Europe at a glance

The criminalisation, prosecution and punishment of tax-related wrongdoing continues to be an area of focus in Europe. Bribery and corruption have also received considerable attention this quarter. A number of new investigations have been opened, convictions obtained and significant sentences imposed. Institutions are dealing with a lack of clarity over what bribery and corruption-related matters need to be included in their annual reports (in light of the EU directive on non-financial and diversity information). The publication of updated guidance by the Wolfsberg Group provides an insight into the current issues that anti-bribery systems and controls could be addressing.

The Fourth EU Money Laundering Directive (MLD4) remains to be implemented across all European jurisdictions.

Finally, a U.S. court ruling on the inadmissibility of lawfully compelled testimony may have widespread implications for the conduct of investigations in Europe and elsewhere.

UK

Consultations opened into: (1) expanding certain powers under the Proceeds of Crime Act 2002 (POCA 2002); (2) operation of new Office for Professional Body Anti-Money Laundering Supervision; and (3), guidelines for companies to disclose bribery and corruption-related matters in their annual reports; Amended guidance published on the new offences of failing to prevent the facilitation of tax evasion; FCA publishes guidance on the treatment of Politically Exposed Persons (PEPs); FCA publishes Annual Enforcement Performance Account 2016/17; U.S. authorities seek extradition of former UK bank executive to face charges brought by the Department of Justice in relation to the alleged “front running” of a foreign exchange deal in December 2011; SFO announces more bribery-related convictions and the commencement of three new bribery investigations; Courts impose significant sentences of imprisonment for corruption offences; SFO heralds success of Deferred Prosecution Agreements; UK Office of Financial Sanctions Implementation updates reporting guidance.
FRANCE
French tax evader cannot register as a victim for the purposes of a criminal investigation into the laundering of the proceeds of his own tax evasion (nemo auditur...); Criminal courts continue to impose increasingly harsh penalties in money-laundering tax-related matters; Mandatory penalty of ineligibility introduced for corruption cases; Harsh penalties imposed by the Paris Criminal Court in the first episode of the "ill-gotten gains" case; NGOs initiate criminal complaint against a major French bank on grounds of aiding and abetting crimes against humanity.

GERMANY
New AML regime in Germany; First criminal proceedings about to be initiated for "cum/ex" trades; Legality of "cum/cum" trading patterns also called into question; Scrutiny of German automobile manufacturers in connection with treatment of diesel emissions continues; Prosecutors do not seek punitive fines in bribery proceedings after obtaining disgorgement; Department of Trade and Industry proposes establishment of nationwide register to assist public authorities in determining the debarment of contractors; Highest German court confirms compliance systems and remediation measures following internal investigations to be taken into account for sentencing decisions; German constitutional court temporarily prohibits Munich public prosecutor from reviewing documents seized during dawn raid of law firm; Ministry for Finance of North Rhine Westphalia proposes the establishment of a task force to combat organised crime, money laundering, tax fraud and the financing of terrorist activities.

ITALY
Significant amendments introduced to Suspicious Transaction Reporting (STR) system; The ECJ Advocate General questions compatibility of the Italian dual track system for prosecuting market abuse with the double jeopardy principle.

BELGIUM
New AML regime; Criminal sanctions applicable to market offences are increased; New Belgian Act of 31 July 2017 requires the Belgian regulator of the financial sector, the Financial Services and Markets Authority (FSMA) and entities it supervises to implement whistleblowing procedures; Obligations imposed on large companies and groups to report anti-bribery and corruption matters in their annual reports; Project commenced to overhaul Criminal Procedural Code; Bill introduced to avoid disproportionate confiscation of property; Remedial bill on criminal settlements expected to enter into force on 1 January 2018.

NETHERLANDS
No signs of MLD4 being implemented although Dutch courts interpret existing law consistently with MLD4.

EU WIDE
Council of the EU publishes an EU roadmap for assessing high-risk third countries under MLD4; Deadline for implementation of MLD4 missed in many jurisdictions; European Commission proposes that lawyers, tax consultants and auditors may be obliged to disclose certain tax structuring methods of their clients to local tax authorities; OECD releases anti-bribery and corruption publications; Wolfsberg Group (comprising 13 global banks) publishes updated guidance on how financial institutions should construct an effective anti-bribery and corruption compliance programme; Testimony lawfully obtained under compulsion in Europe and elsewhere inadmissible in U.S. criminal proceedings; European Commission launches public consultation on improving access to electronic evidence in criminal investigations.
Italian implementation of MLD4 introduces significant amendment to Suspicious Transaction Reporting (STR) system See ‘A closer look’ section on page 7 for more detail.

Consultations opened into operation of the UK’s new Office for Professional Body Anti-Money Laundering Supervision See ‘A closer look’ section on page 8 for more detail.

French court finds that tax-evader cannot register as a victim for the purposes of a criminal investigation into the laundering of the proceeds of his own tax evasion (nemo auditur...)

After a bank had been placed under investigation for aggravated money-laundering of the proceeds of tax evasion, one of its clients (who had previously admitted to tax fraud by settling with the French tax authorities) attempted to register as a victim in the on-going criminal proceedings. The client alleged, principally, that the bank had failed to properly advise him, including by providing him with the means to avoid paying his taxes and sought damages from the bank. On 11 July 2017, the French Supreme Court declared his claim inadmissible, confirming that the damages he had suffered as a result of fines imposed by the French tax authorities were the result of his own conduct and in particular, of his failure to declare the assets he held abroad to the French tax authorities.

French criminal courts continue to impose increasingly harsh penalties in money laundering tax-related matters

On 28 June 2017, the Paris Court of Appeal upheld a number of convictions in the so-called carbon tax fraud case. The case concerned the purchase of carbon emission quotas in one country free of VAT, the sale of the same quotas in another country including VAT and the withholding of the VAT received from the French state. The two principal architects of the fraudulent scheme were sentenced to eight years’ imprisonment, a fine of EUR1m each, and the forfeiture of their estate up to the amount of the fraud, ie EUR283m.

However, the Court of Appeal confirmed the dismissal of all charges against a money transfer company and its manager, as well as against a brokerage firm and its CEO for allegedly assisting in the fraud. This was primarily due to difficulties in establishing knowledge of the underlying fraud. In reaching this decision, the Court of Appeal emphasised the strength of the companies’ internal processes (AML checks and due diligence), their compliance with the foreign laws governing their activities, and the limited amount of the fraud’s proceeds which they had processed as compared to the overall funds they had processed during the same year.

On 6 July 2017, the 32nd Chamber of the Paris Criminal Court sentenced the Latvian bank Rietumu to a record EUR80m fine for laundering the proceeds of tax evasion. Rietumu was found to have knowingly handled the funds of an offshore company that facilitated tax evasion by French taxpayers. The amount of the fine was established by reference to Rietumu’s 2016 profits. Although the Bank asserted that it had always complied with local regulations and international standards governing AML/CFT duties, the Court held that the Bank willingly “turned a blind eye” to the fraudulent nature of the funds. Two of the Bank’s representatives were also found guilty of laundering the proceeds of tax evasion and sentenced to one and four years’ imprisonment respectively. Both sentences were suspended.

