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U.S.-U.K. Cross-Border Investigations: Frameworks for Cooperation

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As technology continues to shrink the globe and businesses seek fresh opportunities overseas, financial crime has become an increasingly cross-border phenomenon. Evidence, suspects, witnesses, and victims are ever more likely to be located in multiple overlapping jurisdictions. This creates both hurdles and opportunities for criminal law enforcement. To ensure that justice is done, new laws have been enacted—and existing laws interpreted—to facilitate better international cooperation among prosecuting bodies. This article explains some of the main legal frameworks for this cooperation.

Identifying the Prosecutor

When a criminal offense is suspected to have been committed in concurrent jurisdictions, it is necessary to determine which prosecuting authority will be responsible for investigating the accountable parties. It may be that the offending behavior is so expansive that prosecuting authorities divide the conduct, so that each authority investigates and prosecutes the conduct most relevant to its jurisdiction. Alternatively, an early decision may be taken that one authority should take the lead in investigating and prosecuting all of the conduct, with support from authorities in other countries. There are numerous considerations to be evaluated in reaching this decision.

In the U.K., the Crown Prosecution Service guidance encourages early discussions and sharing of information between domestic U.K. authorities and their overseas counterparts. This guidance states that discussions should concentrate on issues including the location of the evidence, victims, witnesses, and the accused; whether it is feasible for the prosecution to be divided, allowing each jurisdiction to deal with offending relevant to it; and the manner in which the case will be pursued in the U.K. and other jurisdictions, giving regard to any delays and costs arising from the laws and practicalities of prosecuting in respective jurisdictions.

The likelihood of extradition proceedings succeeding to bring a suspect to the U.K. should also be considered, as there is little value in pursuing an investigation against an individual if criminal proceedings against him or her cannot ultimately commence. Specific arrangements are often also made between states in an attempt to ensure that cooperation is consistent. For example, the EU Agency for Criminal Justice Cooperation provided guidance for member states.

Such agreements can also be bilateral in nature, such as a 2007 agreement for handling criminal cases with concurrent jurisdiction between the U.K. and the U.S. This agreement codified the parameters for the decision-making process between the countries. It is not an extensive set of instructions, but rather reinforces the provisions laid down by the CPS guidance. It encourages cooperation between the U.K. and U.S. in general terms, without prescribing the specific practices that should be undertaken.

Rolls-Royce: Collaboration in Practice

Multijurisdictional prosecutions involving cooperation between the U.S. and U.K. are not uncommon. The investigation into British multinational manufacturing company Rolls-Royce, following allegations of large-scale bribery and corruption, was a successful example of such a collaborative approach. Rolls-Royce admitted that it hired commercial agents across numerous countries, who made millions of dollars of corrupt payments to secure contracts.

Rolls-Royce brokered deferred prosecution agreements with the U.K. Serious Fraud Office and the U.S. Department of Justice, as well as a leniency agreement with the Brazilian Ministério Público Federal, to ensure the investigations in all three countries were concluded. The result was that Rolls-Royce received fines of approximately £671 million (£497 million to the SFO, $170 million to the DOJ, and $26.5 million to the MPF).

The Rolls-Royce case was generally regarded as a successful example of collaboration in multijurisdictional investigations, given both the substantial value of the fines imposed and the fact that the SFO took the lion's share of those fines.

Collaboration Aspirations and Realities

In Sept. 2018, SFO Director Lisa Osofsky warned law enforcement authorities of the dangers of working in "geographic law enforcement siloes" and said that law enforcement "must work closely together," "share information," and "follow criminals across borders." The extent of this multijurisdictional cooperation is difficult to discern, however. Since Osofsky's tenure began, the SFO has not achieved an outcome comparable to Rolls-Royce, although Osofsky continues to preside over joint SFO-DOJ investigations opened by her predecessor, such as the investigation into alleged bribery at Airbus. Osofsky suggested in a 2019 speech that the difficulties of unearthing admissible evidence and ensuring that prosecution was in the public interest were reasons why the SFO had opened fewer cases than originally anticipated.

