

Alternatives to prosecution in an age of global enforcement

Global alternatives to prosecution when a corporate is facing a criminal investigation





Article reproduced with the approval of
Global Investigations Review,
first published in September 2017.

Alternatives to prosecution in an age of global enforcement

Companies that find themselves in the spotlight of multiple enforcement authorities must determine their global strategies to avoid resolving a matter in one jurisdiction only to increase their exposure to prosecution in another.

Businesses are increasingly becoming global, and so are enforcement actions in response to alleged corporate wrongdoing around the world. The harsh reality is that wherever there is potential corporate criminal wrongdoing, companies and their employees may well find themselves the focus of not just one law enforcement body, but of many across the world. The potential fallout from just one enforcement authority opening a criminal investigation can be devastating, with its potential to inflict crippling fines, debarment and reputational damage. But when a company finds itself in the crosshairs of more than one prosecutor, further complications undoubtedly arise. Given the frequent involvement of more than one country's enforcement authorities in the investigation and prosecution of the same transactions, companies need to assess the potential consequences of strategies and tactics in multiple jurisdictions and coordinate accordingly.

Corporations generally seek to behave consistently (deliberately so, in order to build brands), but the enforcement powers, processes and tools for resolution of corporate wrongdoing differ across the globe. Anti-corruption remains high on the agenda for enforcement bodies worldwide. As well as the US and the UK, France's recent Sapin II law has shone the spotlight on corporate prosecution. Belgium,

Switzerland and the Czech Republic all have the ability to pursue companies criminally for corruption. It is therefore vital that companies understand the alternatives to prosecution across jurisdictions so that a consistent and effective global strategy can be adopted.

One of the best things a company can do to avoid prosecution is to implement a robust compliance program, which is regularly reviewed to ensure its continued effectiveness. Such a plan may not stop a determined employee from engaging in wrongdoing, but it may protect the company, and may even help the company avoid a criminal investigation being opened against it.

But what if law enforcement does come knocking on the corporate door, and an investigation ensues and identifies wrongdoing attributable to the company itself, what global alternatives are there to resolve the matter short of short of a full-blown prosecution?

CIVIL SETTLEMENTS

The least intrusive of all the possible alternatives to prosecution is the civil settlement. This alternative avoids much of the reputational damage of a company or individual being publicly sanctioned for 'criminality', even if the underlying conduct amounts to criminal behavior. Unfortunately, whilst popular historically, civil settlements are now less likely to be used in cases of serious economic crime.



Wherever there is potential corporate criminal wrongdoing, companies and their employees may well find themselves the focus of not just one law enforcement body, but of many across the world

**US\$
16,000**

In the US, businesses can face a penalty of up to US\$16,000 per each anti-bribery violation

United States

Civil settlements in the US are often used in cases where the fundamental underlying behavior is less serious. The consequences of a civil settlement can still be onerous: Corporations, and other business entities, for example, can face a penalty of up to US\$16,000 for each anti-bribery violation and be subject to disgorgement of ill-gotten gains, which often dwarfs statutory penalties. Further conditions can be attached to a civil settlement, such as suspending or debarring the company from engaging in specific business activities for a set period.

United Kingdom

Between 2008 and 2012, the UK's Serious Fraud Office (SFO) made use of nine Civil Recovery Orders (CROs) against corporates in white collar cases. A CRO enables an enforcement authority to recover property obtained through unlawful conduct. There is no requirement to establish that a specific criminal offence was committed, but only that the property is or represents the proceeds of crime. Civil Recovery powers may be appropriate where the evidence does not support a realistic prospect of conviction, or where the public interest is better served by a civil, rather than criminal disposal.

However, the introduction of Deferred Prosecution Agreements in 2014, combined with the arrival of SFO Director David Green QC in 2012, has meant that CROs have now fallen out of favor as a tool to address and resolve white collar criminal conduct. CROs additionally attracted judicial criticism in the past for lacking transparency, despite the fact that CROs are a flexible and straightforward means of achieving resolution between repentant and reformed companies and the SFO. Unless there is a sea change in approach from the next SFO Director (David Green QC's tenure ends in early 2018), civil recovery orders for cases of serious economic crime are likely, in most cases, to be a thing of the past.