New Belgian AML Act enacted

The Belgian legislator has implemented MLD4 through the adoption of the Act of 18 September 2017 on the prevention of money laundering and the financing of terrorism and on restricting the use of cash. The new Act entered into force on 16 October 2017 and replaced the Belgian Anti-Money Laundering Act of 11 January 1993 (which previously dealt with the prevention of money laundering in Belgium) in its entirety (see also Allen & Overy’s Q2 2017 European White Collar Crime Report, pp. 7 and 22).

UK Serious Fraud Office (SFO) launches criminal investigation into Afren plc and brings charges against former officers

An investigation launched by the SFO concerned secret agreements arranged by Afren plc’s former CEO Osman Shahenshah and former COO Shahid Ullah. Both individuals were charged with fraud and money laundering offences before Westminster Magistrates Court, on 27 September 2017.

UK consults on expanding certain powers under the Proceeds of Crime Act 2002 (POCA 2002)

The Attorney General’s Office and the Home Office sought views on proposals for expanding powers under POCA 2002. These proposals cover:

- extending powers to search, seize and detain property to Serious Fraud Officers;
- extending POCA 2002 investigation powers to include powers relating to unexplained wealth orders and disclosure orders;
- the use of search powers for recovering criminal cash;
- powers to seize certain listed assets (eg valuable metals);
- guidance for prosecutors on the operation of POCA investigation powers; and
- the exercise of various new seizure, detention and forfeiture powers created by the Criminal Finances Act 2017.

UK FCA publishes guidance on the treatment of Politically Exposed Persons (PEPs)
The UK’s FCA has published finalised guidance (FG17/6) (July 2017) on the treatment of politically exposed persons (PEPs) for anti-money laundering purposes. The guidance outlines the FCA’s expectations that firms will take appropriate but proportionate measures in meeting their financial crime obligations. The guidance also provides clarity on how firms should apply the definition of a PEP in a UK context. Finally, the guidance sets out a number of risk factors which will help firms to consider relevant issues when meeting their obligations.

Council of the EU publishes an EU roadmap for assessing high-risk third countries under MLD4
The Council of the EU has detailed its proposals to strengthen the process by which high-risk third countries are identified for the purposes of AML regulation (which requires the application of enhanced due diligence measures). The letter annexed to the roadmap and written by Commissioner Jourová, indicates that the Commission will be considering any third country that represents a risk to the international financial system or which represents a risk to the EU internal market as a high-risk third country. The initial focus will be on “priority countries”, which will be selected on the basis of their financial importance to the EU and their risk exposure to terrorist financing and money laundering.

New AML regime in Germany
Under the tightened requirements of the new AML regime in Germany, companies as well as individuals are obliged to re-think their traditional AML approach. The scope of the legislation has been broadened, the risk management requirements are stricter and fines have been increased significantly. As soon as a case can no longer be appealed, supervisory agencies will publish details of any parties fined as well as the amount of and reason for the fine.

Deadline for implementation of MLD4 missed in many jurisdictions
As reported in Allen & Overy’s Q2 2017 European White Collar Crime Report, the implementation deadline for MLD4 expired on 26 June 2017. A number of jurisdictions are yet to enact implementing legislation, as highlighted in the accompanying table.

In particular:
– In the Netherlands, there have been no developments since a first draft of the implementing legislation was proposed and discussed during the summer of 2016. Although there are rumours that a revised draft implementation act will soon be presented, Dutch courts must, for the time being, interpret domestic laws in a manner which is consistent with MLD4. There are, however, limitations to this interpretive tool. In particular, it cannot be used to the detriment of a criminal defendant, nor can it be used to contradict a clear legal rule. It is unlikely that this will have a major impact on financial institutions and other entities operating in the Netherlands.
– In Romania, a draft law on preventing and combating money laundering and terrorist financing has not yet entered into force. Public reports suggest that the draft law is yet to be sent to the Parliament for approval.
The below table summarises the status of MLD4’s implementation in various Members States:

<table>
<thead>
<tr>
<th>Country</th>
<th>MLD4 implementation status</th>
</tr>
</thead>
<tbody>
<tr>
<td>Germany</td>
<td>Effective from 26 June 2017. Money Laundering Act (Geldwaschegesetz)</td>
</tr>
<tr>
<td>France</td>
<td>Not yet fully implemented. Order No. 206-1635 of 1 December 2016 yet to be ratified by French Parliament.</td>
</tr>
<tr>
<td>Spain</td>
<td>Not yet implemented.</td>
</tr>
<tr>
<td>Italy</td>
<td>Effective from 4 July 2017. Legislative Decree 90/2017, aimed at amending AML Legislative Decree 231/2007, entered into force on 4 July 2017. Second level regulations to be implemented by competent supervisory authorities within 12 months.</td>
</tr>
<tr>
<td>Belgium</td>
<td>Effective from 16 October 2017. The Belgian legislator has adopted the Act of 18 September 2017 on the prevention of money laundering and the financing of terrorism and on restricting the use of cash (Wet van 18 september 2017 tot voorkoming van het witwassen van geld en de financiering van terrorisme en tot beperking van het gebruik van contanten; Loi du 18 septembre 2017 relative à la prévention du blanchiment de capitaux et du financement du terrorisme et à la limitation de l’utilisation des espèces). Provisions regarding the functioning of the ultimate beneficial ownership register will be implemented in a separate royal decree.</td>
</tr>
<tr>
<td>Netherlands</td>
<td>Not yet implemented. Provisions regarding the ultimate beneficial ownership register will be also be implemented in a separate Act.</td>
</tr>
<tr>
<td>Slovakia</td>
<td>Not yet implemented.</td>
</tr>
<tr>
<td>Poland</td>
<td>Not yet implemented. Ministry of Finance has presented a new draft Act on Counteracting the Introduction into Financial Circulation of Property Values Derived from Illegal or Undisclosed Sources and on Counteracting the Financing of Terrorism, which is due to replace the previous act of the same name. As reported in Allen &amp; Overy’s Q2 2017 European White Collar Crime Report, it could take several months of parliamentary work before it is enacted.</td>
</tr>
<tr>
<td>Romania</td>
<td>Not yet implemented. The draft law on prevention and combating money laundering and terrorism financing has been finalised by the Office for Prevention and Combating Money Laundering. As reported in Allen &amp; Overy’s Q2 2017 European White Collar Crime Report, it will now be sent to the competent authorities in order to obtain the necessary endorsements before sending it to the Parliament.</td>
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</table>
On 4 July 2017, Legislative Decree 90/2017 (the New AML Decree), implementing MLD4 entered into force in Italy. The New AML Decree reflects the so-called “risk-based approach”, meaning that entities subject to Italy’s AML regime are, more than ever, required to assess the money laundering risk of their clients and to shape AML countermeasures accordingly.

Ever since AML Legislative Decree 231/2007, entities subject to AML regulation have been required to report suspicious transactions to the UIF (the Italian Financial Intelligence Unit). The UIF regularly publishes and updates a list of specific indicators that may help to identify a suspicious transaction.

The New AML Decree now requires that all suspicious transactions are reported before the transaction is carried out. Previously, entities could report suspicious transactions after the transaction where it was not practicable to do so earlier.

It is unclear how entities will implement this new requirement in practice. One possibility is that it leads to a significant increase in the number of suspicious transaction reports. Faced with a limited window to properly investigate suspicions and a penalty if a suspicious transaction is not reported before the trade occurs, entities may file defensive reports on the basis of limited information simply to avoid sanction. This could hinder the STR system’s efficiency by requiring the UIF to analyse a disproportionate amount of transactions, most of which would actually engage a limited level of suspicion (if any).