Another restraint on the SFO is that it is simply not as well-equipped as its U.S. counterparts in persuading individuals to plead guilty and receive a substantially reduced sentence in return for assisting the prosecution. The fact that the U.S. criminal justice system is capable of offering attractive plea deals to pivotal individuals, such as those entered into by Cyrus and Saman Ahsani in the DOJ's Unaoil investigation, no doubt explains why the SFO was prepared to cede jurisdiction to the DOJ in that case. Simply put, the DOJ could "turn" these individuals whereas the SFO could not. Yet, it would be wrong to characterize this outcome as a failure of collaboration. Rather, this was arguably collaboration guided by pragmatism.

Established Cooperation Frameworks

The question of which law enforcement authority should take precedence in a cross-border investigation will be influenced in part by the country in which culpable individuals can be put on trial, and how easily the relevant evidence can be made available in that country. These factors will be determined by the frameworks of extradition and mutual legal assistance.

Extradition

The U.K. is party to a number of different extradition arrangements, both multilateral and bilateral, to enhance the reach of law enforcement. Extradition requests are processed in accordance with a well-established statutory framework—the Extradition Act 2003. The EU Council Framework Decision in 2002 introduced the European Arrest Warrant scheme. Both of these schemes allow EU member states to request the extradition of individuals from other member states, without needing to provide evidence of the case against the requested person.

The looming specter of Brexit means that the future of U.K. extradition with other EU states is unknown. However, while the current framework derives from an EU directive, Brexit is unlikely substantially to affect the U.K.'s extradition capabilities. To ensure that the U.K. is able to secure the return of individuals residing outside the U.K. who are wanted for or convicted of criminal offenses, it is highly likely that the U.K. will enter into an alternative arrangement analogous to the EAW scheme, or simply fall back on the 1957 European Convention on Extradition.

The U.K. is also a signatory to the U.N. Convention against Transnational Organised Crime and the U.N. Convention against Corruption. These global multilateral instruments include provisions for extradition to be used by any signatory party. Unsurprisingly, they can be particularly effective in the prosecution of white-collar crime, as offenses such as fraud, corruption, and bribery are rarely confined to a single jurisdiction.

In addition to these multilateral agreements, the U.K. also has a number of bilateral agreements with various nations around the world. Since 2000, it has entered into bilateral extradition treaties with Algeria, United Arab Emirates, Philippines, Kuwait, Iraq, Morocco, and Libya. Coupled with the multilateral treaties it is already party to, the result is that the world has become a far smaller place for fugitives attempting to evade justice.

Mutual Legal Assistance

In terms of transferring evidence across borders, the conventional route was mutual legal assistance, and MLA treaties remain a powerful tool in the fight against global crime. These treaties allow prosecutors to recruit the assistance of another state to acquire relevant evidence. In the U.K., the Crime (International Co-operation) Act 2003 provides the statutory framework governing MLA requests. The Act specifies that MLA requests are only to be made if the requesting authority believes, or has reasonable grounds for believing, an offense has been committed, and an investigation or criminal proceedings are underway. MLA is an evidence-sharing, rather than intelligence-sharing, process. It is commonly used, but infamously slow.

In an effort to combat the sluggishness of MLA requests, the EU devised the European Investigation Order in 2014. The EIO introduced an agreed process and time limits by which member states have to provide evidence pursuant to a request. Its intention was to speed up cross-border cooperation to ensure that an investigation is not stunted by having to wait for information and evidence from elsewhere. In practice, the EIO has been used only intermittently by member states, and so MLA remains the main route for obtaining evidence. Further, it is unclear whether the availability of the EIO scheme to the U.K. will survive Brexit.

