 2018, lawyers told GIR.

Coming into effect on 1 January, an amendment to China's Anti-unfair Competition Law is the first change since the law was passed in 1993, and an indication that China's anti-corruption purge is likely to press on.

The amendment exposes companies to greater risk of enforcement actions by China's State Administration for Industry and Commerce. Companies also risk greater fines under the law.

K Lesli Ligorner, a Beijing-based partner at Morgan, Lewis & Bockius, said Chinese authorities may make examples of multinationals under the legislation.

She said: "As the definition of commercial bribery has been broadened, there is likely to be increased enforcement and a number of seminal cases brought in order to demonstrate increased commitment to enforce".

The amendment broadens the scope of commercial bribery in China, lawyers said. Under the new law, all that is required for authorities to prosecute is that a company or individual "seeks transaction opportunities or competitive advantage" in paying a bribe. In the previous definition, the purpose was limited to "purchasing or selling goods."

Previously, the vicarious liability of employers was not clearly defined. Under the new amendment, an employer can be held liable for an employee's bribery. Administrative penalties are set to rise under the amendment, from a previous maximum of US$30,000 to a new maximum of around US$450,000, and potential loss of business licences.

The new amendment also focuses on third-party bribery risks. Unlike the previous law in China, the amendment states that third parties can be considered bribe recipients.

Mini vandePol, head of Baker McKenzie's compliance and investigations practice in Asia, told GIR that her firm sees "time and time again companies turning a blind eye to which companies are being hired, what they are being paid, what they do" on behalf of companies transacting in China. VandePol said more than 85% of investigations Baker McKenzie is working on across Asia involve third-party conduct.

> "Time and time again companies are turning a blind eye to which companies are being hired, what they are being paid, what they do."
>
> **– Mini vandePol**

Tough new data protection regulations kick in

This year will see the long-awaited introduction of the EU General Data Protection Regulation (GDPR), and the implementation of the main reporting components of the New York Department of Financial Services (DFS) cybersecurity regulations.

Among the requirements within the GDPR, which comes into effect on 25 May, are that EU member nations create an authority empowered to investigate and punish companies that fail to adequately protect consumer data, creating the possibility of more investigations into data breaches.

Penalties under GDPR can be as high as 4% of a company's annual turnover, and companies can be barred from processing data. Lawyers have said that EU companies could even run into trouble under GDPR simply by responding to requests for information from US prosecutors that don't go through official country-to-country information sharing channels.

In New York, financial institutions will have to submit plans to protect data from cyberattacks to the DFS by 15 February. The reporting requirement was part of cybersecurity regulations introduced by the authority on 1 March, parts of which will continue to rollout until March 2019.

However, the February 2018 deadline is particularly important because for the first time a senior officer or chairperson of the board of directors will have to declare that their company has met the DFS's minimum cybersecurity measures.

Failure to implement such measures by the deadline will lead to a range of enforcement actions against a company and individuals. Former DFS general counsel Celeste Koeleveld, who is now at Clifford Chance in Washington, DC told GIR: "The consequences can range from very minor – 'where is your certification and why haven't you filed it?' – to more severe consequences."

"Things get more serious the longer you delay and any penalties available to the department for failure to comply with the regulation will kick in after the February deadline," she added.

David DiBari, managing partner of Clifford Chance in Washington, DC, told GIR in March 2017 that the DFS cybersecurity regulations should spark an attitude change among companies. He said it will mark a "shift in thinking about hacked companies as victims to organisations who have breached regulations, or didn't have adequate procedures in place".

> "DFS cybersecurity regulations will mark a shift in thinking about hacked companies as victims to organisations who have breached regulations, or didn't have adequate procedures in place."
>
> **– David DiBari**

"In Germany, we see contradicting case law about the extent to which attorney work-product – reports and interview memoranda – of internal investigations are subject to legal privilege."

– Eike Bicker

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German court to rule on Jones Day privilege dispute

German lawyers will pay keen attention to a forthcoming decision by the country's Constitutional Court in a professional secrecy dispute between Munich prosecutors and Jones Day, which is representing Volkswagen in an investigation into whether the car company manipulated diesel engines to give misleading emissions test results.

The wrangle started on 15 March 2017 when Munich prosecutors, reportedly frustrated that Jones Day wasn't sufficiently cooperative in their investigation, seized 131 internal investigation documents from the firm's Munich office.

At the time, Volkswagen had shared its findings with the DOJ but refused to hand them over to German prosecutors for fear of impairing its cooperation with the US and potentially arming shareholders with evidence to use against the company in related proceedings.

While a Munich district court ruled in May 2017 that the raid was legal, the Constitutional Court responded to Jones Day's appeal by slapping an injunction on the evidence in July, preventing prosecutors from reviewing the documents until the court issues its final ruling. With its forthcoming decision, the court could clarify a handful of murky German privilege issues.

German lawyers, who spoke on the condition of anonymity, said privilege applies to documents from an internal investigation prepared for the purpose of mounting a defence, but not to investigations that aren't strictly conducted for the purpose of defending a client against allegations of misconduct.

Furthermore, the court should rule on the protections afforded to reviews conducted by law firms in response to allegations of misconduct by a foreign authority – the DOJ in the *Volkswagen* case.

Eike Bicker, of Gleiss Lutz in Frankfurt, told GIR that the German legal community is looking for the court to provide "clear guidelines" on what is protected by privilege in internal investigations.

"In Germany, we see contradicting case law about the extent to which attorney work products – reports and interview memoranda – of internal investigations are subject to legal privilege," he told GIR.

Volkswagen hired Jones Day to conduct an internal investigation in 2015, after the US Environmental Protection Agency revealed that the German car manufacturer had installed illegal devices in its diesel cars to cheat emissions tests. The matter has seen Volkswagen pay out or earmark close to US$30 billion for settlements.

Some of that money has been used to resolve class action suits, vehicle recalls and regulatory investigations. So far, the biggest settlement has been the US$4.3 billion plea agreement the company signed with the DOJ in January 2017 after pleading guilty to installing "cheat devices" in vehicles. Despite the large settlement figure, the DOJ continues to investigate the matter.

ENRC appeal ruling to create new litigation privilege definition

The outcome of Eurasian Natural Resources Corporation's (ENRC) appeal against a narrow interpretation of litigation privilege by the UK High Court could affect how lawyers conduct internal investigations.

The 8 May 2017 ruling by Mrs Justice Andrews of the High Court of Justice at the Queen's Bench Division, concerning a Serious Fraud Office (SFO) bribery investigation into ENRC that limited litigation privilege in SFO investigations to covering that which is prepared for the sole or dominant purpose of conducting litigation, and not to legal advice created to avoid contemplated litigation.

ENRC appealed against the decision in an attempt to protect a raft of internal investigations documents, including notes taken by the company's former counsel Dechert in interviews of current and former employees of ENRC and its subsidiaries between August 2011 and March 2013.

The company, now represented by Hogan Lovells, was granted leave to appeal on 11 October by Lord Justice Floyd, who said the company's appeal had "a real prospect of success".

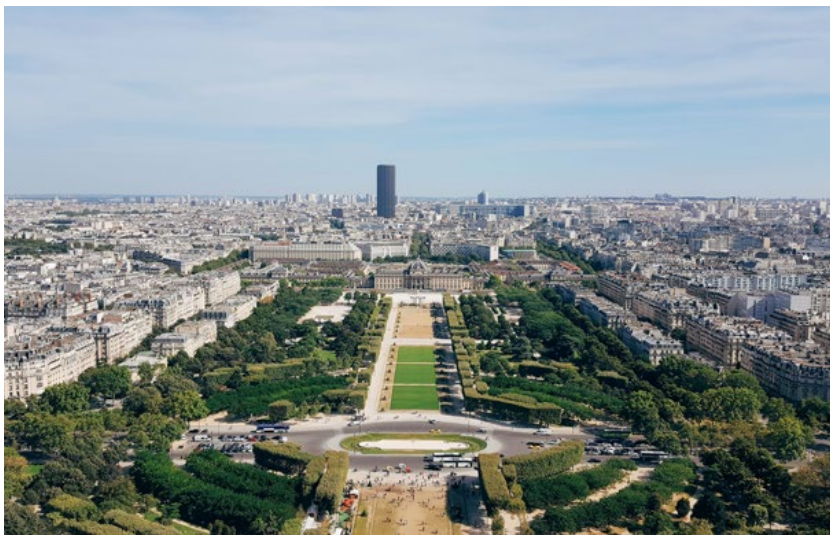
The appeal hearing is expected to begin in July and UK lawyers told GIR that the decision should clarify how they conduct the first round of witness interviews in internal investigations.

Elizabeth Robertson, of Skadden, Arps, Slate, Meagher & Flom in London, told GIR that while she has always held that "a simple first account may not be privileged" an "adverse decision in *ENRC* will mean that we have to be much more thoughtful about how we treat and record those initial first account interviews, making it potentially much harder to give clear legal advice to our clients".

Such is the interest in the appeal that in November the Law Society of England and Wales sought permission to intervene in the appeal proceedings. The Law Society's president, Joe Egan, said in a statement at the time that the decision will have "profound implications for when and how companies and their employees are protected by privilege".

The SFO announced the investigation into ENRC in April 2013. The authority is focusing on allegations that ENRC officials paid bribes to executives in Kazakhstan and the Democratic Republic of Congo to win mining contracts. ENRC denies wrongdoing.

> "An adverse decision in *ENRC* will mean that we have to be much more thoughtful about how we treat and record those initial first account interviews, making it potentially much harder to give clear legal advice to our clients."
>
> **– Elizabeth Robertson**



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French authorities search for the next DPA

France reached its first settlement under its new anti-corruption law in 2017. Lawyers in the country predict that prosecutors will carry that momentum in 2018 by opening more investigations and pushing to agree deferred prosecution agreements (DPAs).

France introduced DPAs as part of a 2016 anti-corruption law, known as Sapin II. The law came into effect in December 2016 and, within 12 months, France's Public Prosecutors Office (PNF) agreed its first settlement – a €300 million DPA with HSBC Private Bank Switzerland.

Lawyers in France said the HSBC settlement is the first of many in the pipeline. HSBC counsel Denis Chemla, of Allen & Overy in Paris, said: "There's going to be more and more of these deals offered by prosecutors."

Chemla added that French companies will soon get into the habit of cooperating with prosecutors. "French companies will begin uncovering facts and rushing to the prosecutor to seek clemency or leniency," he said.

In 2017, French prosecutors opened a raft of investigations, including bribery probes into aerospace company Airbus and French bank Société Générale, as well as a terrorism financing investigation into Franco-Swiss cement company LaFargeHolcim and a money laundering investigation into Denmark's Danske Bank.