NON-PROSECUTION AGREEMENTS

United States

An option only available in the US, the Non-Prosecution Agreement (NPA) can be used where a company or individual agrees to cooperate with the law enforcement agency, pays a monetary penalty and is subject to some remedial conditions for a time period. Under an NPA, criminal charges are not filed, enabling the company to demonstrate its good conduct, and no court review is required. In some cases (but not all) the enforcement authority does not require an admission of wrongdoing. NPAs can be used in a variety of circumstances, including to resolve allegations of criminal corporate wrongdoing entailing more severe misconduct than civil wrongdoing. Civil enforcement authorities, such as the SEC, can also use NPAs.



In France, the fine imposed on the company may be up to 30% its average annual turnover for the three years prior to the offence

The penalties for breaching an NPA can be onerous: The law enforcement agency can file criminal charges and use any admissions made as part of the NPA process in the proceedings.

DEFERRED PROSECUTION AGREEMENTS

United States

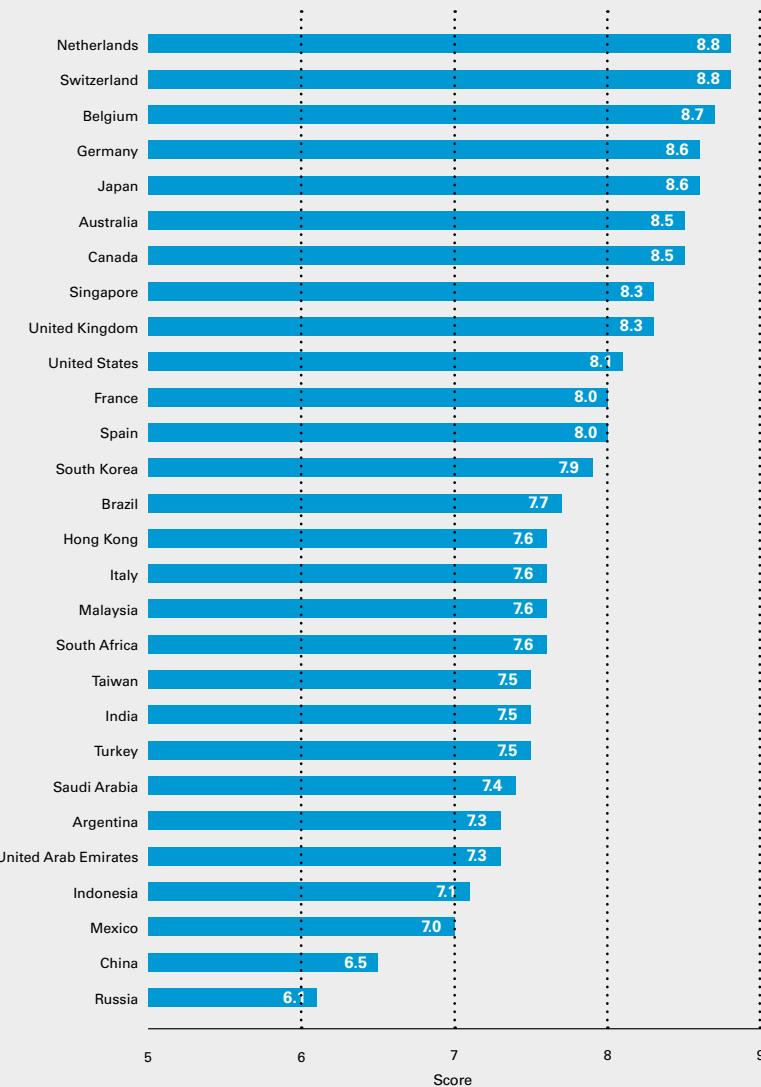
The US has been using Deferred Prosecution Agreements (DPAs) for a number of years as a means to resolve matters involving corporate wrongdoing. Under the terms of



Civil settlement is the least intrusive of all possible alternatives to prosecution

