

# KING & SPALDING: TRANSATLANTIC BUSINESS CRIME AND INVESTIGATIONS APRIL COLUMN

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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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## THE AIRBUS SETTLEMENT: UNPRECEDENTED TRANSATLANTIC CO-OPERATION

The authorities in the US, the UK and France are becoming increasingly co-operative in their approach to enforcement actions. Recent settlement agreements with Airbus achieved by prosecutors in each of the three countries demonstrate the benefits of transatlantic co-operation. Airbus recently settled one of the largest investigations into foreign corruption and bribery allegations ever, paying a combined \$4 billion settlement to the three authorities. The leadership of the UK and French prosecuting authorities in conducting the investigation, and the large penalties paid to both nations, also show a growing willingness by the US to defer to other nations in cross-border enforcement actions.

### How did the countries co-operate?

The settlements showcase the benefits of joint investigations. Each national authority focused on the conduct and regions most relevant to their own interests. However, together, this meant they were able to address misconduct all over the world, with the agreements covering conduct touching more than 20 countries. Efficient, cross-border



collaboration is reflected in the language of the agreements. For example, the UK Serious Fraud Office's (SFO) Statement of Facts, accompanying its Deferred Prosecution Agreement (DPA), referenced the "joint investigation" conducted with France's *Parquet National Financier* (PNF). The two countries went so far as to enter into a Joint Investigation Team Agreement to "facilitate the Parties' investigations into allegations of fraud, bribery and corruption and other related offences against Airbus Group", noting that the French controlled the document supply. (See [Article, Deferred prosecutions: the effect of Airbus and SFO: R v Airbus: Deferred Prosecution Agreement.](#)) The joint investigation allowed the countries to work together to review and analyze a mountain of data; the Joint Investigation Team collected more than 30 million documents from over 200 custodians, covering conduct over more than four years and 23 countries.

Importantly, the US, UK and France also agreed to defer to one another's investigations, conclusions and penalties for relevant misconduct. The DPA between the US Department of Justice (DOJ) and Airbus explicitly deferred to the PNF and SFO for the conduct covered by each agency's agreement, as well as penalties paid to the two countries (see *USA v Airbus: Deferred Prosecution Agreement (31 January 2020)*). The US DPA focused on more narrow conduct related to China, whereas France and the UK took the lead with regard to conduct in other jurisdictions. The US DPA also covered separate conduct related to export control violations. Notably, the US investigation into Airbus's bribery conduct did not become public until December 2018. This was more than two years after the PNF and the SFO launched their investigations, and almost two years after France and the UK formed their Joint Investigation Team, suggesting the US was willing to defer to investigative work already conducted.

### Airbus settlement: key takeaways

For a country that has long sought to take the lead (and the biggest cut of the penalty) in foreign corruption investigations, it is noteworthy to see the US deferring to this degree in such a large-scale investigation into a company with a significant US footprint. (Airbus operates a \$600 million manufacturing facility in Alabama, as well as multiple engineering and training centers around the country. Its American headquarters in Virginia employs more than 200 people (see [Airbus: Commercial aircraft in the US](#)).) The Airbus agreements may therefore show a shift in US co-operation in multinational investigations and enforcement actions, particularly regarding entities that are not US issuers or domestic concerns.

Ultimately, co-operation will have to continue between the US, UK and France. Both the UK and US have deferred monitoring to France's *L'Agence Française Anticorruption* for the next three years and will be relying on reporting obligations to French authorities (see Paris Court of Appeal: Judicial Public Interest Agreement between French National Prosecutor's Office and Airbus SE (29 January 2020)).

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## ARRESTED DEVELOPMENT: WHAT HAPPENS TO THE EUROPEAN ARREST WARRANT POST-BREXIT?

For 16 years, the UK has been able to rely on the European Arrest Warrant (EAW) scheme to extradite criminals from across the 27 other EU member states. However, in February 2020, the government announced that it does not intend to participate in the EAW scheme as part of its ongoing relationship with the EU following Brexit (which is scheduled to come into effect at the start of 2021). Instead, the government intends to establish "fast-track extradition arrangements, based on the EU's surrender agreement with Norway and Iceland" and to ensure that any agreements provide "further safeguards for individuals beyond those in the [EAW]."

### Background to the EAW

Before the introduction of the EAW, extradition within the EU was governed by the 1957 European Convention on Extradition, which was by all accounts a tiresome and slow process. A streamlined or fast-track approach was considered necessary in order to address these criticisms. The central concept behind the fast-track approach was premised on the assumption that all EU states upheld the same, or at least similar, principles which underpin a fair criminal justice system, and therefore on the "mutual recognition" of judicial decisions by EU states. On that basis, member states wishing to participate in the EAW scheme also had to be party to the European Convention on Human Rights (ECHR) and implement domestic legislation giving it effect.

### EAW: the current system

Extradition of individuals between EU member states (category 1 territories) was indeed streamlined by Part 1 of the Extradition Act 2003. Arrests under an EAW effectively became a form-filling exercise, with limited judicial intervention or oversight.