Investigations into Airbus and Société Générale have seen French prosecutors working with UK and US authorities, among others, setting up the possibility of France's first cross-border settlement. Of particular interest to French lawyers is how French prosecutors interact with the US Department of Justice in settlement negotiations.

The reason for this, according to Stéphane de Navacelle, of Navacelle Law in Paris, is that the French government feels the DOJ has harshly sanctioned French companies in the past and so "Sapin II is a geopolitical law, to tell the US to get lost".

"Let's hope that those in charge can actually use it to make a difference," he added.

> "French companies will begin uncovering facts and rushing to the prosecutor to seek clemency or leniency."
>
> **– Denis Chemla**

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"The SFO will continue to operate as an independent organisation."

David Green and the future of the SFO

With David Green coming to the end of his tenure at the UK Serious Fraud Office (SFO), the authority is set for a year of change.

Lawyers say that Green will be "a hard act to follow" after he reshaped the SFO. In particular, they said that Green's key legacy is securing the first four deferred prosecution agreements (DPA) to date for the SFO. During his time as director, the SFO entered into its first DPA with London-based Standard Bank in 2015. The SFO then entered into agreements with Rolls-Royce, Tesco and a company known as XYZ.

Lawyers have been busy speculating who will take over from Green in April; many GIR spoke to are betting on the SFO's general counsel, Alun Milford. The UK Cabinet Office formally launched its search for a new director when it posted an advertisement for the role on 12 December.

However, lawyers told GIR that the search for a new director could be hindered by uncertainty over the future of the SFO itself.

In May 2017, the Conservative Party pledged in its manifesto to fold the SFO into the UK's National Crime Agency (NCA), an idea that has been brewing since 2011. While the SFO investigates fraud and corruption cases, the NCA has jurisdiction over organised crime, cybercrime and national security cases.

The Conservative Party's plans for an overhaul of the SFO were initially derailed when the party lost its majority following a snap election in June 2017. However, recent announcements have lawyers concerned once again over the SFO's future. On 11 December, the UK's home secretary Amber Rudd announced that the government will legislate to give the NCA powers to "directly task" the SFO, which will "continue to operate as an independent organisation".

"It's illogical to make the SFO less effective – if it ain't broke, don't fix it."

Lawyers told GIR that this announcement may indicate a move towards fulfilling the Conservative Party's original pledge. Addleshaw Goddard partner Michelle de Kluyver said that a prospective leadership candidate could be deterred by drawn-out discussions over the SFO.

"There is uncertainty in what the government wants to do with the SFO, which seems to raise its head again and again. I think this is very unhelpful when you're trying to recruit a successor [for Green]".

Green himself has said that absorbing the SFO into the NCA would require a rejection of its Roskill model, named after former chairman of the fraud trial committee Lord Roskill. The model was used to combine the expertise of investigators, lawyers and forensic accountants to fight fraud under one roof. Prosecutors at the SFO are overseen by the attorney general for England and Wales, and don't report to a secretary of state, as the NCA does. Green said this is crucial to the SFO's independence.

Lawyers have told GIR that a potential shift in power from the SFO to the NCA seems counterintuitive following the SFO's strength under Green. Chris Warren-Smith, a partner at Morgan, Lewis & Bockius in London, told GIR that any changes to the SFO's independence could damage the authority.

He said: "It's illogical to make [the SFO] less effective – if it ain't broke, don't fix it."

As Green makes his exit in the coming months, lawyers have been speculating over his next move. Green has previously said that he will look for a new role in private practice. Lawyers also said that Green's exit could speed up investigations that he wants wrapped up before leaving the SFO this year.

Stephen Pollard, a partner at Wilmer-Hale in London, said: "Given the length of time the SFO has been investigating some of its big cases and the fact that the director is leaving in April, I would expect that we will see some significant charging decisions in the first quarter of 2018."

What's next for Brexit?

As plans take shape for Brexit – the UK's departure from the European Union – the future of cross-border enforcement between the UK and EU could become clear in 2018. With 29 March 2019 set as the UK's official exit date, some lawyers are concerned that the the country could lose the benefits of its seat at the EU table.

Jonathan Pickworth, head of the white-collar crime team at White & Case in London, said that Brexit will be "a novel challenge for the UK Serious Fraud Office (SFO)," adding that SFO head David Green is "clearly concerned about life after Brexit" for the authority.

Green spoke at the House of Commons' Justice Committee on 13 December 2017, where he said that preserving cooperation between UK and European authorities is "in everyone's best interest". The SFO continues to be "feeding into EU exit planning", according to an SFO spokesperson.

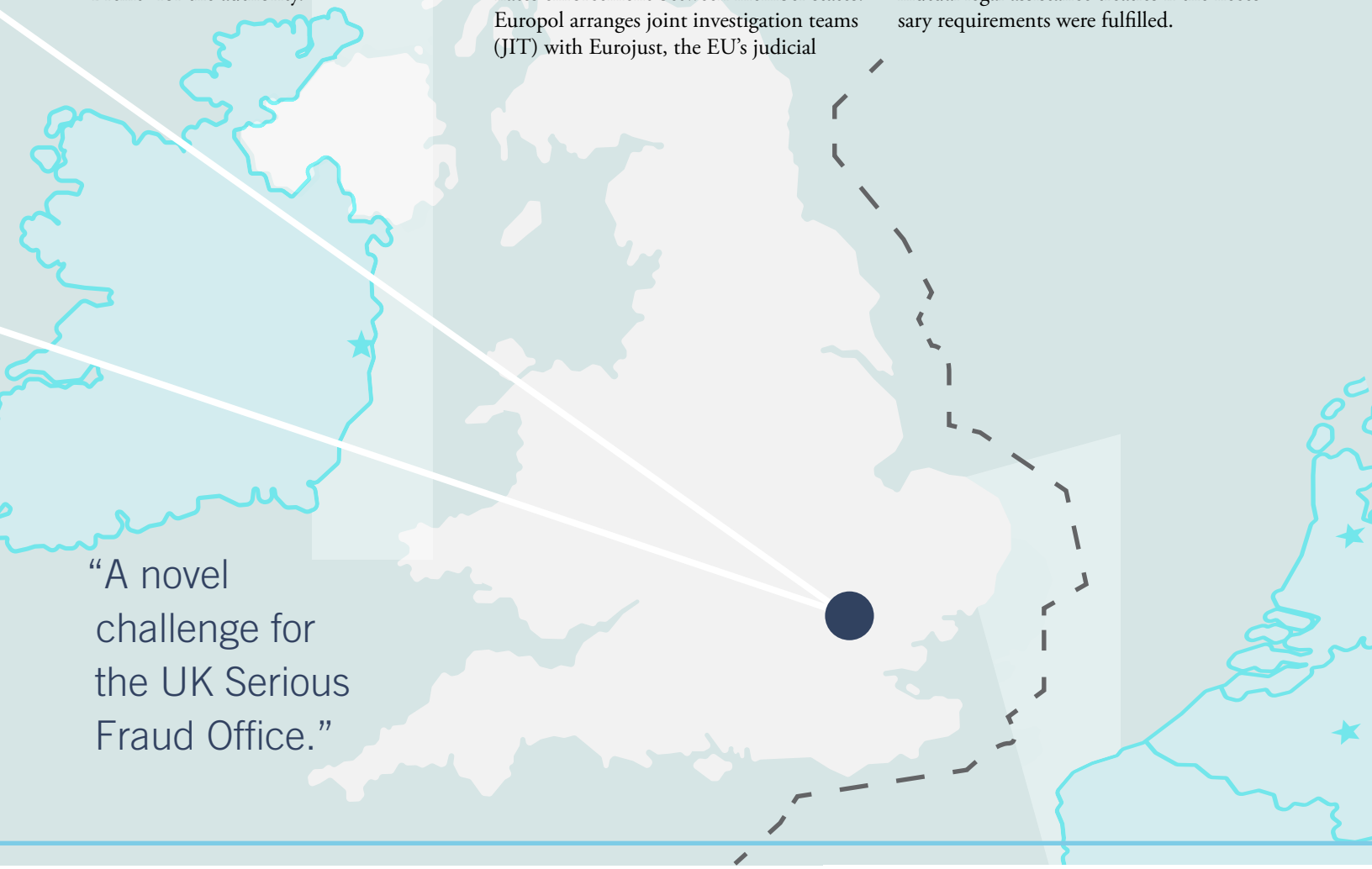
Green warned that Brexit has the potential to damage the SFO's ability to carry out and request overseas arrest warrants, confiscations orders and mutual legal assistance in European countries. He said that maintaining the integrity of UK–EU cooperation structures is beneficial to both parties in this respect.

The committee also questioned whether the UK could continue to work with Europol, an EU-wide body that coordinates enforcement between member states. Europol arranges joint investigation teams (JIT) with Eurojust, the EU's judicial cooperation unit. Both Europol and Eurojust help process mutual legal assistance requests.

While membership in Europol is reserved for EU member states, the authority cooperates with many non-EU authorities.

Pickworth said that, if the UK must leave European bodies such as Europol, "making sure there is an alternative framework in place" will be necessary to ensure cooperation with the EU.

However, other lawyers thought differently, and said that Brexit would not significantly affect cross-border investigations. Michelle de Kluyver, a partner at Addleshaw Goddard expects investigations to remain business as usual post-Brexit. She said she can't see any reason why overseas authorities wouldn't execute and act on mutual legal assistance treaties if the necessary requirements were fulfilled.



"A novel challenge for the UK Serious Fraud Office."

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In response to the Panama Papers, the EU will require the beneficial owners of companies to be logged in a publicly available register.

Legislation post-Panama Papers: who's running the show?

Following the Panama Papers, revised EU legislation will demand that companies disclose their true owners. The move to strengthen anti-money laundering laws in the EU follows concerns that individuals are concealing the ownership of companies.

Millions of files from Panamanian law firm Mossack Fonseca were leaked to newspapers in April 2016, exposing the details of over 200,000 offshore entities. The leak sparked global outrage over the widespread use of offshore entities to evade taxes and hide their assets. In Pakistan, former prime minister Nawaz Sharif was impeached in July 2017, and now faces a criminal investigation.

In response to the Panama Papers, the EU will require the beneficial owners of companies to be logged in a publicly available register. The national registers will be interconnected across EU member states, and available to authorities without restrictions. Member states will also have to put mechanisms in place to verify the beneficial ownership information and ensure that it is accurate.

Once the agreement is formally endorsed by the European Parliament and Council, member states will have 18 months to set up registers.

Neil Gerrard, global co-head of investigations at Dechert in London, said that investigations derived from the Panama Papers are likely to be launched in the new year. He said that the trove of information in the millions of files will no doubt provide leads to new inquiries.