Some more clarity in this respect might be brought by the second level regulatory legislation which will be implemented by the competent authorities in the next months and that, hopefully, will contribute to resolving doubts regarding the implementation of the aforementioned requirement.

The penalties for non-compliance with the STR regime have also been increased. The new AML Decree prescribes that a failure to report a suspicious transaction could lead to an administrative sanction of up to EUR300,000 in the case of serious, repeated, systematic or plural violations. Where a failure to report generates an economic benefit for the reporting entity, the maximum administrative sanction is increased to twice the amount of the benefit (if the benefit can be determined) or to EUR1m (if it cannot).
What is OPBAS and how will it operate?
In Allen & Overy’s Q2 2017 European White Collar Crime Report, we noted the UK FCA’s commitment to establishing OPBAS as a “supervisor of supervisors” with responsibility for setting out how professional body AML supervisors should comply with their obligations under the UK’s Money Laundering Regulations 2017 (MLRs).
In a further move towards the launch of OPBAS, the UK government issued a consultation on 20 July 2017 on draft regulations which will breathe life into OPBAS. OPBAS will function as part of the UK’s FCA, and will follow the FCA’s general stance of pursuing risk-based supervision. The draft regulations also give the FCA information gathering powers plus the power to require a self-regulatory professional body to commission and provide the FCA with a skilled person’s report. The draft regulations further give the FCA the power to issue directions to a self-regulatory organisation, in addition to the ability to issue a censure and to impose civil penalties on such persons.
The FCA will recover the costs of its supervision by charging professional body supervisors a fee for its services.

Why does the UK need OPBAS and who will it supervise?
The Money Laundering Regulations 2017 (MLRs) set expectations for supervisory authorities, including UK professional body supervisors. These expectations include the requirement to gather certain information and submit it to the Treasury on demand. At present, each anti-money laundering supervisor prepares a questionnaire response annually for the Treasury. Once OPBAS becomes operational, it will collect this information from professional body supervisors on behalf of the Treasury. OPBAS will publish an anonymised summary of the responses, as well as providing specific feedback to each body about how its approach compares to that of its peers. OPBAS will not supervise activity carried out by professional body supervisors outside of the UK, or by the individual members of the professional bodies which are themselves subject to the requirements of the MLRs.
It is now hoped that OPBAS will be up and running by the beginning of 2018.

FCA consultation
In addition to the Treasury’s consultation, the FCA has also commenced a three-month long consultation seeking views on a draft sourcebook containing guidance for professional body supervisors.
First criminal proceedings about to be initiated in Germany for “cum/ex” trades
German media reports that the Frankfurt Public Prosecutor’s office has completed its initial investigations and is about to bring tax fraud charges against the alleged architect of the “cum/ex” trading pattern. See ‘A closer look’ section on page 10 for more details.

Legality of “cum/cum” trading patterns in Germany has now been called into question
The Federal Ministry of Finance (Bundesfinanzministerium) has issued a letter to Regional Tax Offices regarding “cum/cum” deals. The letter suggests that such deals may be considered unlawful even if they predate the 2016 law which formally prohibited them. See ‘A closer look’ section on page 10 for more details.

UK Government publishes amended guidance on the new offences of failing to prevent the facilitation of tax evasion ahead of them coming into effect on 30 September 2017
See ‘A closer look’ section on page 11 for more detail.

European Commission proposes that lawyers, tax consultants and auditors may be obliged to disclose certain tax structuring methods of their clients to local tax authorities
On 21 June 2017, the European Commission published new proposals concerning transparency for tax planning intermediaries. In brief, a tax planning intermediary (such as an accountant, lawyer or tax advisor) would be required to report any cross-border tax arrangement they are involved in designing or promoting if it contains certain ‘hallmarks’. As currently drafted, these hallmarks are broad and include the use of losses to reduce tax liabilities and the use of special/beneficial tax regimes. Also of note to practitioners is that the proposals would cover any cross-border tax arrangement involving a member state and a third country (ie the cross-border arrangement does not have to be between two member states). The Commission has expressed an aim of having the proposals in force by January 2019. We will be monitoring how significantly the provisions are amended during the EU legislative process.
Investigations by the German authorities into “cum/ex” trades have attracted considerable attention. More than 30 preliminary proceedings are reported to have been instituted against approximately 100 financial institutions and individuals. Several banks are reported to have paid substantial fines and repaid taxes. Overall losses to the German tax authorities have been estimated at up to EUR30bn.

The investigations centre upon a trading practice under which one taxpayer agrees to transfer shares to another taxpayer with entitlement to a dividend (ie cum dividend) but delivers the shares without the entitlement to a dividend (ie ex dividend). This practice is alleged to have resulted in multiple taxpayers obtaining refunds of capital gains tax that had only been paid to German tax authorities once. The legality of “cum/ex” trades is yet to be definitively tested before the German courts. It is anticipated that the initiation of criminal proceedings against the alleged architect of the “cum/ex” trading practice would provide an opportunity for the courts to provide clarity on this issue.

The ongoing investigations into “cum/ex” trades and the publication of the Panama Papers data set (which contains several million files relating to offshore companies in Panama) have generated significant public interest in the topic of tax evasion in Germany. This has, in turn, prompted law makers and authorities to take a number of actions:

- In July 2017, the Federal Ministry of Finance issued a letter stating that “cum/cum” trading practices might be considered abusive and illegal. Such practices involve a taxpayer (who is not entitled to tax credit on dividends) transferring shares to another taxpayer (who is entitled to such a credit) before the share accrues the entitlement to a dividend. The share is transferred back after it has accrued the entitlement to a dividend. A taxpayer who would not otherwise be entitled to receive a tax credit on dividends receives the benefit of such a credit (which it shares with the other participating taxpayer). Until the practice was prohibited in late 2016, this practice was considered to be lawful. However, the Ministry of Finance’s letter goes further in suggesting that such practices will be considered unlawful and abusive even if they occurred prior to late 2016 if the sole reason for the deal was to avoid taxation. Trades might be considered abusive if shares are transferred back and forth within a period 45 days before and after the dividend record date.

- A special task force has been established to consider whether to initiate proceedings against German taxpayers in relation to the contents of the Panama Papers. The organisation involves members of the Federal Criminal Police office (Bundeskriminalamt, BKA) and the Oberfinanzdirektion Frankfurt and is supported by the Public Prosecution Office of Frankfurt. Any resulting fiscal and criminal preliminary proceedings will be conducted in close co-operation with the competent Public Prosecutors.

- The German legislature enacted a Statute Against Detrimental Tax Practices in Connection with the Allocation of Rights passed (Gesetz gegen schädliche Steuerpraktiken im Zusammenhang mit Rechtüberlassungen). This statute seeks to limit the ability of multinational corporations transfer profits, via licence payments, to jurisdictions which offer the corporations more favourable tax treatment.

- The German legislature enacted a statute Against Tax Avoidance (Steuerumgehungsbekämpfungsgesetz). The statute aims to combat tax evasion and enhance transparency of offshore company holdings by imposing disclosure obligations on taxpayers and third parties and expanding the investigative powers of tax authorities. The statute makes the use of an offshore company for tax evasion a particularly serious form of tax evasion with an increased punishment. Other significant aspects of the statute are outlined in the below table.