### What about outside the EU?

Part 2 of the Extradition Act 2003 also established a statutory framework for the extradition of individuals in many states outside the EU, including the US (category 2 territories). While extradition under Part 2 is still far less streamlined, US-UK extradition agreements have also been criticized for being one-sided and not providing sufficient protection for British citizens. Interestingly, with the exception of cases involving the death penalty or hostage-taking, there are also fewer statutory bars to extradition in respect of non-EU states. It may be against this backdrop that, in December 2019, Boris Johnson unveiled plans to introduce an alternative extradition bill which would allow for the swift arrest of individuals wanted for serious crimes in “trusted” countries outside the EU (see [GOV.UK: The Queen's Speech 2019](#)).

### The Norway-Iceland surrender agreement

The surrender agreement between the EU, Norway and Iceland came into force in November 2019 and established a fast-track extradition system comparable to the EAW. There are, however, some key differences from the EAW regime, including the ability of the member state to refuse to extradite individuals, or demand their immediate return once criminal proceedings in the requested country have concluded. Furthermore, and perhaps significantly for the UK, the ECJ is not the final arbiter of any appeals, nor is its law binding for the purposes of extradition proceedings under that agreement.

### Issues for the UK in adopting a Norway-Iceland style surrender agreement

The government has been heavily criticized for its “decision” to leave the EAW. However, given that participation is dependent on states being part of the Schengen Area or allowing free movement of people, and also the ECHR, leaving the EAW was actually inevitable for the UK. Adopting the Norway-Iceland style surrender agreement is therefore an attractive alternative, the terms of which have already been negotiated at length and approved. There are, however, a number of complicating factors for the UK.

First, unlike Norway and Iceland, the UK will not be part of the Schengen Area and will not continue to be part of the Schengen Information System. This may cause additional complications and delay in terms of any negotiations. Second, while the Norway-Iceland surrender agreement was finalized in 2006, it then took a further 13 years to negotiate and implement all the legal formalities. This is a significant concern for the UK, given that it has limited time to negotiate and implement a new agreement before the Brexit transition period ends in December 2020.

Furthermore, while the EAW will remain available until the Brexit transition period ends, some EU member states, including Germany, Austria and Slovenia, have already indicated they will not be extraditing their nationals to the UK under the EAW. In the event that a new agreement is not finalized in time, it is not clear what system will operate or whether EU member states would again have to rely on the 1957 European Convention on Extradition when dealing with the UK.

### Conclusion

The government’s intentions are clear: it seeks to replicate the operational capabilities of the EAW while implementing additional safeguards. This approach, coupled with the possibility of a new extradition bill for non-EU states, suggests a move away from the presumption of “trust” in EU states, with the focus shifting towards a consideration as to which countries, whether within the EU or not, should have a fast-track extradition procedure with the UK. It is hoped that any new extradition agreements achieve the right balance between protecting British citizens and tackling serious crime.

### DOJ RELEASE UPDATED EXPORT CONTROL AND SANCTIONS VOLUNTARY DISCLOSURE POLICY: A UK AND US PERSPECTIVE

On 13 December 2019, the United States Department of Justice (DOJ) released an updated Export Control and Sanctions Enforcement Policy for Business Organizations. This revised the prior policy governing voluntary self-disclosures of export control and sanctions violations. The policy encourages companies to voluntarily self-disclose all potentially willful violations of the primary export control and sanctions statutes directly to the Counterintelligence and Export Control Section (CES) of the National Security Division (NSD) of DOJ (the primary export control and sanctions statutes are the Arms Export Control Act (22 U.S.C. § 2778), the Export Control Reform Act (50 U.S.C. § 4801 et seq) and the International Emergency Economic Powers Act (50 U.S.C. § 1705)). Under the new policy, if a company voluntarily self-discloses potentially willful export control or sanctions violations to the CES, fully co-operates and timely and appropriately remediates, then there is a presumption that the company will receive a non-prosecution agreement (NPA) and will not pay a fine, absent aggravating factors.

#### Financial institutions as well as business organizations

As well as adding additional incentives to self-report, the policy now allows financial institutions to take advantage of the incentives for self-disclosure, by eliminating the carve-out that specifically excluded these entities from the prior policy. However, the policy still does not go as far as the position in the EU and the UK (at least until the end of the Brexit transition period on 31 December 2020). In the UK, relevant institutions, businesses and professions (including financial institutions) are legally obliged to report to the Office of Financial Sanctions Implementation (OFSI) if they know or suspect that a breach of financial sanctions has occurred, that a person is a designated person, or they hold frozen assets and that knowledge or suspicion came to them while conducting their business.

#### Why now?

So why these changes in the US now? Companies and financial institutions should view the policy against a background of heightened NSD criminal enforcement of export control and sanctions violations, particularly in the context of Chinese state-sponsored economic espionage. In his Statement before the Committee on the Judiciary of the United States Senate (on 12 December 2018), John Demers, Assistant Attorney General at DOJ, described how DOJ is “marshall[ing] resources” to confront the threat of Chinese state-sponsored economic espionage.