"As more and more people drill down into them, including prosecutors, they're going to find more and more information," he said.

German federal police announced in July that they have obtained the Panama Papers, and have been sifting through the documents. They also announced that they will cooperate with foreign authorities where there is criminal misconduct abroad.

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European countries are divided on the issue of protection for whistleblowers.

The rise of the whistleblower

This year is likely to be a good one for whistleblowers, lawyers say, with further major money payouts expected in the US and moves in Europe towards harmonising laws protecting tipsters.

The European Union has made progress recently towards implementing standards on whistleblowers in the 28 nation block. However, European countries are divided on the issue of protections for whistleblowers, and some have few, if any, protections for employees who expose corruption.

In March 2017, the European Commission launched a public consultation on the question of whistleblower protections, and in October the European Parliament adopted a resolution on measures to protect whistleblowers acting "in the public interest" when disclosing confidential information of companies and public bodies. The resolution called for the commission to implement an EU-wide protection plan for whistleblowers.

The EU still has further to go, including defining what constitutes the public interest, and setting out concrete legislation.

"There are attempts at harmonising the regime on whistleblowing" in Europe, said Bruno Cova, chair of Paul Hastings' Milan office. He said the proposals "make a lot of sense," because companies designing whistleblower compliance programmes and dealing with cross-border investigations are often confronted by different rules and requirements.

"It becomes difficult for a company to manage, difficult for the employees to understand, and this can discourage whistleblowing," Cova said. Several countries have recently advanced whistleblower protection legislation. Italy introduced a law in November protects whistleblowers from retaliation and protects those wrongly accused by a putative whistleblower.

In February, the Russian government proposed an amendment to the country's anti-corruption law to extend existing whistleblower protections to the private sector. The draft was submitted to the lower house of Russia's legislature in October 2017. In 2016, the Dutch senate passed the House for Whistleblowers Act, forcing organisations to have internal procedures in place for employees to report suspicions of misconduct.

In the US, large well-publicised awards have led to a booming industry for lawyers representing whistleblowers making claims to the Securities and Exchange Commission (SEC), and this is likely to continue in 2018.

In November, the US SEC published its annual report suggesting the agency will spend up to US$221 million on whistleblower awards in the coming years. In the past financial year the agency spent US$50 million on payouts to 12 tipsters that helped with its investigations.

However, lawyers should keep an eye on a US Supreme Court case that seeks to establish whether employees who blow the whistle inside a company are protected from retaliation under the 2010 Dodd-Frank Act. There has been a split in US appeals courts over whether employees who blow the whistle in-house are covered, or whether they must report their allegations to the SEC to be covered. In November 2017, judges seemed ready in *Digital Realty Trust v Somers* to limit who's covered by the anti-retaliation protections of the 2010 Dodd-Frank Act.

Judges from across the bench voiced support for the idea that if employees want to be protected from retaliation under Dodd-Frank they have to report to the SEC.

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Operation Car Wash shifts gear

Brazil's Operation Car Wash investigation, which has exposed corruption by executives, companies, politicians and government officials, has been running for several years now. Expect the investigation to continue in 2018.

At the operation's headquarters in the southern Brazilian city of Curitiba, the authorities have collected enough information to wind down active investigations and push forward with prosecutions in the next year, Mattos Filho partner Thiago Jabor Pinheiro told GIR.

Pinheiro said: "We are in a new phase of the operation in Curitiba. The investigative phase seems to be mostly concluded."

He also said investigators in 2018 will focus on passing evidence before filing more actions. Pinheiro stated his practice had seen a slowdown in Car Wash-related work in 2017.

Investigators in Curitiba are ahead of those in Rio de Janeiro and Brasília who launched Car Wash-related inquiries off the back of the initial Curitiba investigation, Pinheiro said. Authorities in Rio de Janeiro and Brasília are not yet at the prosecutorial phase of their operations, Pinheiro said.

"All of them will continue in 2018 but in different phases," he said. Pinheiro also said that "we are likely to see new leniency agreements, including multi-jurisdictional settlements."

It's not known yet who prosecutors will charge in 2018 – but lawyers said it is likely to be former public officials and businessmen, rather than current federal congressmen, who can only be investigated by superior courts.

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"We are in a new phase of the operation in Curitiba. The investigative phase seems to be mostly concluded."

– Thiago Jabor Pinheiro

Which political heads will roll?




"A lot of the attention will turn to enforcement against elected officials."

Top left to right:

South Korean former President Park Geun-hye, ex- speaker of Brazilian Congress Eduardo Cunha, former Brazillian President Luiz Inácio Lula da Silva and ex Pakastani President Nawaz Sharif

Centre:

Peruvian President Pedro Pablo Kuczynski and Keiko Fujimori daughter of former President Alberto Fujimori


Bottom left to right:

Ex Russian minister Alexey Ulyukaev, Chinese sitting politburo member Sun Zhengcai, Hong Kong's former leader Donald Tsang and Israelian Prime Minister Benjamin Netanyahu




Around the world in 2017, top government officials and ministers and a head of state were toppled either due to corruption charges or the pressure of investigations. This year the pressure is likely to continue, and electoral campaigns will put a spotlight on political corruption.

In recent times, the list of politicans who have succumbed to corruption investigations has been long and broad: South Korean President Park Geun-hye was ousted from office; the former speaker of Brazil's Congress, Eduardo Cunha, was sentenced to 15 years and four months in prison; former Brazilian President Luiz Inácio Lula da Silva faced off with judge Sérgio Moro over corruption charges; an anti-corruption court in Pakistan indicted ex-President Nawaz Sharif. Moro and Sharif both deny the charges against them.

Former Russian minister for development, Alexey Ulyukaev was jailed; Colombian former vice-minister of transport Gabriel García Morales was sent to prison; in China, Communist Party discipline tsar Wang Qishan detained seven top party officials; in Hong Kong, former leader Donald Tsang was jailed.

Several prominent politicians are likely to face political battles over corruption investigations in 2018.

In Israel, Prime Minister Benjamin Netanyahu is currently the subject of two corruption investigations, with speculation over whether he will be charged formally. The Prime Minister has been interviewed several times by Israeli police. Several officials close to Netanyahu have also been under investigation. In the first investigation, known as "Case 1,000", Netanyahu and his family are suspected of accepting expensive gifts, allegedly in return for promoting the interests of wealthy benefactors. In a second investigation, the Prime Minister is suspected of seeking a deal to get good coverage from an Israeli newspaper, *Yedioth Ahronoth*. Netanyahu has denied the allegations and says he is the target of political campaign by his opponents.

> "The state wants to show it takes these attempts to combat corruption seriously."
>
> **– Alexei Dudko**

In Latin America, the investigations into Brazilian engineering company Odebrecht may take down its biggest political figure yet. Odebrecht has admitted to paying US$788 million in bribes across 12 countries from 2001 to 2016. The Peruvian Congress brought impeachment proceedings against President Pedro Pablo Kuczynski in December, which he narrowly survived. Kuczynski faces allegations he received more than US$782,000 in improper payments from the company. Odebrecht has not denied it made payments to companies linked to the President – but Kuczynski denies accepting bribes. After the December vote, Kuczynski was summoned by anti-corruption prosecutors to answer questions over his Odebrecht ties, and the investigation is ongoing.

Prosecutors in Peru are also investigating Keiko Fujimori, the daughter of former President Alberto Fujimori, and her party over allegations of illegal campaign donations from Odebrecht. Fujimori has denied wrongdoing. Former President Alan García is also under investigation on money laundering charges, which he denies

Both Russia and Brazil will run elections in 2018, which will increase public scrutiny on corrupt politicians in both countries, lawyers said. In Russia, Moscow-based Hogan Lovells partner, Alexei Dudko, said

"The presidential election means it is likely that there will be an acceleration of the kinds of investigations that brought down ex-Russian minister Ulyukaev."

Ulyukaev was sent to prison in December after being found guilty of accepting US$2 million in bribes.

"The state wants to show it takes thes attempts to combat corruption seriously" said Dudko.

In Brazil, the campaign begins in the summer and culminates in October. With elections for president, upper and lower houses of congress, and at state governor level, Brazilian lawyers say there is going to be significant interest from the public in how the candidates talk about corruption following several years of explosive revelations from the Car Wash investigations.

Thiago Jabor Pinheiro, a partner at Mattos Filho in São Paulo, told GIR that corruption would be a "front and centre" issue during the campaign – both the anti-corruption legislative platforms proposed by candidates, and investigations into the candidates themselves.

"A lot of the attention will turn to enforcement against elected officials" Pinheiro said. Corruption will be a bigger issue at this election than it has ever been since Brazil restored civilian government in 1985, he said. Focus will certainly be on former President Lula, who has announced his candidacy but may not be able to run, depending on how continuing investigations into his business dealings play out. Lula denies the allegation against him.

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Growing enforcement in the Middle East

The Middle East is likely to see a rise in enforcement in 2018.

Borys Dackiw, a United Arab Emirates-based partner at Baker McKenzie and head of the firm's UAE corporate and compliance practice, told GIR to expect "more enforcement" of bribery laws in 2018, after governments have stepped up prosecution of private businesses in the past year. Dackiw noted the Dubai Financial Services Authority as an important body for companies to watch out for.

The UAE has "gone through a flurry of new compliance and investigations-related laws in the past year and a half" that could contribute to boosted enforcement in 2018, said Dackiw. The government made changes to the criminal code in 2017, expanding the definition of bribery to include foreign public officials. Previously, only bribes to domestic officials were covered. Furthermore, in 2016 the government introduced considerably larger penalties for cybercrime.

