

# King & Spalding: transatlantic business crime and investigations December column

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Articles | [Published on 12-Dec-2019](#) | England, United States, Wales

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King & Spalding's Special Matters and Government Investigations team shares its views on developments in transatlantic business crime and investigations.

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## UK-US Bilateral Data Access Agreement: changing the landscape for cross-border evidence-sharing in investigations and prosecutions of serious crimes

The use of global communications tools, including email and social media applications, to facilitate criminal activities has increased at an unprecedented rate, making the data generated by such communications all the more critical to the investigation and prosecution of serious crimes. With a recent landmark cross-border data access agreement between the US and the UK, existing barriers to cross-border access to such electronic data by law enforcement have been significantly alleviated.

Through the US-UK Bilateral Data Access Agreement, signed on 3 October 2019 (the Agreement), the UK and US now have reciprocal rights to demand electronic data regarding serious crimes directly from technology companies in the other's respective jurisdiction. The Agreement enables national security, law enforcement and prosecution agencies to make extraterritorial requests, using the appropriate court process under the laws of the country making the request, to the communications service provider who holds the data. While recently signed, both the UK Parliament and US Congress must ratify it before it can be brought into force.

The Agreement potentially means more accelerated investigations (and fewer abandoned investigations) facilitated by the streamlined process by which US and UK authorities can obtain electronic evidence. US Attorney General William Barr said during the [signing](#) of the Agreement that it:

"will enhance the ability of the United States and the United Kingdom to fight serious crime -- including terrorism, transnational organized crime, and child exploitation -- by allowing more efficient and effective access to data needed for quick-moving investigations."

While his comments show that the initial focus may not be white collar crime investigations, the Agreement has far-reaching effects and companies can still expect law enforcement authorities to have quicker access to data stored abroad in cases relating to bribery, corruption, fraud, money laundering and so on.

## Replacement for mutual legal assistance

The Agreement, which was four years in the making, is the world's first agreement entered into pursuant to the Clarifying Lawful Overseas Use of Data Act (CLOUD Act), enacted by US Congress in March 2018, and the parallel Crime (Overseas Production Orders) Act 2019 (COPO Act), which received Royal Assent in February 2019 (see our [August 2018 column](#) about the COPO Bill for further details). The CLOUD Act and COPO Act paved the way by giving authority to the US and UK governments respectively to enter into such an international agreement to bypass existing mutual legal assistance mechanisms in relation to electronic data. The mutual legal assistance process, which requires court approval of requests for electronic data from law enforcement and requires the government to collect the data and return it to the requesting country's law enforcement agency, typically means that prosecutors wait years to access data held abroad. Prosecutors hope that this new agreement means the process will be significantly expedited.

## Impact on the UK vs the US

The need for swift access to electronic evidence is particularly relevant to UK investigators, as such evidence is frequently held by tech companies, or processed by them, in the US. As noted by Lisa Osofsky, Director of the Serious Fraud Office (SFO) in a [speech](#) at the Royal United Services Institute (RUSI) in April 2019:

"E-mails, social media, closed chatrooms and Whatsapp messages are now the most likely sources of vital evidence to unravel serious and complex crimes and to identify the people who commit them. Today, about 95% of the evidence that the SFO confronts is electronically based."

Of course, in practice, the Agreement will not accelerate each and every cross-border investigation. Data may be held in a jurisdiction other than the US, or it may be encrypted, and the Agreement also prohibits targeting residents of the other country. However, there is no question that it will make things easier for the SFO.

Across the Atlantic, there is speculation that the US will have less use for the Agreement's procedure to request access to electronic data, as the US (home to companies such as Amazon, Apple, Facebook, Google, and Microsoft) is a global leader in public cloud storage. If this proves correct, the hallmark benefit to the US is likely to be the reduced burden on its government from mutual legal assistance treaty requests. On the flipside, US communications service providers are likely to see an increase in international requests, given the streamlined process and shorter timeframe contemplated by the agreement for requesting electronic communications. Thus, communications service providers may see an increased burden in complying with such requests and producing such data.