<table>
<thead>
<tr>
<th>Expanded disclosure obligations</th>
<th>Taxpayers must disclose to the German tax authorities if they acquire or sell interest in foreign companies. Certain financial institutions must disclose to the German tax authorities if they facilitate certain business relationships between their clients and foreign companies. A breach of the disclosure obligations can be fined up to EUR25,000. Furthermore, financial institutions can be held liable for any resulting tax deficit.</th>
</tr>
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<tbody>
<tr>
<td>Expanded investigative powers for tax authorities</td>
<td>Bank secrecy in relation to tax matters has been abolished. Tax authorities are also empowered to request collective disclosure of information from third parties. Previously, tax authorities had to respect the relationship between financial institutions and their clients. If the tax authorities gained information about clients while auditing financial institutions, this information could not be forwarded to the tax authorities that are responsible for the respective client.</td>
</tr>
<tr>
<td>Increased burdens on financial institutions</td>
<td>Financial institutions now also have to obtain information about the tax status of an individual when opening an account. The same information has to be obtained with regard to other entitled individuals. Financial institutions are also required to store information for ten years after a taxpayers account has been terminated.</td>
</tr>
</tbody>
</table>
On 1 September 2017, HM Revenue & Customs published updated guidance on the corporate tax evasion offences contained in the Criminal Finances Act 2017 (as required by s. 47(1) of the same Act). Those offences came into force on 30 September 2017.

While the final guidance has not changed significantly from the draft guidance which was published during the legislative process, a few notable changes are as follows:

– The guidance contains a new clarification on the dual criminality requirement that for a foreign tax evasion facilitation offence to have been committed it must be a crime in both the UK and that country. Specifically, where the act of facilitation is carried out in a third country (ie not the UK or the country suffering the tax loss) then the country suffering the tax loss must recognise the act of facilitation as an offence.

– Two case studies have been fleshed out, in particular those concerning liability for various branches of a foreign bank and liability of an intermediary. A helpful additional case study looking at liability for a firm providing payroll services has also been added.

– Two suggested training requirements have been removed (penalties for person and corporate for committing an offence; and the social and economic effects of tax evasion).

As the official statutory guidance, this will be the first port of call for practitioners seeking further detail on the new corporate failure to prevent the facilitation of tax offences. In addition, a number of other useful sector-specific guidance notes have been published or are forthcoming – for example the Law Society published industry guidance on 8 September 2017.

Finally, HMRC has also published detailed online guidance on how to self-report a potential tax evasion facilitation offence. This emphasises that while rapid self-reporting doesn’t guarantee that a firm won’t be prosecuted, it can go to the firm’s defence; be taken into account by prosecutors when making decisions about prosecution; and be reflected in any associated penalties, if convicted. The guidance also makes clear that firms in the regulated sector should, if required to do so, submit a Suspicious Activity Report before self-reporting to HMRC.

A closer look: **UK publishes updated guidance on the failure to prevent facilitation of tax evasion**

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**ACTIONS**

– Track the development of the European Commission’s new proposals, concerning reporting requirements for tax planning intermediaries.

– If your company is a multinational corporate, falling within the scope of the new German Statute Against Detrimental Tax Practices in Connection with the Allocation of Rights, consider its impact on your ability to transfer profits to jurisdictions offering more favourable tax treatment.

– Continue to monitor for the remainder of the Criminal Finances Act 2017 (eg reforms to the SAR regime, Unexplained Wealth Orders) coming into force. If the introduction of the corporate tax evasion offences is anything to go by, then the implementation period may be short.

– Financial institutions that fall within the scope of the new German Statute Against Tax Avoidance, should consider whether they have sufficient policies and controls in place to meet the more onerous information storage requirements that the Act imposes. They should also consider the implications for their clients of the tax authorities’ new ability to forward client information, gathered from an audit of their institution, to other tax authorities.
The ECJ Advocate General questions compatibility of the so-called Italian dual track system with the double jeopardy principle. See ‘A closer look’ section on page 13 for more detail.

New Belgian Act of 31 July 2017 increases the criminal sanctions applicable to market offences

Pursuant to the implementation of the 2014 Market Abuse Directive, maximum terms of imprisonment have been increased in Belgium from: (i) two to four years for market manipulation; (ii) one to four years for insider dealing; and (iii) one to two years for unlawful disclosure of inside information. A person convicted of market manipulation may now be ordered to pay a criminal fine of up to three times the proceeds derived, directly or indirectly, from the offence. This brings penalties for market manipulation into line with those for insider dealing.

UK Financial Conduct Authority publishes Annual Enforcement Performance Account 2016/17

43 new financial crime cases were opened in the year to 31 March 2017, bringing the FCA’s total number of open financial crime cases to 56. Seven financial crime cases were closed during the same period, and financial penalties totalling GBP166.3m were imposed.

U.S. authorities seek extradition of former UK bank executive to face charges brought by the Department of Justice in relation to the alleged “front running” of a foreign exchange deal in December 2011

A trial of the executive’s colleague has already commenced in New York.

Scrutiny of German automobile manufacturers in connection with treatment of diesel emissions continues

- German media reports that the Stuttgart Public Prosecutor’s office has initiated preliminary criminal proceedings against another automobile manufacturer in relation to alleged manipulation of diesel emission data.

- Three separate public prosecution offices in Germany have opened investigations against affiliates of that automobile manufacturer.

- In the course of a claim for repayment of the purchase price and the assessment of damages for a manipulated diesel vehicle, the district court in Krefeld came to the conclusion that the management of the automobile manufacturer group must have had knowledge about the manipulation.

New Belgian Act of 31 July 2017 requires the Belgian regulator of the financial sector, the Financial Services and Markets Authority (FSMA) and entities it supervises to implement whistleblowing procedures

On 31 July 2017, Belgium enacted a bill modifying the Act of 2 August 2002 on the supervision of the financial sector and on financial services. The Act of 31 July 2017 provides, amongst other things, that the FSMA will establish procedures to facilitate reporting to it of infringements of all rules that the FSMA is charged with supervising (ie the rules relating to the treatment of financial consumers and the integrity of the financial markets).

The FSMA issued a regulation, confirmed by Royal Decree of 24 September 2017, determining the procedural rules it will apply to the receipt and treatment of whistleblowing reports. The regulation specifies the information to be communicated by the whistleblower and the steps followed to process the information received. The regulation also provides for the appointment of FSMA staff specialised in the treatment of whistleblowing reports, the institution of four communication channels for the reporting of infringements, the preservation of the confidentiality of the identity of the whistleblower, and the registration and preservation of the whistleblowing reports.

The Act of 31 July 2017 also obliges the institutions and persons regulated by the FSMA and covered by Article 45 §1, al. 1, 2 and 3 of the Act of 2 August 2002 to set up internal whistleblowing procedures, failing which, the FSMA will take measures or impose financial penalties. The measures which the FSMA could impose mainly consist of: (i) ordering the institution/person responsible for the violation to remediate the situation in a well-determined time period, possibly subject to a penalty payment per day, or to the prohibition of commercialising to a financial product on Belgian territory as long as the obligation is not observed; and (ii) ordering an administrative fine. Where the violation persists after the time period set to remediate the situation, the FSMA can: (i) suspend the direct or indirect exercise of the entire or part of the activity of the firm; or (ii) order the replacement of the directors of the firm.
In Allen & Overy’s Q2 2017 European White Collar Crime Report, we reported that two separate Italian courts had upheld the dual track system for prosecuting market abuse in light of the decision of the European Court of Human Rights in A & B v Norway. However, it has not taken long for all of these decisions to be called into question.