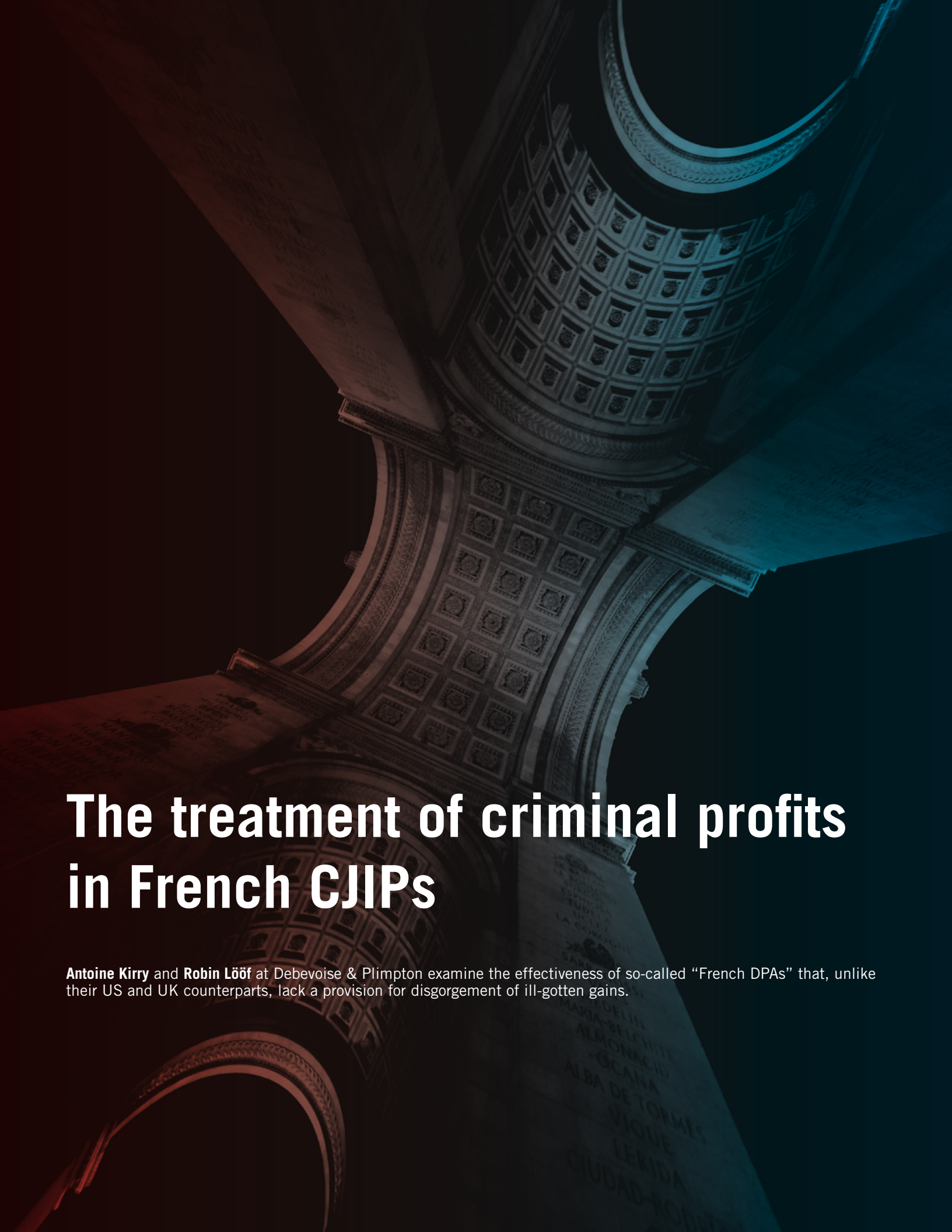
The government also established the Dubai Economic Security Centre, a new authority with a broad mandate to tackle corruption, money laundering, terrorist financing. With a Financial Action Task Force review of the UAE's approach to money laundering set to start in 2019, the issue is likely to be high on the government's agenda.

Dackiw said it can be difficult to track regional trends in enforcement, as often corruption investigations "don't get disclosed", but a recent prosecutorial sweep of individuals in positions of authority, who had managerial responsibility for government-owned institutions has "driven a change in mentality".

Elsewhere in the Gulf, Saudi Arabia is reported to be winding down its corruption purge, with settlements expected to top US$100 billion.

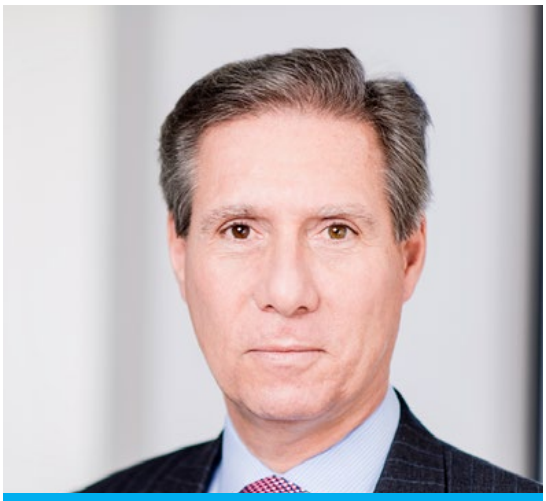
In Israel, bribery investigations continue into Prime Minister Netanyahu. In Kuwait, investigators have opened an inquiry into a 2016 helicopter deal with French company Airbus following a media report alleging fraud.

> "A flurry of new compliance and investigations-related laws in the past year and a half."
>
> **– Borys Dackiw**



The treatment of criminal profits in French CJIPs

Antoine Kirry and **Robin Lööf** at Debevoise & Plimpton examine the effectiveness of so-called "French DPAs" that, unlike their US and UK counterparts, lack a provision for disgorgement of ill-gotten gains.



Antoine Kirry

Robin Lööf

The Judicial Agreement in the Public Interest (CJIP), colloquially known as the "French DPA", does not provide for the confiscation or disgorgement of profits from criminal conduct. This affects not only the total size of French settlements of corporate misconduct, but also in all likelihood how foreign authorities judge their effectiveness.

HSBC Private Bank (Suisse) SA (PBRS) recently entered into the first ever CJIP to settle a long-running investigation into the provision of tax avoidance facilities to wealthy French nationals. Having assisted with the dissimulation of some €6 billion in assets from the French revenue, PBRS was made to pay the largest corporate penalty for criminal conduct in French history. A headline-grabbing amount, €300 million represents an important statement of intent by the French National Financial Prosecutor's (PNF) office and a French enforcement community long thought of as being soft on corporate offenders.

Nevertheless, the PBRS settlement also highlights a striking feature of the CJIP framework: it does not provide for confiscation of the corporate offender's profits from the criminal conduct. Combined with the CJIP's overall provisions on monetary penalties, this produces results which appear highly favourable to the defendant company, as the PBRS settlement illustrates.

Having first provided some background on confiscation of profits from criminal conduct in French law, we will look at how this issue is dealt with in the context of the CJIP and its consequences in the PBRS settlement. We will then consider what the likely results would be for CJIPs in relation to other types of offending, notably corporate bribery, before setting out some issues relevant for companies confronted with potential criminal exposure in France.

Confiscation of criminal profits in French criminal law

Confiscation is a "complementary sentence" in French law, imposed at the discretion of the sentencing judge in addition to (or as a substitution for) the main sentence, the details of which are set out in article 131-21 of the Penal Code. Traditionally of relatively limited scope and mainly used to deprive offenders of the literal tools of their offending, article 131-21 has been progressively strengthened and now constitutes a confiscation regime which is, at least on its face, every bit as draconian as that created by the UK's Proceeds of Crime Act 2002.

Significantly, article 131-21 provides for value-based confiscation of the profits of criminal conduct. As far as is relevant, the third paragraph provides that confiscation applies to "all property which is or represents the direct or indirect product of the offending", and the ninth paragraph specifies that "confiscation can be ordered in equivalent value".

Although the confiscation provisions are frequently invoked against individual offenders, the paucity of corporate convictions for economic or financial offending translates into a lack of examples for how article 131-21 would be applied in that context, particularly as strengthened over the past decade. We note, for instance, that one of the rare cases where companies have been convicted of bribery offences (*Total and Vitol*, Paris Court of Appeal, 26 February 2016; review pending before the French Supreme Court) related to events between 2000 and 2002 so the modern confiscation regime could not be applied. Nevertheless, recent case law from the French Supreme Court, including in relation to a corporate defendant, has applied article 131-21 in a way which makes it clear that it can be used to confiscate sums (or other assets) in the

Nevertheless, the PBRS settlement also highlights a striking feature of the CJIP framework: it does not provide for confiscation of the corporate offender's profits from the criminal conduct

hands of the offender equivalent to the profits from the criminal conduct.

Disgorgement of criminal profits and CJIPs

The two principal financial components of a CJIP are: (1) the fine, to be in an amount "proportionate to the benefits obtained from the established misconduct", but capped at 30% of the corporate entity's average gross turnover in the last three financial years; and (2) compensation for any victims. There is no reference to the confiscation regime in article 131-21 of the Penal Code, and no provision for disgorgement of profits from the criminal conduct as a separate term of a CJIP.

To an observer with a US or UK perspective, this may well appear odd. In the context of sentencing corporates for economic or financial offences, it is generally accepted that disgorgement or confiscation of profits from criminal conduct and fines serve two distinct purposes: depriving the offender of the benefits of the offending, and punishment respectively.

Consequently, the UK deferred prosecution agreement regime (Schedule 17 of the Crime and Courts Act 2013) provides for disgorgement of profits of the criminal conduct as a separate term. In US law, section 8C2.9 of the US Sentencing Guidelines provides for the disgorgement of "any gain to the organisation from the offense that has not and will not be paid as restitution or by way of other remedial measures." In US practice for corporate settlements, disgorgement is often left to the Securities and Exchange Commission by way of civil penalty, or the criminal fine levied by the Department of Justice is deemed sufficiently high to cover both disgorgement and punishment (although the recent *General Cable* non-prosecution agreement and the *HSBC* DPA are examples of the DOJ imposing both fines and separate disgorgement).

In principle, there is nothing in the CJIP framework that prevents French authorities from approaching the fine calculation so as to take the profit amount as the baseline and then adding an additional sum depending on the characteristics of the offending. The PBRS settlement goes some way in this direction, but in so doing illustrates some major limitations in the penalty provisions of the CJIP, which in many circumstances will prevent this from being effective.

The PBRS settlement and the penal limitations of the CJIP

In setting the fine payable by PBRS, the CJIP does indeed start from PBRS's profits from its criminal conduct (€86.4 million) and states that this amount is payable "by way of restitution of the profits derived from the established misconduct". The CJIP then goes on to impose an "additional penalty", justified on the basis of the "exceptional gravity and repetitive nature of the acts of which PBRS is accused" in the sum of circa €71.6 million. The "non-disgorgement" part of the fine in the PBRS settlement was only some 80% of the profits made; an objectively "good" result for the company, particularly given the serious and repetitive nature of the conduct, and the lack of cooperation from PBRS with the investigation (all noted in the CJIP).

To the extent that this represents a principled approach to be adopted by the PNF to calculating fines in the context of CJIPs, it would mean that in the standard case, the fine will equal the profit made, and only in exceptionally serious cases should a fine exceed that amount. On this basis, one wonders whether, and by parity of reasoning, in relation to less egregious offending, or where there has been full cooperation with the investigation, a company could coherently argue that the fine should be less than the profit made.

The PBRS settlement also illustrates the potential effect of the combination of no separate consideration of disgorgement or confiscation of the profits of the criminal conduct, and the 30%

turnover cap: the total fine of some €158 million was the absolute maximum that could be imposed on PBRS in the context of a CJIP, given its recent average gross annual turnover, and this regardless of the offences in question, the seriousness of the offending, or its degree of cooperation.