Overall, the Agreement signals a continued cooperation between US and UK law enforcement. While it is a landmark agreement and will surely serve as a model for future agreements in different jurisdictions, whether it will truly accelerate the pace of cross-border investigations remains to be seen. Nonetheless, companies and individuals potentially subject to investigations should be aware of the possibility that law enforcement agencies will have more ready access to their electronic data.

## World Bank Group issues Sanctions System Annual Report for 2019: key highlights

On 10 October 2019, the World Bank Group issued its latest joint [Sanctions System Annual Report FY19](#) (Report), which addresses the Bank's efforts to investigate and adjudicate allegations of misconduct in projects that they finance. The Report reveals that in the fiscal year 2019, the World Bank completed 47 investigations, imposed

temporary suspensions on 34 firms and individuals, and formally sanctioned 53 entities, including through settlements.

Given the far-reaching consequences for those found to have engaged in wrongdoing (which can include debarment and cross-debarment) companies and individuals on both sides of the Atlantic that take part in World Bank or other multilateral development bank projects should be aware of these enforcement and adjudication trends.

We set out below some key highlights from the Report, as supplied by the Sanctions Board, the Integrity Vice Presidency (INT) and the Office of Suspension and Debarment (OSD).

## **Overview of the World Bank Group's two-tier sanctions system**

Briefly, the World Bank uses a system of administrative sanctions (Sanctions System) against firms and individuals who are alleged to have engaged in fraud, corruption, coercion, collusion or obstruction (collectively, Sanctionable Practices) in connection with projects funded by the World Bank. Under the current Sanctions System, there are five possible sanctions: debarment, debarment with conditional release, conditional non-debarment, public letter of reprimand, and restitution (*section 9, Bank Procedure: Sanctions Proceedings and Settlements in Bank Financed Projects* (Sanctions Procedures)).

The Sanctions System has two tiers. The World Bank's investigative and prosecutorial arm, INT, investigates allegations of Sanctionable Practices and determines whether there is sufficient evidence to substantiate the allegations. If so, INT will refer the matter (along with all the evidence collected during its investigation) to OSD, which is the first tier of the two-tier Sanctions System.

### **Tier 1: Suspension and Debarment Officer review process**

OSD is led by the World Bank's Chief Suspension and Debarment Officer (SDO), who, in accordance with the Sanctions Procedures, reviews the evidence referred by INT and determines whether it is sufficient to support a finding that the alleged Sanctionable Practices occurred. If the SDO believes that there is sufficient evidence, it will issue a Notice of Sanctions Proceedings (Notice) to the entity alleged to have engaged in the Sanctionable Practices (Respondent). The Notice contains the allegations and evidence submitted by INT and will also contain a recommended sanction. (The SDO has further authority to recommend sanctions on affiliates of the Respondent.) Upon issuance of the Notice, the Respondent may be temporarily suspended from eligibility for new contracts financed by the World Bank.

Once a Respondent receives the Notice, they have three choices, which are not mutually exclusive:

- Do not contest the allegations or the recommended sanction, allowing the sanction recommended by the SDO to be imposed.
- Contest the allegations and/or the sanction directly to the SDO in the form of an Explanation within 30 days of receiving the Notice.
- Contest the allegations and/or the recommended sanction directly to the Sanctions Board.

### **Tier 2: Sanctions Board process**

The Sanctions Board is the second tier of the two-tier Sanctions System. The Sanctions Board will hear a case only upon either a Respondent's request, or at the discretion of the Sanctions Board Chair. Nearly all Sanctions Board hearings are held at the request of a Respondent contesting the SDO's recommended sanction and/or findings related to the allegations.

The Sanctions Board reviews each case *de novo*, and it is not bound by the SDO's recommendations. The Sanctions Board will consider:

- INT's allegations and evidence as attached to the Notice.
- The Respondent's arguments and evidence submitted in response to INT's allegations and evidence.
- INT's reply brief.
- The parties' presentations at a hearing.
- Other additional materials, if any, contained in the record.