On 12 September 2017, the Advocate General of the ECJ issued an opinion in three conjoined applications concerning the compatibility of the dual track Italian system with the double jeopardy principle contained in Article 50 of the Charter of Fundamental Rights of the European Union (the Charter). Two of the applications concerned the pursuit of both criminal prosecution and administrative sanctions by the Italian Companies and Stock Exchange Commission (CONSOB) for market abuse and insider trading. The other application concerned the pursuit of criminal prosecution and administrative sanctions by the Italian tax authorities for non-payment of VAT.

In his opinion, the Advocate General rejected the narrow formulation of the double jeopardy principle adopted by the ECHR in A & B v Norway. In his view, Article 50 of the Charter required a higher degree of protection.

In particular, Article 50 of the Charter should be interpreted as preventing non-criminal (albeit criminal in substance) sanctions to be inflicted following administrative proceedings whenever:

– the defendant has already been subject to criminal sanctions for the same facts under scrutiny; and
– the national system does not provide a specific procedural mechanism aimed at preventing a double punishment for the same facts.

In practical terms, this analysis seemingly permits the simultaneous pursuit of criminal and administrative proceedings for the same market abuse violation. However, it demands that, as soon as a (criminal in substance) sanction is imposed at the conclusion of one set of proceedings, the proceedings still pending should immediately stop.

It remains to be seen whether the Grand Chamber adopts the Advocate General’s opinion. If it does so, Italian courts would be required to disregard any Italian law provision to the contrary. This would cut across the recent trend of judicial rulings in Italy and reopen the longstanding debate over the Italian dual-track system.

A closer look: Debate over the legality of the Italian dual track system for prosecuting market abuse just won’t go away

In Allen & Overy’s Q2 2017 European White Collar Crime Report, we reported that two separate Italian courts had upheld the dual track system for prosecuting market abuse in light of the decision of the European Court of Human Rights in A & B v Norway. However, it has not taken long for all of these decisions to be called into question.

On 12 September 2017, the Advocate General of the ECJ issued an opinion in three conjoined applications concerning the compatibility of the dual track Italian system with the double jeopardy principle contained in Article 50 of the Charter of Fundamental Rights of the European Union (the Charter). Two of the applications concerned the pursuit of both criminal prosecution and administrative sanctions by the Italian Companies and Stock Exchange Commission (CONSOB) for market abuse and insider trading. The other application concerned the pursuit of criminal prosecution and administrative sanctions by the Italian tax authorities for non-payment of VAT.

In his opinion, the Advocate General rejected the narrow formulation of the double jeopardy principle adopted by the ECHR in A & B v Norway. In his view, Article 50 of the Charter required a higher degree of protection.

In particular, Article 50 of the Charter should be interpreted as preventing non-criminal (albeit criminal in substance) sanctions to be inflicted following administrative proceedings whenever:

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France introduces mandatory penalty in corruption cases, preventing individuals from running for public office

On 2 August 2017, the French Parliament adopted the “bill for transparency in political life” (“loi pour la confiance dans la vie politique”) which imposes an additional penalty of ineligibility against all individuals punished on grounds of “probity offences” such as corruption and influence peddling. Imposition of the ineligibility penalty prevents individuals from running for public office going forward. The bill was approved by the French Constitutional Council on 8 September 2017 and entered into force on 16 September 2017.

Harsh penalties sought imposed by the Paris Criminal Court in the first episode of the “ill-gotten gains” case

Several African political leaders (including Omar Bongo (Gabon) and Denis Sassou Nguesso (Republic of Congo)) and members of their families are currently the subject of criminal investigations in France. The investigations relate to properties located in France which are alleged to have been financed through the proceeds of crimes committed by these leaders in their home countries. The investigation has been separated into several proceedings. A first trial was held before the Paris Criminal Court at the beginning of July 2017, in which the French Financial Prosecutor sought three years’ imprisonment, a EUR30m fine and the forfeiture of the seized property (worth more than EUR150m) against Téodorin Obiang, son of the President of Equatorial Guinea who was represented at trial but did not himself attend. On 27 October 2017, the Paris Criminal Court found Mr Obiang guilty on grounds of the laundering of the proceeds of multiple offences, including corruption, misuse of corporate assets, embezzlement and breach of trust, and convicted him to a three years’ imprisonment sentence, a EUR30m fine (both penalties being suspended) and to the forfeiture of the seized property. Mr Obiang’s attempt to challenge the jurisdiction of the Paris Criminal Court was denied on the basis that the laundering offence, which is independent from the predicate offences, had been committed on the French territory. An appeal has been filed by the defendant.

NGOs initiate criminal complaint against a major French bank on grounds of aiding and abetting crimes against humanity

According to the press, on 29 June 2017, three NGOs (including the anticorruption association Sherpa), filed a criminal complaint against a major French bank on grounds of aiding and abetting genocide, war crimes and crimes against humanity allegedly committed in Rwanda. The criminal complaint alleges that the bank financed the purchase, in June 1994, of 80 tons of weapons used in the commission of the genocide, by authorising two transfers from the account of the National Bank of Rwanda to an account held by a South-African owner of an arms brokering company.

Belgium imposes obligations on large companies and groups to report anti-bribery and corruption matters in their annual reports

On 3 September 2017, Belgium passed a new law that imposes additional obligations on certain companies and groups to disclose non-financial information in their annual management report (rapport de gestion/jaarverslag). This report must be submitted each year by the board of directors to the shareholders, and, as regards listed companies, filed with the Belgian National Bank. This new requirement applies to “public-interest entities” (ie listed companies, credit institutions, insurance companies, and settlement institutions) which: (i) exceed the average number of 500 employees over the last closed fiscal year, on their balance sheet date; and (ii) exceed either a balance sheet total of EUR17m or a turnover of EUR34m (excl. VAT), on their balance sheet date.

Companies must describe amongst other things: (i) the internal policies and diligence procedures they have put in place to fight corruption; (ii) the main corruption risks generated by the company’s activities; and (iii) the outcome of the anti-corruption and bribery policies put in place by the company. If no specific policy is in place, a clear and reasoned justification will have to be included in the annual management report. These new disclosure requirements apply to reports relating to the fiscal year 2017. Failing to comply with these new requirements may expose the directors to civil and criminal liability, and the company may be held jointly liable for the payment of the fines.

As this law was adopted pursuant to European Directive 2014/95/UE, the European Commission published non-binding “Guidelines on non-financial reporting” in July 2017 on the methodology that may be used by the relevant companies when reporting non-financial information. The key recommendations include publishing information that is material, understandable, comprehensive but concise, forward-looking, stakeholder oriented, consistent and coherent.
The UK Financial Reporting Council (FRC), the UK regulator responsible for promoting corporate governance and reporting, has opened a consultation on new guidelines that advise companies on how to disclose corruption in their annual reports. Under amendments to the UK Companies Act that came into force in December 2016, companies with more than 500 employees are required to publish a strategic report which contains information on, amongst other things, anti-corruption and anti-bribery matters. The draft guidelines offer limited prescriptive guidance on the anti-corruption and anti-bribery information that ought to be disclosed. Instead, the draft guidelines suggest that “materiality” should be the touchstone for any disclosure. Information is material if its “omission or misrepresentation could reasonably be expected to influence the economic decisions of shareholders”.