The balance of the total PBRS settlement of €300 million was made up of compensation paid to the French state with respect to still unpaid taxes on the €6 billion in undeclared assets (circa €142 million).

It is illustrative to compare this outcome with the maximum financial penalty that could have been imposed on PBRS following a conviction:

	Unlawful financial solicitation	Aggravated money laundering
Max fine	€1,875,000	€15 billion (Half the amount of assets laundered, multiplied by five.)
Confiscation	€86.4 million	
Compensation	€142 million	
Total	€15,228,400,000 (For concurrent offences, the total fine cannot exceed the maximum for any one offence.)	

It is highly unlikely that a French criminal court would order confiscation as well as compensation in full to the victims in a sum equal or greater than the profits the offender derived from the criminal conduct. In addition, even on the facts in the PBRS case, a criminal court would not impose a fine anywhere near €15 billion. Nevertheless, a delta of nearly €15 billion between the theoretical maximum amount payable on conviction, versus the maximum payable pursuant to a settlement is, on any view, extraordinary. It should be noted that the PBRS settlement is far from clear on the amount it was accepted to have been hidden from the French tax authorities, and there are suggestions it was only somewhat in excess of €1.6 billion. Even on that basis, however, the maximum fine following conviction would have exceeded €4 billion, still an enormous difference with the maximum under a CJIP.

Wider implications

The CJIP framework places no cap on the amount that can be ordered by way of compensation to victims. In the particular context of the PBRS settlement, the fact that significant compensation was also payable, to a certain extent compensates for the lack of separate provision for disgorgement or confiscation of PBRS's profits from the criminal conduct.

However, in the context of many types of economic and financial offending, with bribery being a case in point, there often is no or relatively little financial loss to be compensated. Even contracts obtained by bribery are often performed satisfactorily or, at least, in line with market practice. So if a bank the size of PBRS obtained a €6 billion asset management mandate by means of bribery, and the investment performed in line with its benchmark, the maximum fine under a CJIP would still be €158 million, regardless of the bank's profits from the mandate. That would be so even if those profits exceeded €158 million.

The effects of the absence of equivalence between the amounts that can be imposed by way of a fine under a CJIP and the amounts payable following a criminal conviction are clearly magnified by the absence of separate treatment of confiscation or disgorgement of the profits from the criminal conduct. If confiscation were dealt with separately, to be considered alongside or instead of compensation, the 30% turnover cap would only apply to the punishment element of the financial penalty and would be less controversial in its effects.

While the 30% turnover cap would in most instances provide relatively little protection for large multinationals, as the PBRS settlement also illustrates, the reality is that the French rules on corporate criminal liability mean that responsibility will more often attach at the level of subsidiaries than that of the global parent entity. This, in turn, means that the 30% turnover cap is likely often to represent a highly relevant, and valuable, provision particularly for corporate defendants benefiting from the deep pockets of their parent.

Conclusion

It might have been thought that where this discrepancy between the maximum sentence following conviction and the financial penalty that can be imposed under a CJIP is particularly large, it would be a very strong factor against the authorities accepting to settle the matter by entering into a CJIP. However, if the PBRS settlement is anything to go by this will not be the case.

The structure of the financial penalties that can be imposed under a CJIP are potentially very attractive to corporate suspects. Nevertheless, companies with potential criminal exposure in France as well as in the US or the UK would need to carefully consider whether a CJIP is likely to be deemed sufficient for the authorities in the latter jurisdictions to consider the matter adequately dealt with in France. The tantalising opportunity presented by the limits on the potential fine payable under a CJIP could therefore prove a mirage should US or UK authorities feel obliged to pursue parallel settlements to make up the perceived difference.

Bias in monitorship selections has become a 'self-perpetuating myth'

A sharp spike in Foreign Corrupt Practice Act monitorships in 2016 and the beginning of 2017 has stoked long-standing complaints about the way the Department of Justice's criminal division chooses private sector lawyers for the lucrative oversight contracts. **Dylan Tokar** reports

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While there's little consensus among critics about how monitor selection should work differently, former candidates have privately expressed gripes about a vetting process that in their eyes amounts to trying to secure entry to an exclusive club.

Their grievances have animated an internal debate about who is best qualified to serve as a monitor: a well-reputed criminal defence lawyer or a career compliance professional with more extensive experience designing the types of compliance programmes that keep companies from becoming repeat offenders.

Most practitioners – and the Justice Department too – will say that both skill sets can be useful, and that one may be more important than the other depending on the circumstances. But among some former monitor applicants there is a perception that officials at the DOJ often skew toward picking defence lawyers – a large number of whom are former prosecutors.

"Statistically it's impossible for these monitorships to pan out the way they do," a lawyer who was recently considered for a monitor position told GIR Just Anti-Corruption, repeating a sentiment expressed by others interviewed for this article. "Again and again and again they're given out to former government officials."

Over the years, the practice of using monitors – both by the DOJ and other government agencies – has remained a consistent feature of corporate settlement agreements. Their use has led to the growth of a cottage industry of lawyers and accountants who specialise in monitorships, and to the creation of monitor associations and industry standards for monitors.

In the private sector, scoring a monitorship can mean tens of millions in dollars in revenue and an entrance into an elite group – since both prosecutors and the companies who are required to have a monitor often prefer a candidate with prior monitor experience.

In 2014 and 2015, monitorships seemed to fall out of fashion with the leaders of the FCPA unit. In total, there were only two monitors imposed on companies during that time. But in 2016 and 2017, the number rose dramatically. Ten monitorships were imposed, many in high-profile cases involving companies such as Israel's Teva Pharmaceuticals and Brazil's Odebrecht and Braskem.

Among the monitors selected, six previously worked in the Justice Department, and four were trial attorneys or supervisors in the DOJ criminal division's fraud section. One, Charles Duross of Morrison & Foerster, served as head of the FCPA unit from April 2010 to January 2014. Others include a former fraud section chief and an assistant chief of the FCPA unit.

Duross's appointment in particular came as a surprise to many lawyers, given his very direct connection to the FCPA unit and how recently he had departed the DOJ. Duross did not respond to a request for comment on his appointment.

Allegations of cronyism persist

For some, the fact that 60% of the monitors chosen in FCPA cases over the last two years are former prosecutors is evidence enough that the process is rigged. The preference for former DOJ prosecutors goes hand-in-hand with the favouritism that is shown to defence lawyers, they say.

Critics argue that while prosecutorial experience lends itself well to a private criminal defence or investigations practice, true compliance expertise is accrued by working closely with companies over many years, often in-house. Most former federal prosecutors don't typically have this type of experience. Still, the DOJ is unlikely to dispute the credentials of their former colleagues.

"The DOJ people who do the screening are not going to question for a second [a former DOJ official's] compliance chops," the recent monitor candidate told GIR Just Anti-Corruption.

The concern over cronyism in monitorships dates back to at least 2008, when then-US Attorney Chris Christie, a Republican, awarded a contract for overseeing a medical supply company to his former boss, John Ashcroft, a former Republican attorney general. The monitorship, expected to cost as much as US$52 million, led to intense scrutiny by Congress and the creation by the DOJ of a set of principles designed to prevent future conflicts of interest.

L-R
Andrew Weissman
and Hui Chen

In reality, there's little preventing former government officials from applying to be a monitor, or from working on a monitor's team, as long as they didn't previously work on the case in question. The rules that govern whether a former prosecutor can be a monitor are the same ones that apply to their work more generally after they leave public service.

The relevant criminal statute, 18 USC section 207, prohibits all former employees from appearing before the government for two years on any matter that was pending "under his or her official responsibility" during their last year of service. If an employee worked on the matter "personally and substantially," the bar is permanent. Certain high level employees are also subject to a one or two-year "cooling off" period – meaning they can't appear before the Justice Department on any matter during that time.

Notwithstanding any real or perceived preference for former prosecutors, most lawyers say that compliance expertise is more important than white-collar defence experience when it comes to monitoring companies.

Tim Dickinson, a partner at Paul Hastings who has served as a monitor three times and has advised many companies on monitorships, said there are three criteria that he looks for when picking monitor candidates: compliance expertise, credibility with the Justice Department, and – when possible – prior experience as a monitor.

In Dickinson's view, the most important criteria is compliance expertise. "I like to see a list of potential candidates that includes – first and foremost – lawyers who have lots of expertise on compliance, not solely with white-collar defence," he said.

While they may be very good lawyers, many white-collar specialists don't have sufficient experience advising on compliance programmes, said Dickinson. "The skill set needed for an investigation and those needed to develop a good compliance programme are not the same."

The era of the compliance counsel

During a speech in December 2016, the chief of the criminal division's fraud section at the time, Andrew Weissmann, blamed companies for the increase in monitors, saying they weren't doing enough to remediate misconduct after it is discovered.

"That just seems like an area, where, if you're going down that road, there's so much in the company's control to avoid that," Weissmann said. "We are not looking, obviously, to have a monitor. It is so much better if the company is just doing this on its own."

In fact, the uptick was more likely the result of enforcement-related decisions that were made during Weissmann's tenure. The one that probably most directly attributed to the increase in monitors was the hiring of a consultant whose primary job was to vet companies' claims about the state of their compliance programmes.

The hiring of the consultant, Hui Chen, in 2015 may have also helped boost the prospects of compliance professionals who were up for monitorships. Many of the lawyers who spoke to GIR Just Anti-Corruption described Chen as bringing a laser-like focus on compliance expertise to the selection process.

During her time at the DOJ, Chen would ask probing questions to gauge the candidates' familiarity with best compliance practices and their knowledge of the company they would be overseeing, the lawyers said. Chen left the Justice Department in July, and the agency has not yet picked her successor.

Chen, in a GIR interview, described the process in similar terms. She said she would ask questions about the company's business model, risk profile and past conduct to see if the candidates had done their "homework".

Sometimes Chen would ask a paralegal to do one or two hours of public record research on the company that would be receiving the monitor. During interviews, many of the candidates would appear to know less about the company than what the paralegal had discovered, she said.

"A monitor needs to have a plan," said Chen. "The level of preparation can make or break a candidate."

Companies are the gatekeepers

Chen also voiced frustration that monitors often skewed toward criminal defence, as opposed to a compliance skill set. But she said the problem originates with the companies. When it comes to selecting a monitor, the DOJ is stuck with the proposed pool of candidates. In some instances, prosecutors may deem one or more of the candidates to be unqualified, and ask a company for more candidates – but that's rare.