Bribe payers index

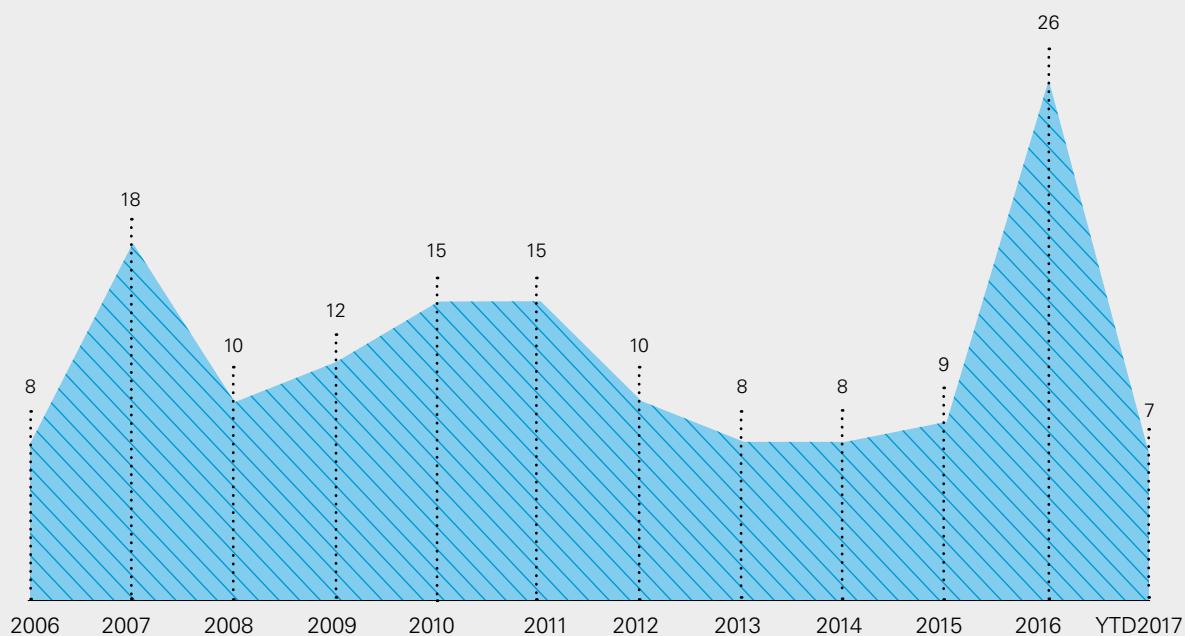
Perceived likelihood of companies from 28 leading economies to win business abroad by paying bribes. Countries are scored on a scale of 0 – 10, where a maximum score of 10 corresponds with the view that companies from that country never bribe abroad and a 0 corresponds with the view that they always do.



Source: Bribe Payers Index 2011, Transparency International

SEC enforcement actions: FCPA cases

■ Number of enforcement actions by SEC by calendar year, 2006 – 2017



Source: US Securities and Exchange Commission

a DPA, a company or individual admits to violating the law, and must assist the enforcement agency in its investigation of the underlying wrongful conduct. In addition to levying a monetary penalty, DPAs can often require the company to implement an enhanced compliance program and agree to corporate monitorship. In exchange, the enforcement authority agrees to defer the prosecution of the company for a specific, usually a three-year term. If the company complies with the terms of the agreement for the allotted period, the charges will be dropped. If not, the agency has the option to prosecute the company. DPAs are reached after a formal criminal case has been initiated against a company and official charging documents have been filed in court. Notwithstanding any such resolution with the company, individual representatives of the company may still be prosecuted. Civil enforcement authorities such as the SEC can also avail themselves of DPAs where appropriate.

United Kingdom

In the UK, DPAs were first introduced in 2014, and they



In Belgium, the financial penalty may not be lower than 40% of the minimal administrative fine multiplied by the number of employees concerned

remain a relatively new alternative to prosecution. Unlike their counterparts in the US, UK DPAs are available only in respect of corporates, although their use does not restrict the enforcement agency from prosecuting the individuals deemed responsible for the relevant acts. UK DPAs are typically considered appropriate when a company self-reports any wrongdoing and offers full and extensive cooperation in an investigation, although a self-report is not always the determinative factor—see the recent case of Rolls-Royce. Under the terms of the DPA, the agency agrees not to commence criminal proceedings, provided that the company agrees to a series of terms. As in the US, these terms usually include a combination of financial sanctions, enhanced compliance procedures (possibly including monitoring) and ongoing cooperation. UK DPAs do require court approval.