The Sanctions Board will determine whether it is "more likely than not" that the Respondent engaged in a sanctionable practice, and if so, it will impose a sanction, which may also extend to a Respondent's affiliates, successors and assigns. Decisions of the Sanctions Board are final and non-appealable.

## **2019 enforcement statistics and highlights**

Within this framework, the Report sets forth the following statistics and highlights regarding recent activity:

### **INT statistics**

- INT received 2,461 complaints. Of the complaints that resulted in preliminary investigations in FY19, 18.5% came from World Bank staff and 81.5% from non-Bank sources, including contractors or other bidders, concerned citizens, government officials, employees of NGOs, and other multilateral development banks.
- 1,969 of the complaints resulted in no further action taken by INT.
- 106 of the complaints were forwarded to other World Bank Group units and two were forwarded outside of the World Bank Group.
- 384 of the complaints resulted in Preliminary Investigations.
- INT began 49 new investigations.
- 47 investigations were completed, of which 36 were Substantiated.
- INT submitted 37 cases to OSD.
- INT made 42 referrals to national authorities.
- INT entered into 16 settlements.

### **OSD statistics and highlights**

- OSD temporarily suspended 24 firms and 10 individuals.
- 19 firms/individuals did not appeal and were automatically sanctioned.
- Approximately 77% of cases and settlements reviewed by OSD involved at least one accusation of a fraudulent practice.
- 14% of cases and settlements contained at least one allegation of collusion.
- 12% cases contained an allegation of corruption.
- 4% contained an allegation of an obstructive practice.

#### **Sanctions Board statistics and highlights**

- 14 firms or individuals were sanctioned by the Sanctions Board.
- The Sanctions Board published nine of its decisions, setting out in detail the Sanctions Board's analysis and conclusions with respect to the merits of INT's allegations and Respondents' defences. The nine decisions further analyse evidentiary and procedural disputes, as well as factors relevant to the determination of a sanction.
- In only 4% of the cases heard by the Sanctions Board did the Board determine that INT failed to present sufficient evidence to support at least part of their allegations against the respondent.

### **World Bank Group's ability to handle complex and multi-jurisdictional investigations**

Also in the Report, INT reiterated its focus and ability to handle complex cases, highlighting three investigations in particular:

#### **The Rio Bogota Environmental Recuperation and Flood Control Project**

INT reviewed a total of 1.8 million emails in five languages, interviewed over 75 witnesses and conducted eight forensic audits in respect of the Rio Bogota Environmental Recuperation and Flood Control Project. The investigation resulted in a three-year debarment of Construtora Norberto Odebrecht S.A., the Brazilian subsidiary of Odebrecht S.A. Two additional settlements were reached with subsidiaries of Veolia Water Technologies. All three companies were sanctioned for fraudulently and collusively failing to disclose fees paid to commercial agents during tender prequalification and bidding processes. INT is continuing to negotiate settlements and seek sanctions against other companies involved in this project.

#### **Hanoi Urban Transport Development Project**

Six companies and one individual were separately sanctioned following three Sanction Board decisions and one settlement for collusive, fraudulent, corrupt and obstructive practices relating to the US\$ 304 million Hanoi Urban Transport Development Project that closed in 2016. In February 2019, the World Bank debarred Cadpro Jsc, with the possibility of conditional release after nine years and nine months. The individual was debarred for four years and six months. INT is in the process of seeking sanctions against additional entities involved in the project.

### **Bangladesh Access to Services Project**

The World Bank *sanctioned* three companies and one individual for collusive, corrupt and obstructive practices in respect to a US\$ 96.6 million identification system for enhancing access to a services project in Bangladesh. The main supplier for the contract was debarred under a settlement agreement in 2017. The main supplier admitted improper payments to its subcontractor, Tiger IT Bangladesh Ltd, and its principal who solicited payments to influence public officials. The World Bank debarred Tiger IT with the possibility of conditional release after a minimum period of nine years and six months. The individual was also debarred for six years and six months.

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