"The problem is that [the DOJ] has no visibility or say into how these candidates are selected by the companies," said Chen. "It's not surprising at all who gets selected given the size of the white-collar bar."

To be shortlisted as a monitor candidate a lawyer needs to be well-known, well-connected or both.

In early 2017, for example, the DOJ chose Gil Soffer – a former senior department official who, incidentally, helped craft the guidance that was implemented in response to the backlash over Chris Christie's monitor pick – to serve as monitor for Teva following the company's US$519 million FCPA settlement. Soffer had a number of qualifications, including his ability to speak Hebrew (Teva is based in Petah Tikva, Israel), that may have made him a good pick. But he also had ties to one of the lawyers who served as outside counsel to Teva, Mark Filip of Kirkland & Ellis. Soffer had previously worked as one of Filip's lead deputies, during the latter's stint as deputy attorney general.

Chen said she interviewed many "big-name lawyers" and former DOJ officials for monitorships while at the Justice Department. Sometimes these lawyers knew very little about compliance, she said.

Chen said she found this unsurprising. Like Dickinson, she viewed compliance expertise as qualitatively different from the work that defence or investigations lawyers typically do.

However, to pre-empt any objections about their compliance expertise, many white-collar lawyers

who applied for monitorships would put together a team that included compliance experts, Chen said.

Ultimately, Chen said she didn't think the perception that the DOJ prefers former prosecutors was accurate. But that perception could affect the choices that companies make when putting together a list of candidates, she said.

"I think there's a perception that the DOJ wants former DOJ officials," said Chen. "And that creates a self-perpetuating myth, because the companies think that's who they have to propose for monitor positions."

Monitor selection faces uncertain future

For all the griping about the monitor selection process, there have been few proposals from within the FCPA bar on how to fix it.

Chen is the exception. In an interview with *The Wall Street Journal* in November, she suggested creating an independent government agency funded by fines and penalties from corporate settlements – essentially employing civil servants to be monitors.

Speaking with GIR Just Anti-Corruption, Chen pitched another approach. Instead of shifting monitors away from the private sector, the Justice Department could require that companies comply with their own procurement processes when searching for a monitor, she said.

Most companies normally subject significant expenditures to a fixed procurement process that ensures a degree of scrutiny and transparency. Companies should be required to apply the same procedures to the monitor selection process, rather than simply relying on an outside counsel's professional network, Chen said. Doing so would yield a more diverse group of candidates, she argued.

In fact, many of the complaints levelled at the monitor selection process are already addressed in the DOJ's guidance. The memo that Soffer helped draft in 2009, dubbed the Morford memo after the deputy attorney general at the time, did not impose any new restrictions on the selection of former DOJ officials for monitorships. But it did suggest that such officials may not always be the best choice for the job.

"While attorneys, including but not limited to former government attorneys, may have certain skills that qualify them to function effectively as a monitor, other individuals, such as accountants, technical or scientific experts, and compliance experts, may have skills that are more appropriate to the tasks contemplated in a given agreement," the memo reads.

It remains up to the Justice Department to determine which skill set is appropriate for any particular monitorship. Nor is the department required to offer any public justification for its monitor choices. Criminal division officials will generally only release the names of selected monitors if requested under the Freedom of Information Act. A request filed by GIR Just Anti-Corruption for detailed information about the candidates submitted by companies for FCPA monitorships remains outstanding.

But it's possible that changes are on the horizon. Rod Rosenstein, the deputy attorney general, said in a speech in October that his office is reviewing practices concerning corporate monitors.

He did not specify if the review included the department's processes for selecting monitors. The use of monitors is controversial with companies and business lobby groups such as the Chamber of Commerce, and his comments could foreshadow a wider roll-back of their use, as opposed to any specific changes to the selection process.

Either way, as long as monitors continue to rake in tens of millions of dollars in revenue for the world's biggest law firms, it's unlikely that gripes over the DOJ's selection process will be ending any time soon.

DRAFT AMERICAN LAW PUTS BANKS ON COLLISION COURSE WITH EUROPE'S GDPR

A proposed US law requiring foreign banks to hand information to authorities within 10 days of a demand – or face being cut off from correspondent banks – would put financial institutions in direct conflict with EU data protection laws coming into force in May, lawyers say. Waithera Junghae reports

The Combating Money Laundering, Terrorist Financing, and Counterfeiting Act is currently being considered by the US Senate. The bill, which was introduced to senate by Iowa Senator Chuck Grassley in November 2017, will give US authorities the power to subpoena foreign banks that maintain correspondent accounts in the US to access records, including information stored outside of the US.

Under the proposed law, which is also known as the Grassley bill, foreign banks will have to comply with the subpoenas within 10 days or face being cut off from their US correspondent banks. If the US bank fails to terminate the relationship, it will be fined a civil penalty of US$10,000 for every day of non-compliance.

At the time of its introduction, Senator Grassley said the bill would give US authorities vital tools to combat money laundering and terrorism finance.

However, lawyers said that, if passed, the proposed law will put financial institutions in direct conflict with the EU's General Data Protection Regulation (GDPR) if the subpoenas sought under the Grassley bill seek the personal data of EU citizens.

Article 48 of the GDPR provides that companies can only comply with requests for information made by foreign authorities through international agreements such as mutual legal assistance treaties (MLATs) "without prejudice to other allowed means of transfer". Companies that violate the GDPR face a fine of €20 million, or 4% of annual turnover, whichever is greater.

David Werbel at Forensic Risk Alliance in Providence, Rhode Island said financial institutions currently developing GDPR compliance should keep an eye on the passage of the Grassley bill.

Under the proposed law, foreign banks are precluded from telling account holders about the subpoenas. Foreign banks are also precluded from relying on an assertion that compliance with the subpoena would conflict with a provision of foreign secrecy or privacy law.

"Special attention should be given to the subpoena provisions which restrict notifying the target of the investigation, do not permit data-privacy laws to quash or modify the subpoena and requirement to comply with the subpoena in 10 business days," Werbel said.

Werbel said that a practical solution to the conflict would be to amend the Grassley bill to take into consideration article 48 of the GDPR.

However, there may be a way of complying with a subpoena under the Grassley bill without breaching the GDPR. One way, lawyers said, is claiming that there is a "compelling legitimate interest" in transferring the data. But in doing so, the bank would have to inform both its local data protection authority and the individual whose personal data is sought in the transfer, which would contravene the requirement in the Grassley bill that the subpoena is kept secret.

Another means of transferring the data without triggering Article 48 is by obtaining consent claiming that there is a "compelling legitimate interest" to transferring the data. But to do so, the bank would have to inform both its local data protection authority and the individual whose personal data is sought before the subpoena is issued, which would be against the requirement in the Grassley bill that the subpoena is kept secret.

However, Jason Masimore at Kobre & Kim in London said such consent must be obtained before a subpoena is issued.

"If you obtain consent after the fact, then you are disclosing the existence of a subpoena which is in direct contradiction to the Grassley bill," Masimore said.

Given this, Masimore said, banks should consider obtaining consent from customers when they set up an account.

This is not the first time the extraterritorial reach of requests for information have come into conflict with EU data laws. The US Supreme Court is currently hearing a case concerning a dispute between Microsoft and the federal government over whether prosecutors have the right to demand data the company holds in Ireland. Lawyers say a more permanent solution is therefore required.

Tanguy Van Overstraeten at Linklaters in Brussels said unless an international agreement is put in place such as the Foreign Account Tax Compliance Act, which provides a global standard for automatic of exchange of tax information, companies will continue to be placed "between a rock and a hard place".

"Overall, the solution – but it may a time-consuming effort, especially in the current political environment – would be to develop a more global approach for data access and data protection," he said.

The UK and the US are working to implement a treaty that will facilitate the reciprocal access to electronic communications controlled in each other's jurisdictions. The US and UK have been working on implementing the treaty since June 2017.

The Grassley bill, which has bipartisan support, would also make it a crime for an individual to lie to a bank about the true beneficial ownership of an account.

Recent NPAs set ‘troubling precedent’

In 2017, companies settled violations with the DOJ in unprecedented non-prosecution agreements that contained disavowals of any criminal liability. GIR Just Anti-Corruption investigates why. **Kelly Swanson** reports

In July 2017, the US Attorney's Office for the Middle District of Pennsylvania announced non-prosecution agreements (NPAs) with four separate alcohol vendors all containing similar denials of criminal liability. The settlements resolved allegations that the companies "provided things of value" to officials at the Pennsylvania Liquor Control Board.

Then, in December, Netcracker Security Corporation, a US software company, and the Justice Department signed an NPA to resolve allegations of poor data security. In the settlement, the company denied any criminal wrongdoing, but agreed to the statement of facts "in the interest of reaching a mutual agreement" and enhancing US national security.

The lack of admissions in the NPAs caught the attention of Gibson, Dunn & Crutcher, which in a recent report described the deals as novel because "most NPAs and DPAs require a clear acknowledgement by the company that the statement of facts is 'true and accurate,' and that 'the company bears responsibility.'"

Brandon Garrett, a professor at the University of Virginia School of Law who runs a website tracking DPAs and NPAs, said the company denials are unprecedented and troubling.

"'Neither admit nor deny language' undermines the goal of criminal accountability – that if a company committed crimes it must acknowledge having done so – and if the evidence is doubtful no prosecution should be brought," Garrett wrote in an email. "The SEC [US Securities and Exchange Commission] has walked back its use of neither admit nor deny language in civil cases, and it would be troubling if DOJ went in that direction in most corporate criminal cases."

Lawyers familiar with both NPA agreements, speaking on the condition of anonymity, said these NPAs included denials of criminal liability because of the lack of available evidence necessary to secure a conviction.

McDonnell casts doubt in prosecutors' minds

In July 2017, four alcohol vendors entered into NPAs with the US Attorney's Office for the Middle District of Pennsylvania for conduct that appeared vague – they were accused of offering things of value to government officials but not of bribing the officials.

According to the agreements, material goods were exchanged and if these goods were "given in quid pro quo exchange for official decisions, [it] would constitute violations of federal law." In the NPAs, the companies denied "criminal liability for the conduct." In total the companies agreed to pay US$9 million in fines.

An attorney familiar with the case said that the Pennsylvanian US attorney's office has been nervous about filling bribery charges because "the *McDonnell* case had a huge impact on them." That may have opened the door for securing an NPA without an admission of guilt, the lawyer said.

In the *McDonnell* case, the Supreme Court struck down public corruption charges in 2016 against former Virginia governor Bob McDonnell after finding that prosecutors had overreached in their definition of what constitutes an "official act" by a government official. Under federal bribery law, a public official is prohibited from accepting something of value in exchange for an "official act".