France

France's recent Sapin II law introduced the concept "Judicial Agreement in the Public Interest" as an alternative to criminal prosecution. This means of disposition is available to any

company suspected of having committed bribery, influence peddling ("tracé d'influence") or laundering the proceeds of tax fraud. The agreement may be initiated before the start of criminal proceedings or after the company is indicted, but must be started before the company is called to appear before the French criminal courts. Where an agreement is reached, the fine imposed on the company may be up to 30 percent of the company's average annual turnover. The agreement must be validated by the President of the relevant French court. In addition, the company can be required to implement a compliance program under the control of the French Anti-Corruption Agency for a period of three years, and indemnify all identified victims.

Czech Republic

Another jurisdiction where agreements similar to DPAs may be used is the Czech Republic. In 2012, Czech criminal legislation was introduced to create a form of settlement known as the "agreement on guilt and punishment." Such agreements are reached between the public prosecutor and an accused company, and—as is the





case in the US, the UK and France—must subsequently be approved by the competent court. A further prerequisite for entering into such an agreement is a declaration by the accused company that it committed the offence.

Amongst the European countries, **Switzerland** and **Belgium** have no direct equivalent to the DPA regime but do have a range of settlement options for companies facing allegations of economic crime. In **Belgium**, the public prosecutor may, in certain circumstances, agree to a financial settlement with a company where the ongoing proceedings are set aside and any identified victims are indemnified. Such a settlement may be entered into at any stage of the proceedings, but must be started before a final judgment has been issued. This type of settlement is currently under scrutiny in Belgium and may face significant changes in the near future. In **Switzerland**, the authorities have the power to refrain from prosecuting a company when it has made both reparations and every reasonable effort to right the relevant wrong, and where the public interest warrants it. The Swiss also have the power to impose a Summary Punishment Order.

In **Germany** there is no concept of corporate criminal liability. However, German companies may be subject to administrative fines if their directors, officers or managerial staff commit a criminal or administrative offence and either violate that company's duties or enrich, or even attempt to enrich, the company. A company may also be fined, again administratively, if any of its directors or officers fails to take the organizational and supervisory measures required to prevent the company's staff from committing business-related offences. Generally, such fines are intended to at least nullify any economic benefits the company has gained from the offence. Independently of this, in certain circumstances German criminal law permits an order to be granted confiscating the proceeds obtained by a company from a crime. On the other hand, **Poland's** legislation allows Polish authorities to prosecute companies for economic crimes, but provides no settlement regime as an alternative to prosecution.

A GLOBAL STRATEGY

So where does this leave a company that finds itself under the spotlight of different enforcement authorities? The company's aim must be to avoid resolving a matter in one jurisdiction that increases the exposure of the company to prosecution in another.

To achieve this objective, the company must determine its global strategy before it decides to approach any particular authority. There could be catastrophic consequences if it cooperates with one enforcer and then finds that any admissions it has made are subsequently used to prosecute it in another country. Multi-jurisdictional cases invariably have numerous strands, and one agency might choose to settle in respect of only some of the allegations, leaving another jurisdiction to pursue a completely different part of the case. Since there is no general protection internationally in respect of double jeopardy (although the principle applies in most countries), whether a corporate can avoid being punished by multiple national authorities for the same conduct comes down to negotiation and prosecutorial discretion.

To protect themselves, companies should focus on information gathering, to determine the likely scope of the alleged wrongdoing, the areas of the business potentially exposed, the jurisdictions that may be affected and the law enforcement agencies that could ultimately have an interest in the case. Once these facts have been established, the company then needs to consider where its relevant data is located.

The location of data is important for two reasons: first, there will be a need to formulate a document preservation order, so that the company can retain any relevant material which will need to be handed over to the particular law enforcement agencies in due course. Second, there can be jurisdictional challenges, for example, if a multinational company hosts its data in Switzerland but is likely to want to cooperate with law enforcement in countries such as the US and the UK, certain local laws may prohibit the voluntary disclosure of that data. This has the potential to jeopardize any cooperative relationship if the company has not attempted to think about, and engage meaningfully with, this issue and with other problems that may arise.

Consideration should also be given at an early stage to suspending any business activity that might continue to expose the company, regardless of jurisdiction. For example, if the allegations included that a company had made suspicious payments to intermediaries, the company might be sensible to impose a moratorium on such payments pending resolution of the matter.