OECD releases anti-bribery and corruption publications

In July, the OECD at the request of the G20 Anti-corruption Working Group published a “Compendium of good practices on the use of open data for Anti-corruption”. The compendium provides an overview of initiatives for the publication and re-use of open data to fight corruption across OECD and G20 countries. The practices summarised in the compendium illustrate how open data can be used to combat corruption, increase public sector transparency and integrity, and foster economic development and social innovation.

In August, The OECD Working Group on Bribery (“the Working Group”) published a report outlining progress towards implementation of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (“The OECD Convention”). The report notes that the Working Group is in the fourth and final phase of implementation. This phase focuses on enforcement and will cover unresolved issues from previous reports and in-depth exploration of issues including detection of bribery and corruption, company liability and co-operation and mutual legal assistance amongst law enforcement officials. The report notes that 24 out of the 43 parties to the convention have yet to conclude a foreign bribery enforcement action.

German prosecutors do not seek punitive fines in bribery proceedings after obtaining disgorgement

According to press reports, the investigation concerned the alleged bribery of public officials between 1998 and 2014 involving a marine electronics and systems company. The Bremen Public Prosecution Office concluded bribery proceedings after obtaining disgorgement of ill-gotten gains amounting to EUR48m from the company. However, contrary to similar cases in the past, further fines were not imposed on the company due to its response to the bribery allegations. This included assistance with the public prosecutor’s investigations, the conduct of its own internal investigation and the taking of steps to improve its compliance and risk management structure.

The German Department of Trade and Industry has proposed legislation to establish a nationwide register to assist public authorities in determining the debarment of contractors

The register will record companies who have been convicted of offences that either require mandatory exclusion or permit discretionary exclusion from contract awards and/or concessions. The register will be maintained at the Federal Cartel Office Bundeskartellamt, BKart-A. Public authorities will be required to consult the register for any contract or concession that meets certain criteria. This includes any contract or concession worth at least EUR30,000. Entries can be deleted from the register after the expiration of a certain period of time. Companies can also apply to have entries deleted if they have adopted appropriate remedial measures in response to the relevant offence(s).

International Anti-Corruption Coordination Centre (“IACCC”) is launched in the UK

The IACCC brings together specialist law enforcement officials from Australia, Canada, New Zealand, Singapore, the UK and the U.S. in one location to combat “grand corruption” (ie acts of corruption by politically exposed persons that may involve vast quantities of assets). The IACCC will improve fast-time intelligence sharing, assist countries that have suffered grand corruption. It will be hosted by the UK National Crime Agency until 2021. Interpol is scheduled to join later this year.
UK SFO announces convictions arising out of its investigation into F.H. Bertling Ltd freight forwarding business in Angola
F.H. Bertling Limited and six current and former employees have been convicted (after pleading guilty) of conspiracy to make corrupt payments to an agent of the Angolan state oil company, Sonangol, in relation to a contract worth approximately USD20m. One defendant was acquitted of the charges. Sentencing dates are yet to be scheduled.

UK SFO publicly announces the commencement of three bribery investigations in the space of a month
On 11 July 2017, the SFO announced that it had opened an investigation into Amec Foster Wheeler plc, employees and others associated with it for suspected bribery, corruption and related offences.
On 24 July 2017, the SFO announced that it had opened an investigation into suspected corruption in the conduct of business in the Republic of Guinea by the Rio Tinto group, its employees and others associated with it.
On 1 August 2017 the SFO announced that it was investigating suspicions of corruption in the conduct of business by British American Tobacco plc, its subsidiaries and associated persons.

The Wolfsberg Group (comprising 13 global banks) has published updated guidance on how financial institutions should construct an effective anti-bribery and corruption compliance programme key updates include
– a suggested definition of “Public Official”.
– a suggested definition of “intermediary” and detailed suggestions of specific controls that can mitigate the risks posed by intermediaries.
– detailed suggestions of specific controls that can mitigate the risks posed by acquisitions or joint ventures.
– a dedicated section on mitigating the risks of offers of employment and work experience being used as an inducement or quid pro quo to obtain or retain business, gain an unfair business advantage or influence a government or regulatory action.
– a reduced focus on guidance for managing corruption risks posed by customers. Previous Wolfsberg Guidance included an appendix outlining specific risks, controls and red flags relating to corruption by customers. This appendix is not replicated in the revised guidance.

A copy of the guidance can be found here:

UK Courts impose significant sentences of imprisonment for corruption offences
– On 20 June 2017, Andrey Ryjenko was sentenced in the Central Criminal Court to six years’ imprisonment for accepting more than GBP2m in bribes in exchange for using his role at the European Bank for Reconstruction and Development to approve large loans.
– On 21 July 2017, four men were sentenced in the Blackfriars’ Crown Court to between one and two years’ imprisonment for corruption offences relating to the award of contracts under the Crossrail project. Kevin McKee and John Zayya made payments to Innocent Obiekwe, via an intermediary William Waring, in order to secure a contract to supply safety critical staff for the Crossrail project.
– On 22 September 2017, Wassim Tappuni was sentenced in the Southwark Crown Court to six years’ imprisonment for accepting approximately GBP1.7m in bribes in exchange for helping medical supply companies win tenders from the World Bank. Mr Tappuni was employed as an expert to represent the interests of The World Bank and the United Nations Development Programme in the bidding process for numerous medical projects. He provided a number of bidding companies with information on what the World Bank was looking for in the bids, asked them to help discredit the bids of others, and advised on how to edit their bids to assist them in winning.

– If your company falls within the scope of the new Belgian Act, you will need to consider whether your internal anti-bribery system is sufficient to comply with the new requirements. We suggest reviewing the European Commission’s July 2017 “Guidelines on non-financial reporting”.
– Assess existing anti-bribery and corruption policies and controls against the revised Wolfsberg Guidance, specifically the sections on public officials, intermediaries, acquisitions/joint ventures and offers of employment and work experience.
– Consider whether your next annual report requires disclosure of anti-bribery and corruption matters.
Testimony lawfully obtained under compulsion in Europe and elsewhere inadmissible in U.S. criminal proceedings
See ‘A closer look’ section on page 18 for more detail.

Work continues to establish European Public Prosecutor’s Office (EPPO)
See ‘A closer look’ section on page 19 for more detail.

European Commission launches public consultation on improving access to electronic evidence in criminal investigations
The Commission notes that existing mechanisms for obtaining electronic evidence across borders (such as mutual legal assistance, mutual recognition, direct cooperation of service providers or direct access) may result in less effective criminal justice. It has therefore invited views on current practices on obtaining cross-border electronic evidence in the member states and the limitations of existing regulations. The consultation closed on 27 October 2017.

Belgium commences project to introduce a new Criminal Procedural Code
As part of the programme for the modernisation of the justice system, the Minister of Justice has decided to reform the Belgian criminal justice through the adoption of both a new Criminal Code (see Allen & Overy’s Q2 2017 European White Collar Crime Report, p. 22) and a new Criminal Procedure Code. The experts in charge of drafting the latter have proposed a series of innovative measures to the Minister. These include a controversial move to abolish the role of investigating judges and limitations on the power of victims to initiate criminal proceedings. The new draft code is anticipated to be introduced before the Parliament in 2018.