Despite the possible benefits offered by the policy, it remains to be seen whether and how often it will be employed in practice.

#### Policy overview

The ability of a company to meet the criteria noted above will require a nuanced understanding of the key aspects of each element. A significant new policy requirement also mandates that companies self-disclose directly to DOJ to qualify for the policy benefits in any subsequent DOJ investigation. Self-reporting solely to a regulatory agency will not qualify a company for the benefits afforded by the policy, though the policy is not intended to alter existing reporting protocols to those regulatory bodies.

First, the disclosure must be “voluntary,” meaning the company must self-report before there is an “imminent threat of disclosure or government investigation” (U.S.S.G. § 8C2.5(g)(1)). Self-disclosing before the company becomes aware of an ongoing, nonpublic investigation is still considered “voluntary”. Additionally, a company must disclose the conduct “within a reasonably prompt time after becoming aware of the offense”. The company must also provide all relevant facts known at the time of disclosure and identify individuals involved with or responsible for the misconduct at issue.

Second, to “fully co-operate”, a company must disclose all relevant facts related to the potential wrongdoing. This disclosure includes:

- Providing information attributed to specific sources, rather than a general narrative.

- Updates on any internal investigation findings.
- Information regarding the company's officers, employees, or agents, or third-party companies involved in criminal activity.

The company also must identify, preserve, collect, and disclose relevant documents and information and identify and assist with the production of documents not within the company's possession, as well as make witnesses available for interviews by DOJ. Additionally, DOJ may require de-confliction of witness interviews or the company's other investigative measures.

Third, to fulfill the "timely and appropriate remediation" requirement, a company must:

- Analyze the underlying causes of the conduct.
- Implement an effective compliance programme.
- Appropriately discipline employees.
- Implement controls for and retain business records.
- Take any additional steps necessary to avoid repeating the misconduct.

The policy highlights several compliance criteria to consider when evaluating the efficacy of a compliance programme, but acknowledges that compliance programmes are not one-size-fits-all and will vary based on the size and resources of a particular company.

Even if a company meets the elements to qualify for a presumptive NPA under the policy, certain "aggravating factors" may result in more severe action by DOJ. These aggravating factors, which "represent elevated threats to national security", include, for example:

- Exports of items known to be used in the construction of weapons of mass destruction.
- Exports to a Foreign Terrorist Organization or Specially Designated Global Terrorist.
- Repeated violations, including similar administrative or criminal violations in the past.
- Knowing involvement of upper management in the criminal conduct.

If aggravating circumstances warrant a more stringent enforcement action, but the company still satisfies all other criteria, the policy provides that DOJ will recommend a fine that is at least 50% lower than what would otherwise be available under the alternative fine provision and will not require the appointment of a monitor if the company has implemented an effective compliance programme at the time of resolution.

While offering an important opportunity for companies to potentially mitigate risk when violation of these laws is identified, the policy emphasizes that protecting national security assets (and holding those that violate US export controls and sanctions laws accountable) is a "top priority" of DOJ. Unlike the presumption of a declination afforded under the Foreign Corrupt Practices Act Corporate Enforcement Policy, the government concluded that presuming to take "no action" was not appropriate for this policy, "[g]iven the threats to national security posed by violations of our export control and sanctions laws." As noted in the policy, this concern "distinguish[es] these cases from other types of corporate wrongdoing."

In the context of a merger or acquisition, when misconduct by the target entity is discovered during "timely and thorough" due diligence or, in certain circumstances, during post-acquisition integration, the presumption of an NPA still applies if the company abides by the other requirements under the policy (for example, the timely implementation of an effective compliance programme at the acquired or merged entity).

One key question that remains, however, is how other agencies, including government contracting agencies (particularly the State Department's Directorate of Defense Trade Controls (DDTC) that enforces the International Traffic in Arms Regulations) will view an NPA entered into as a result of a voluntary self-disclosure proceeding with DOJ. DDTC and other agencies that have debarment authority have the discretion to administratively debar companies for violations of export control laws, particularly criminal violations of such laws. Thus, government contractors will need to carefully consider collateral consequences of a voluntary self-disclosure to DOJ when deciding whether to avail themselves of this policy.

### **DOJ's updated policy: key takeaways**

Companies should carefully consider the benefits offered under the policy for voluntary self-disclosures (the presumption of an NPA and no associated fine) since companies who choose not to self-disclose potentially wilful violations that later become known to DOJ may receive significantly greater penalties. These benefits should be weighed against the possible risks of disclosing potentially criminal conduct to DOJ and collateral consequences with other agencies to determine whether and when a disclosure is appropriate. For financial institutions looking at similar breaches in Europe and the US, the calculation may be different, given that they are already under an obligation to disclose in Europe; reporting in Europe could lead to public enforcement action, and the US authorities are likely to take a dim view of being kept in the dark when authorities in other jurisdictions have been informed of similar behaviour.