Compulsory Document Production Notices

A more expeditious and perhaps more efficient evidence gathering tool is the compulsory document production notice. U.K. legislation confers statutory powers on all major criminal law enforcement bodies to compel a person, following receipt of a notice, to produce documents relevant to an investigation. Historically, this power has been used to compel persons to provide documents held within the U.K. However, in the recent case of R (on the application of KBR Inc.) v. Director of the Serious Fraud Office (2018) EWHC 2368 (Admin), the Court of Appeal determined that s2(3) of the Criminal Justice Act (the legislation that bestows the power upon the SFO to use compulsory document production notices) should be interpreted extraterritorially. In other words, a foreign company based outside the U.K. could be compelled to hand over documents located outside the U.K. to a U.K. law enforcement agency, provided there exists a sufficient connection between the company and the U.K.

Double Jeopardy

As the Unaoil investigation demonstrates, those accused of cross-border crimes can be tempted or advised to accept plea bargains in one jurisdiction in the hope that pleading guilty will then prevent prosecution elsewhere. However, the doctrine of double jeopardy is not so cut and dried that it can be applied to all cases in such a fashion. Double jeopardy, in English law, provides that the court retains the power to stay the criminal proceedings if the defendant has already been tried for a different offense, but on the same or similar facts. The doctrine of double jeopardy is often confused with autrefois, which provides that an accused cannot be tried more than once for the same offense. It is with this misperception that difficulties can arise.

Where a defendant faces proceedings in multiple jurisdictions, the overseas offense will likely be different from the offense faced in the U.K. If this is the case, the defendant cannot rely on the autrefois doctrine. Instead, he or she would have to argue that the court should stay proceedings as an abuse of process. However, the prosecution may still be permitted to proceed with a second prosecution if it can successfully argue that "special circumstances" are present.

An example of special circumstances is found in Kulibaba v. United States (2014) EWHC 176 (Admin). In this case, the defendants had pleaded guilty in the U.K. to conspiracy to defraud four U.K.-based banks and their customers. The U.S. authorities then requested their extradition for what was accepted during U.K. extradition proceedings to be the same facts. In other words, the request was based on a similar offense, committed over the same indictment period, corroborated by largely the same evidence. The only difference was that the U.S. indictment identified different victims than those in the U.K. prosecution. The U.K. extradition court found that the U.S. prosecution did not contravene the doctrine of double jeopardy. Special circumstances may therefore exist in what appears to be a relatively small difference in the two indictments.

Defendants and their counsel should therefore take great care in accepting a plea in one jurisdiction merely to avoid prosecution in another. Further, as cooperation between the U.K. and U.S. increases, the suggestion that an accused would have a choice as to where they face prosecution is likely to diminish. It should never be assumed that a plea deal in one jurisdiction automatically triggers unassailable double jeopardy protection from prosecution overseas.

Looking Ahead

The U.K. and U.S. have looked to improve information and evidence-sharing channels between them. As discussed, the KBR judgment was an attempt by the courts to extend the territorial reach of the U.K.'s evidence-gathering powers so as to compel a U.S. company to hand over documents situated in the U.S. However, the judgment has drawn criticism from some, who have argued that the court's interpretation of the legislation was inconsistent with the U.K. Parliament's intentions. It is one of the reasons why the Crime (Overseas Production Orders) Act 2019 was brought into force.

This Act gives effect to a wholly new criminal law enforcement instrument: the Overseas Production Order. An OPO operates as follows: following an ex parte application to the court from a law enforcement officer, a judge can make an OPO against a person in an overseas jurisdiction to produce electronic data, held outside of the requesting jurisdiction. The OPO is served directly on the person holding the data, who has seven days to produce it. This avoids the need for state interaction and, further, the overseas authorities have no power to intervene, ensuring that law enforcement receives the data quickly. This circumvents the cumbersome MLA process and allows the investigation to keep pace with global crime. The Act is underpinned by the world-first U.K.-U.S. Bilateral Data Access Agreement, signed in Oct. 2019.

In conclusion, the investigation of cross-border crime is no longer constrained by traditional principles of national sovereignty. Collaboration between prosecutors, expediting the extradition of suspects, and transferring evidence from one country to another–these frameworks are being actively used to increase the prospects of effective trials based on relevant, admissible evidence.