Belgian bill introduced to avoid disproportionate confiscation
On 9 February 2017, the Belgian Constitutional Court held a provision of the Belgian Criminal Code relating to the confiscation of the “instrumentalities” of crime to be unconstitutional. Under Belgian law, an instrumentality is any property used to commit an offence (eg a vehicle used to transport drugs). Confiscation is mandatory where the instrumentality belongs to the offender, with no possibility of ordering partial confiscation. The Constitutional Court expressed concerns that this may lead to disproportionate confiscation orders (eg the complete confiscation of a valuable vehicle that was used to transport a negligible amount of drugs). In response to this concern, a remedial bill is expected by the end of 2017. It will enable courts both: (i) to order the confiscation of the monetary equivalent of the instrumentality of crime (rather than confiscating the instrumentality itself); and (ii) to reduce the amount of any such order where confiscation of the entire property would be disproportionate in the light of the financial situation of the offender. The bill extends these measures to the confiscation of the object and of the product of crime. In so doing, it brings confiscation of instrumentalities, objects and products of crime into line with the longstanding regime applicable to the confiscation of proceeds (ie benefits) of crime.

Highest German court confirms compliance systems and remediation measures following internal investigations to be taken into account for sentencing decisions
On 28 June 2017, the German Federal Court of Justice (Bundesgerichtshof, BGH) released a judgment in which it held that an administrative fine imposed on a company for the criminal conduct of its employee could be reduced on account of the company’s compliance systems and controls and improvements made in response to employee misconduct (including any internal investigation). A company employee had approved the payment of commission to a third party knowing that it would be used to bribe a government minister to award a contract to the company. The BGH referred the EUR175,000 fine imposed on the company back to the lower court for reconsideration in light of its conclusions regarding compliance systems. Although this was the prevailing view amongst legal commentators, the BGH’s judgment is the first occasion on which it has held that an adequate compliance system can reduce an administrative penalty.

German constitutional court temporarily prohibits Munich public prosecutor from reviewing documents seized during dawn raid of law firm
In March 2017, the Munich public prosecutor raided the Munich offices of one of the law firms instructed by a major car manufacturer in connection with the diesel emissions scheme. Documents which related to the firm’s internal investigation, including interview memoranda were seized. Initial legal challenges to the seizure before the ordinary courts and the German Constitutional Court (Bundesverfassungsgericht, BVerfG) were unsuccessful. However, in July 2017, the German Constitutional Court (Bundesverfassungsgericht) issued an interim order prohibiting the review of the seized material. In its reasoning, the court pointed to the potentially irreparable harm that such a review could cause to the relationship of trust between the client and the law firm. This interim order will be binding until the court reaches a final decision on the merits of the constitutional challenge. It is hoped that the final decision of the BVerfG will clarify the legality of the seizure of documents from law firms.

The Ministry for Finance of North Rhine Westphalia has proposed the establishment of a task force that combines personnel from the Ministry of the Interior, Ministry of Finance and Ministry of Justice to combat organised crime, money laundering, tax fraud and the financing of terrorist activities
This proposal is based on the model of the Organised Crime and Tax Fraud Investigating Team (Ermittlungsgruppe Organisierte Kriminalität und Steuerhinterziehung, EOKS) which has been operating successfully.
In United States v. Anthony Allen and Anthony Conti, No. 16-00898 (2d Cir. July 19, 2017) (U.S. v. Allen), the U.S. Court of Appeals for the Second Circuit overturned the convictions of two men who were accused of conspiring to manipulate London Interbank Offered Rates (LIBOR), finding that the prosecution improperly relied on statements that the defendants made during compelled testimony before the UK’s Financial Conduct Authority (FCA).

In short, the court ruled that the direct or derivative use of compelled testimony as evidence in U.S. criminal trials – even where “the defendant’s testimony was compelled by foreign officials lawfully… in a manner that does not shock the conscience or violate fundamental fairness” – violates the right against self-incrimination that is guaranteed by the Fifth Amendment to the U.S. Constitution.

The implications of this decision are potentially far-reaching. Indeed, prosecutors in New York recently asked the Second Circuit to rehear the case, arguing that the decision ‘substantially impairs the ability of the United States to investigate and prosecute international crime’. In fact, prosecutors say, “the government has already elected to forgo worthy cross-border investigations that…”

According to the U.S. Department of Justice, the Criminal Division’s Fraud Section and Antitrust Division alone have over 50 pending cross-border investigations involving conduct in more than 40 jurisdictions. Regulatory and law enforcement authorities in at least 36 of those jurisdictions may compel testimony on pain of sanctions, including imprisonment, against witnesses who refuse to attend. Defendants enjoy a qualified right against self-incrimination that is guaranteed by the Fifth Amendment to the U.S. Constitution.

The qualified privilege does not apply, however, in the context of regulatory investigations. As such, U.S. prosecutors have urged the Second Circuit to consider ‘the practical realities of international investigations’ that make it impracticable for investigators to avoid the ‘taint’ of compelled testimony. For example, in the preliminary stages of Autorité des Marchés Financiers (AMF), Autorité de Contrôle Prudentiel et de Résolution (ACPR), Agence Française Anticorruption (AFA) or Autorité de la Concurrence investigations – ie before the matter has been referred to enforcement – individuals may be required to participate in on-the-record interviews under threat of administrative sanctions, including a formal warning or fines.

In France, criminal defendants may not be compelled to incriminate themselves. But in the context of regulatory enforcement proceedings, the protections against self-incrimination may not apply. For example, in the preliminary stages of Autorité des Marchés Financiers (AMF), Autorité de Contrôle Prudentiel et de Résolution (ACPR), Agence Française Anticorruption (AFA) or Autorité de la Concurrence investigations – ie before the matter has been referred to enforcement – individuals may be required to participate in on-the-record interviews under threat of administrative sanctions, including a formal warning or fines.

In practice, to avoid these evidentiary pitfalls, we are already seeing U.S. and non-U.S. regulators cooperate extensively to execute elaborate witness interview processes that are designed to avoid any possible “taint” of compelled testimony. For example, regulators are employing “day one/day two” interview schedules that allow DOJ investigators to obtain voluntary witness statements the day before compulsory interviews are taken, although it appears this approach was followed in the underlying investigations in U.S. v. Allen as well.

As Second Circuit Judge José Cabranes observed, “We do not know exactly what this brave new world of international criminal enforcement will entail”. As it stands, however, U.S. v. Allen will require regulatory and law enforcement authorities to rethink aspects of their international cooperation programs. In particular, the ruling will require U.S. prosecutors to carefully consider how they collect and use evidence in cross-border matters going forward.
Establishment of new European Public Prosecutor's Office (EPPO)

As reported in Allen & Overy's Q2 2017 European White Collar Crime Report, p. 17, 20 of the European Union’s member states have reached political agreement on the establishment of the EPPO.

Why is the EPPO needed?

At present, the European Union has no ability to investigate and prosecute EU fraud. Only national authorities can do so and in complex cases of cross-border fraud, they often lack the tools required to act quickly and efficiently.

The EPPO is designed to plug this gap by investigating and prosecuting EU fraud and other crimes affecting the European Union’s financial interests.