McDonnell, a Republican, was accused of accepting more than US$175,000 in gifts and loans from a wealthy businessman who sought favourable consideration from government agencies for his dietary supplement company, Star Scientific. The Supreme Court ruled that the "official acts" taken by McDonnell as a result of the gifts – such as setting up meetings, talking to other officials and organising events – did not rise to an official act as described by the statute.

Each of the four NPAs contain descriptions of goods that executives from the liquor companies gave to the director of marketing at the Pennsylvania Liquor Control Board – including gift cards, free meals and golfing trips – but don't say what purpose these gifts were given for.

An attorney familiar with the case believed the NPAs were agreed because the US attorney's office was worried it would be unable to prove these gifts were given in exchange for official acts. He said it would be "interesting to track the number of bribery convictions pre- and post- the Supreme Court ruling in *McDonnell*." The US attorney's office declined to comment.

Software company signs 'highly unusual' NPA with DOJ

According to a statement of facts accompanying Netcracker's NPA, the company erred when it allegedly employed foreign coders who did not have proper US security clearances. These employees were storing sensitive information on Moscow-based servers, the NPA said. Under Russian

"Netcracker probably would have taken it to trial if the DOJ did not allow the denial of criminal wrongdoing because of how strong they believed their case was."

law, any data transmitted through the country can be made available to Russian intelligence agencies to be searched.

That created a problem for Netcracker because it had two government subcontracts with the Defense Information Systems Agency (DISA), a US agency responsible for securing all defence-related communications around the globe. DISA thought under the terms of its contract with Netcracker, the company could only hire US citizens to work on its software. But Netcracker thought the company was allowed under the agreement to hire foreign personnel as long as they were not handling sensitive information.

Although Netcracker agreed to the statement of facts, the company "denies that it engaged in any criminal wrongdoing." According to a press release from Netcracker: "The evidence did not support the government's concerns" and the NPA "validates Netcracker's long-standing assertion of no wrongdoing and that Netcracker performed all its obligations under this contract."

Netcracker was not required to pay a fine. Instead, it agreed to pay US$35 million if it failed to comply with the terms of the NPA, which included a requirement to upgrade its security protocols.

Gibson Dunn highlighted the *Netcracker* NPA as "an especially interesting example of how NPAs and DPAs may be tailored creatively to resolve government investigations into corporate conduct." The *Netcracker* NPA "most strikingly" contains an "express disavowal of guilt" which the law firm report described as "highly unusual".

A source familiar with the *Netcracker* case said the NPA "took a very long time to negotiate", adding that Netcracker "probably would have taken it to trial if the DOJ did not allow the denial of criminal wrongdoing because of how strong they believed their case was."

One motivating factor for Netcracker to sign the NPA may have been the risk of "losing its government contracts in light of Kaspersky", said a former government official who requested anonymity to talk about the case.

A few months earlier in September 2017, the US government banned the use of all Kaspersky products by all civilian agencies amid reports of the company's close relationship with Russia's main intelligence agency, the FSB. Kaspersky Lab is a Moscow-based cybersecurity and antivirus provider.

Kaspersky denies any connections to the Russian government, and Kaspersky CEO Eugene Kaspersky called the allegations "unfounded conspiracy theories" and "total BS" according to a Bloomberg report.

Kaspersky has filed a motion in a DC federal court to block the Department of Homeland Security directive banning the use of its products arguing that the ban did not provide "due process".

Netcracker's novel agreement stands out

Lawyers said there is another unusual part of Netcracker's NPA that required the company to implement a stronger security programme – a feature that was highlighted by Gibson Dunn's report.

"This is the first instance of a requirement under a non-prosecution agreement of a security plan that protects consumers," the former government official said. "That is new."

According to the NPA, Netcracker must beef up its security programme by implementing a new monitoring system to detect unauthorised access of US customer data, requiring additional background checks for its employees, and moving sensitive US information stored on foreign servers back to the US.

DOJ officials said they hope the new security plan implemented by Netcracker will serve as an industry model.

Acting Assistant Attorney General Boente said in a statement: "As threats to our critical infrastructure increase, especially from abroad, these protocols serve as a model for the kind of security that US critical infrastructure should expect from the firms they use to develop, install, and maintain technology in their networks."

SEC saves Morgan Lewis lawyers from privilege grilling

The US Securities and Exchange Commission has shielded Morgan Lewis lawyers from cross-examination in a dispute over whether oral disclosures to the authority represent a privilege waiver. **Michael Griffiths** reports

The US District Court for the Southern District of Florida announced the resolution to a privilege dispute between Morgan, Lewis & Bockius and former executives of the firm's previous client, US construction company General Cable, on 3 January. The order indicates that Morgan Lewis has handed over notes from witness interviews as well as the names of lawyers that represented the company.

While the order from US District Court Judge Jonathan Goodman does not free Morgan Lewis from an earlier privilege decision that it disputes, a notice filed by the US Securities and Exchange Commission (SEC) saved its lawyers from cross-examination. The SEC said in a 2 January filing that cross-examining the lawyers could force them to disclose facts about an investigation that wasn't before the court.

Judge Goodman ruled on 3 January that Morgan Lewis had "resolved the underlying dispute", thereby abolishing his previous order to hold an evidentiary hearing on 10 January. At the hearing, Morgan Lewis lawyers were to be cross-examined over an "oral download" of witness testimony they gave to the SEC and US Department of Justice (DOJ) on 29 October 2013.

The judge ruled that by summarising witness testimony, Morgan Lewis had waived work-product privilege over the documents themselves. The dispute arose when lawyers representing former General Cable executives Mathias Francisco Sandoval Herrera and Maria Cidre subpoenaed witness testimony from Morgan Lewis's internal investigation of the company. The former executives are charged with deliberately concealing US$46.7 million in accounting errors at General Cable's Brazil operation.

Morgan Lewis argued that its lawyers could be forced to make disclosures in cross-examination beyond the scope of the accounting fraud investigation it had conducted on behalf of General Cable. The SEC sided with the firm in a 2 January motion submitted at Judge Goodman's request. The filing all but eliminated the prospect of Morgan Lewis lawyers taking the stand.

According to the SEC, the meeting on 29 October 2013 covered what later became two separate investigations into General Cable – one into accounting fraud and the other separate US Foreign Corrupt Practices Act (FCPA) investigation.

The SEC's confirmation that the meeting related to two separate investigations appeared to satisfy the defence, who on 3 January withdrew a motion filed on 5 December to compel Morgan Lewis to hand over all documents related to the 29 October 2013 meeting. The motion had been the

basis on which Judge Goodman ruled that Morgan Lewis lawyers could be cross-examined.

According to the SEC's filing, it investigated two separate issues that General Cable self-disclosed to the authority. First, in 2012, the company self-reported potential accounting errors at two of its offices in Brazil. The investigation sparked by that disclosure concerns the actions of defendants Sandoval and Cidre.

The SEC began a separate investigation in 2014 after the company reported potentially suspect payments made by third parties to foreign officials in Angola, Portugal, Thailand, China and Egypt between 2003 and 2015 that may have violated the FCPA.

Morgan Lewis guided General Cable to a US$6.5 million cease-and-desist order in December 2016 that resolved both of these investigations, but didn't conflate the two. The SEC said in its filing that while the underlying facts of the two investigations "overlapped in time", the complaint against Sandoval and Cidre only relates to the accounting errors investigation.

The SEC wrote, therefore, that cross-examining Morgan Lewis lawyers about the 29 October 2013 meeting could force them to disclose evidence that relates to the FCPA investigation and isn't required for the matter before the court.

As part of its disclosures to the defence, Morgan Lewis identified 22 current and former lawyers who were either present at the 29 October 2013 meeting, provided the SEC or DOJ with witness interview summaries or participated in meetings or telephone calls with the SEC or DOJ.

Counsel to Morgan, Lewis & Bockius

- Hogan Lovells
  Partners Marty Steinberg and Rafael Ribeiro in Miami
- Morgan, Lewis & Bockius
  Partner Alison Tanchyk in Miami and partner Christian Mixter in Washington, DC

Counsel to Maria Cidre

- Brune Law
  Partners Susan Brune and Erin Dougherty in New York
- Srebnick Law
  Scott Srebnick in Miami

Counsel to Mathias Francisco Sandoval Herrera

- Kozlowski Law
  Steven Robert Kozlowski in Miami
- Marrero Bozorgi
  Partners Susan Bozorgi and Susan Van Dusen in Coral Gables

Singapore considers adopting a senior managers regime

Singapore could be ready to follow the lead of other jurisdictions in the region and introduce a UK-style senior managers regime to hold senior executives accountable. Michael Griffiths reports

Several lawyers who conduct investigations in Singapore have told GIR that their interactions with the Singaporean Monetary Authority (MAS) and Singapore's Corrupt Practices Investigations Bureau (CPIB) suggest that the city state will introduce a senior managers regime, similar to regulatory frameworks already present in the UK, Hong Kong and Australia.

Luke Hastings, regional head of dispute resolution at Herbert Smith Freehills in Sydney, told GIR that he expects Singapore to introduce a senior managers regime this year. Another lawyer, a partner at a firm in Singapore who didn't want to be identified for fear of affecting ongoing investigations, also said they expected a senior managers regime to be introduced.

According to Hastings, Singapore authorities have been paying close attention to how nearby jurisdictions have introduced financial regulatory regimes to hold senior managers at financial institutions accountable. A second partner at a firm in Singapore, who also didn't want to be identified for fear of affecting ongoing investigations, said that Singapore authorities are "circumspect" over implementing new regulations and are "not ahead of the curve deliberately" so they can look into the actions of other jurisdictions first.

In Hong Kong, the Securities and Futures Commission implemented the manager-in-charge regime in October 2017, which applies to all financial institutions operating in Hong Kong. Australia's Banking Executive and Accountability Regime is scheduled to come online on 1 July 2018, and will only apply to banks and financial services institutions.

The UK Financial Conduct Authority (FCA) launched the Senior Managers and Certification Regime (SMR) in March 2016 to hold senior individuals at banks and lenders accountable for the misconduct from their "area of responsibility". The FCA proposed extending the regime in July 2017 to include all financial services companies that operate within the FCA's purview.

Wilson Ang, of Norton Rose Fulbright in Singapore, told GIR that local authorities have already increased their focus on individuals in criminal anti-corruption enforcement. "They now target senior individuals for negligence or failing to take reasonable care and due diligence for things like signing off on documents that proved to be false," he said.

GIR understands that in criminal anti-corruption matters, Singapore authorities already request that companies submit responsibility maps, similar to what regulatory authorities in Hong Kong, the UK and Australia would do as part of their senior managers regimes.