The EPPO will have exclusive and EU-wide jurisdiction to deal with suspicions of criminal behaviour falling within its remit.

How will the EPPO be structured?

The EPPO will be created as an independent, decentralised body within the European Union which will aim to integrate national law enforcement agencies.

The EPPO will be headed by the Chief European Prosecutor and its investigations will primarily be conducted by European Delegated Prosecutors (EDPs) who will be located in each participating member state. Member states themselves will determine how many EDPs they appoint. Reportedly, the EDPs will act as both European and national prosecutors; when acting for the EPPO, they should act fully independently of their national prosecution bodies. It remains to be seen how this will operate in practice. For example, will the EDPs be remunerated by national law enforcement bodies or by the EPPO? Will the EDPs have their own office of staff upon whom they can call for assistance when acting for the EPPO (as opposed to their national prosecutor)?

When will the EPPO become operational?

On 5 October 2017, the European Parliament agreed to the creation of the EPPO and the regulation establishing the EPPO was adopted on 12 October by those member states which are part of the EPPO enhanced cooperation.

It is not currently clear when the EPPO will become operational. The date on which the EPPO will become operational will be set by the commission on the basis of a proposal from the European Chief Prosecutor once the EPPO has been set up. This date will not be earlier than three years after the entry into force of the regulation establishing the EPPO. The EPPO’s central office will be based in Luxembourg.

A closer look: Establishment of new European Public Prosecutor’s Office (EPPO)

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ACTIONS

– Keep an eye out for future updates on the establishment of the EPPO.
– Keep abreast of developments in Belgium regarding the overhaul of the criminal justice system.
– The use of cross-border evidence remains a hot topic, with its importance heightened by the increasingly global nature of criminal activities and the number of bodies often involved in investigating such conduct. It is important to stay alive to developments in this arena, including the use of compelled testimony around the world and the use of the EU’s mechanisms for obtaining cross-border electronic evidence.
**Settlement**

UK Serious Fraud Office (SFO) heralds success of Deferred Prosecution Agreements (DPAs)

Speaking at the Cambridge Symposium on Economic Crime for the final time as Director of the SFO, David Green QC (who steps down in April 2018) heralded DPAs as a “real success”. Over the past year, DPAs have totalled some GBP640m in financial penalties and costs. David Green QC also praised DPAs for permitting companies to account for their conduct in a transparent way without sustaining a criminal conviction and for enabling them to draw a line under the past and radically to overhaul compliance.

In a separate speech at the same conference, Alun Milford (SFO General Counsel) emphasised two points about the DPAs concluded by the SFO to date:

– It will not be possible for a company to achieve a DPA by doing nothing and then going through the motions with the SFO. Referring to the Rolls Royce DPA, Mr Milford acknowledged that the company did not self-report its concerns. While that meant that the company “started at a disadvantage”, it did not preclude a DPA from being offered given the consistently high level of cooperation that the company gave the SFO over a number of years (which included the disclosure of wrongdoing of which the SFO was unaware).

– The SFO will not always be content to accept summary witness accounts from a company’s internal investigation (rather than written transcripts or audio recordings). Mr Milford reiterated that each case would depend on its own circumstances. In the case of Standard Bank Plc (now known as ICBC Standard Bank Plc), the SFO accepted summary witness accounts. However, in the case of Rolls Royce, the SFO received interview memoranda for interviews that had already been conducted and required that any future interviews by the company would be audio recorded.

UK Office of Financial Sanctions Implementation (OFSI) updates reporting guidance

OFSI has updated its financial sanctions general guidance and information regarding how it will apply its monetary penalties regime to provide further clarity.

Belgian remedial bill on criminal settlements expected to enter into force on 1 January 2018

As reported in *Allen & Overy’s Q2 2017 European White Collar Crime Report*, p. 21, the Belgian government will shortly be proposing a remedial bill to address the Belgian Constitutional Court’s findings that several provisions in the Belgian Code of Criminal Procedure relating to the criminal settlement process were unconstitutional. The remedial bill is expected to be enacted by the end of 2017 and to enter into force on 1 January 2018. It is anticipated that the bill will permit an approving judge to exercise greater scrutiny over the substance of any settlement that is proposed after an investigating magistrate or trial judge has been seized of the case. At present, judicial scrutiny is limited to determining whether formal legal requirements have been met.

**ACTIONS**

– Cooperation and DPAs are becoming increasingly common features of UK SFO investigations. These factors should be borne in mind as early as possible where an SFO investigation looks to be in contemplation.

– Consider registering with OFSI’s subscription list to receive all updates to UK financial sanctions, including their most up to date guidance.
# Looking ahead

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<th>Date</th>
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<td><strong>UK</strong></td>
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<tr>
<td>September-November 2017</td>
<td>Remainder of Criminal Finances Act 2017 expected to come into force.</td>
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<tr>
<td>Estimated by 31 October 2017</td>
<td>Appeal against decision of High Court narrowing the scope of litigation privilege in ENRC v SFO to be heard by Court of Appeal (permission to appeal has been granted)</td>
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<tr>
<td>TBC</td>
<td>Government response to the call for evidence on changing corporate liability for economic crime. Options proposed include: (i) amendment of identification doctrine; (ii) strict (vicarious) liability offences; (iii) strict (direct) liability offences; (iv) failure to prevent an element of the offence; and (v) regulatory reform on sector by sector basis.</td>
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<td><strong>FRANCE</strong></td>
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<td>TBC</td>
<td>Ratification of Order No. 2016-1635 implementing the MLD4 expected.</td>
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<td>TBC</td>
<td>French Anti-Corruption Agency to publish guidance about relevant ABAC procedures and to conduct first onsite inspections.</td>
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<td><strong>GERMANY</strong></td>
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<td>TBC</td>
<td>Final judgment of German Constitutional Court (Bundesverfassungsgericht) expected in relation to raid on Volkswagen external lawyers offices in Munich.</td>
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<td><strong>NETHERLANDS</strong></td>
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<td>TBC</td>
<td>Implementation of MLD4.</td>
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<td>End of 2017</td>
<td>Belgian bill to avoid disproportionate confiscation expected to be enacted.</td>
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<td>End of 2017</td>
<td>Belgian remedial bill on criminal settlements expected to be enacted.</td>
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<td>2018</td>
<td>New draft Criminal Procedural Code expected to be introduced before the Federal Parliament.</td>
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**ITALY**

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<th>TBC</th>
<th>ECJ Grand Chamber to release judgment on compatibility of Italian “dual track” system with double jeopardy principle.</th>
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<tr>
<td>TBC</td>
<td>Government to implement provisions prescribed by reform of Italian Criminal Code and Code of Criminal Procedure.</td>
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<td>TBC</td>
<td>Government to formulate proposals for regulating collection of wiretap evidence.</td>
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**EUROPEAN UNION**

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<th>European Commission proposals concerning transparency for tax planning intermediaries expected to come into force.</th>
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Our global white collar crime practice

Allen & Overy LLP’s market-leading global investigations practice advises clients on a wide range of high-profile criminal and regulatory investigations, with a particular focus on cross-border matters. The global team comprises lawyers with extensive experience of working together in multiple jurisdictions and includes former prosecutors in the U.S. and Europe.

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Allen & Overy LLP or an affiliated undertaking has an office in each of:

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