Singapore authorities have broad enforcement powers to prosecute individuals for corruption, under the Prevention of Corruption Act 1960. The Act enables authorities to prosecute Singapore nationals for committing what is described in the Act as "corrupt acts", even if the misconduct is committed outside of Singapore. It also allows the CPIB to prosecute non-Singaporean citizens if the offence relates to Singapore.

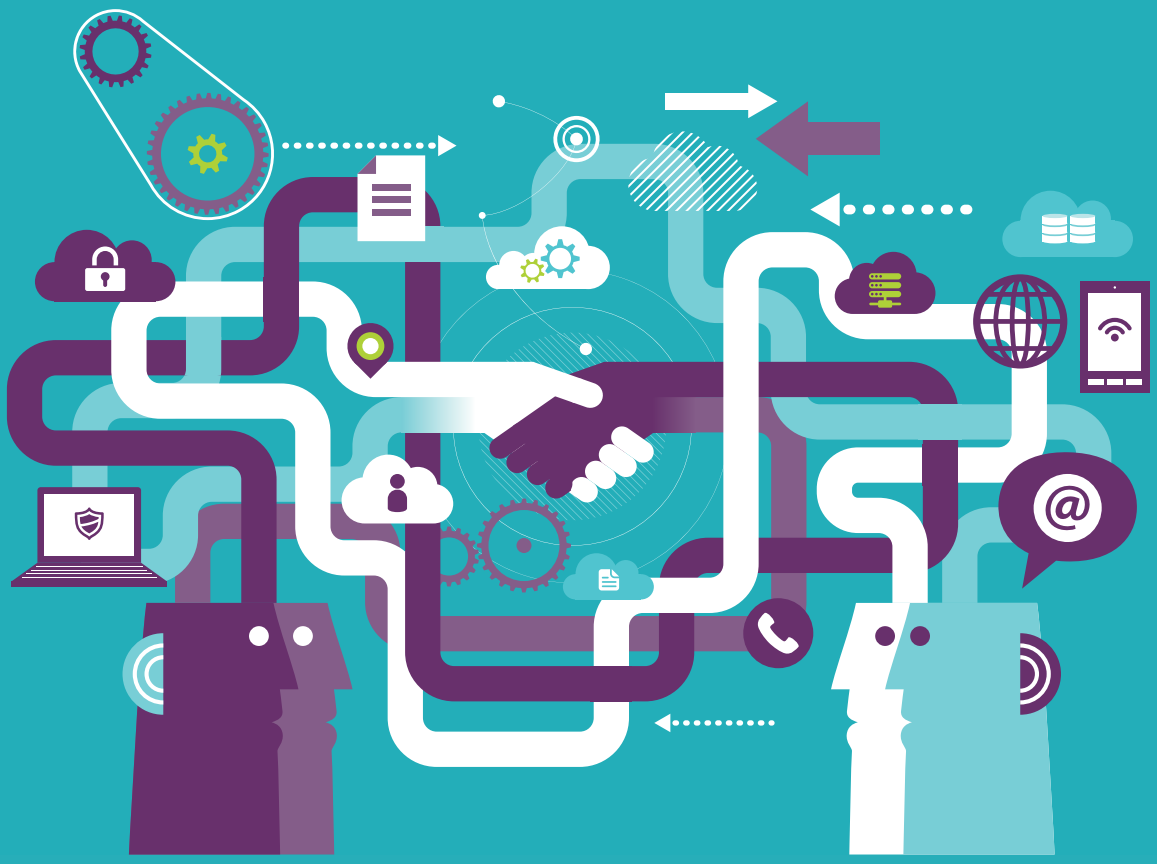
Singaporean authorities have recently demonstrated that they are also willing to consider new ways to hold corporates accountable. On 22 December, Singaporean, US and Brazilian authorities reached a US$422 million settlement with Singaporean shipyard builders Keppel Offshore & Marine.

The settlement resolved allegations that Keppel executives secured contracts in Brazil by bribing officials. For its part of the settlement, Singapore issued Keppel a conditional warning instead of prosecution. It was the first-ever coordinated resolution that included authorities in Singapore, where the settlement was met with some scepticism.

Sylvia Lim, a member of the opposition Worker's Party, reportedly said in Singaporean parliament on 8 January that Singaporeans perceive the settlement as "a slap on the wrist".

The comment came while Lim was questioning Singapore's minister of state for law and finance, Indranee Rajah, who responded that the company had not got off lightly and that the settlement had "achieved more than what we would have been able to do if they were prosecuted solely under the Prevention of Corruption Act in Singapore".

The MAS and CPIB did not respond to a request for comment.



Swiss Supreme Court reins in tax authority's international data sharing

The Swiss Supreme Court has ruled that the country's tax authority cannot identify individuals that aren't under investigation when responding to requests for information from foreign authorities. **Michael Griffiths** reports

The Supreme Court made public an 18 December 2017 ruling on 3 January that forces the Swiss Tax Administration (STA) to redact the names of individuals that aren't the target of foreign tax evasion investigations, when sending documents to an international authority.

The ruling affirms a 2016 decision by the Swiss Federal Administrative Court in a case brought by a former US citizen living in Switzerland, referred to as "X". The action began when the individual challenged an STA decision to assist the US Internal Revenue Service (IRS) with an ongoing investigation into tax evasion allegedly committed by the individual between 2008 and 2012.

The Supreme Court addressed two requests by the IRS for information concerning two accounts held by a bank that settled with the US Department of Justice (DOJ) under the Swiss bank programme – a DOJ initiative that saw 80 Swiss banks avoid prosecution by reaching settlements that required them to provide information to US authorities about US clients suspected of evading tax.

In light of the ruling, the STA must redact the names of individuals that aren't the subject of the investigation but are listed on documents to be sent abroad. Specifically, the court identified bank employees and lawyers as those whose identities could not be provided to US authorities.

The panel of five judges wrote in the decision that concealing the names of third parties should not affect US authorities' investigation into individuals. However, they conceded that concealing the identity of third parties could prevent US authorities from uncovering a wider tax evasion conspiracy.

Andrew Garbarski, of Bär & Karrer in Geneva, said the decision means that "regardless of whatever commitment has been undertaken by Swiss banks in a voluntary programme, international assistance in tax matters is [now] subject to certain requirements".

The case was taken on by the Supreme Court after the STA appealed against the Swiss Federal Administrative Court's 2016 decision. Swiss lawyers told GIR that the STA's decision to challenge the ruling shows how eager Swiss authorities are to cooperate with US authorities in tax evasion investigations.

Benjamin Borsodi, of Schellenberg Wittmer in Geneva, told GIR that "the STA was trying to push as much information as they could to the US, even running the extra mile by bringing the matter to the Supreme Court."

Under the Swiss bank programme, the DOJ targeted Swiss banks suspected of helping US citizens evade tax, and between March 2015 and January 2016 reached 78 non-prosecution agreements with 80 banks.

The STA and counsel to X did not respond to a request for comment.

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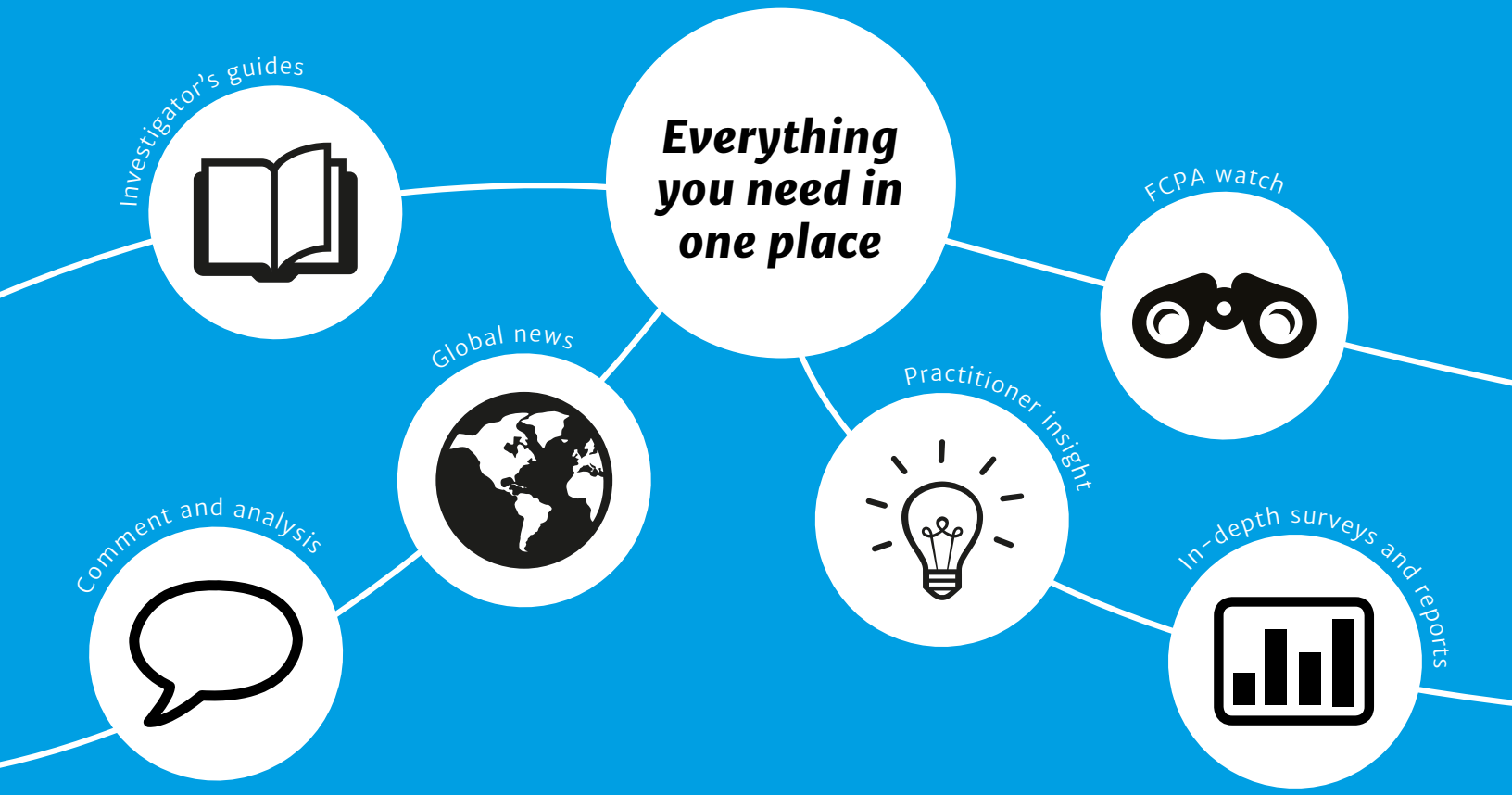

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