Law enforcement agencies will expect companies to have considered all of these steps before making any meaningful attempt to engage with them. This process is compounded when more than one jurisdiction is involved. Companies are well advised to think strategically and to take independent legal advice from an experienced law firm as early as possible, so that any steps that are taken are made with a global resolution firmly in mind.

“

Since there is no international protection in respect of double jeopardy, whether a corporate can avoid being punished by multiple national authorities for the same conduct comes down to negotiation and prosecutorial discretion

Jurisdictional overview: At a glance

	 US	 UK	 France
Are Deferred Prosecution Agreements (or equivalent) available?	Yes – DPAs have been available to US authorities for some time.	Yes – DPAs were introduced in the UK in February 2014, and are an enforcement tool used by the SFO and CPS against companies who commit bribery, fraud or money laundering offences.	Yes – Companies may enter into a “Judicial Agreement in the Public Interest” (“ <i>convention judiciaire d’intérêt public</i> ”). This agreement can be offered to any legal person suspected of having committed bribery, influence peddling (“ <i>tradic d’influence</i> ”) and/or laundering of the proceeds of tax fraud.
Is this form of settlement available to companies as well as individuals?	Yes – This form of settlement is available to companies as well as individuals.	No – DPAs are only available to companies and cannot be used in relation to individuals.	No – These agreements are only available to companies and cannot be used in relation to individuals.
At what stage can a company enter in this form of settlement?	DPAs can be entered into only after a formal criminal case has been initiated against a company, and formal charging documents have been filed in court.	Companies have no right to request or initiate the DPA process. It is a discretionary tool. A prosecutor may invite a company to enter into negotiations to agree a DPA as an alternative to prosecution if and when the prosecutor considers doing so appropriate.	This type of settlement can be offered at the initiative of the public prosecutor or the investigating judge during a criminal investigation, even before indictment of the company and until it is called to appear before the French criminal courts.
Does this form of settlement have to be approved by the courts?	Yes – DPAs are submitted to judges after official charging documents are filed in court. Once accepted by a judge, a DPA becomes a court order and is subject to judicial review.	Yes – DPAs are subject to judicial agreement. The judge must be satisfied that the DPA is in the interest of justice and that the terms of the DPA are fair, reasonable and proportionate.	Yes – A judicial agreement in public interest has to be validated by the president of the relevant French court, but this will not have the effect of a sentencing judgment.

 Czech Republic	 Belgium	 Germany	 Poland
Yes – In 2012, Czech criminal legislation was introduced in the form of a settlement known as the “agreement on guilt and punishment” (“ <i>Dohoda o vině a trestu</i> ”). The agreement cannot be entered into in the case of “particularly serious crimes”; i.e., intentional crimes for which the criminal code prescribes a sentence of imprisonment with the upper limit of at least ten years.	Yes – Although not directly equivalent to the DPA regimes in other jurisdictions, under the Belgian criminal settlement regime, the public prosecutor may, in certain circumstances, agree to a financial settlement with a company, following which ongoing proceedings are set aside.	No – No direct equivalent to the DPA regime exists since there is no corporate criminal liability in Germany.	No – No direct equivalent to the DPA regime exists.
Yes – This form of settlement is available to companies as well as individuals.	Yes – This form of settlement is available to companies as well as individuals. Under Belgian law, the criminal liability of companies is independent from that of natural persons (see below) and the same procedural rules apply to the conviction of companies and natural persons.	–	–
Negotiation on an agreement can be initiated either by a company or by the public prosecutor. The agreement can be entered into in the course of preliminary proceedings (i.e., before an indictment is filed in court), provided that, based on the evidence obtained, there is no doubt that the accused committed the alleged crime.	The public prosecutor can, at his or her discretion, propose a criminal settlement at any stage of the proceedings, even when an investigating judge is in charge of the investigation or when the case has been referred to a criminal court (until a final criminal judgment has been issued).	–	–
Agreements on guilt and punishment must subsequently be approved by the competent court.	Belgian courts are currently only permitted to verify whether the formal requirements for a criminal settlement have been met once a case has already been referred to a criminal court. Following a decision of the Constitutional Court, reforms to the level and scope of judicial scrutiny of such settlements are expected.	–	–

	 US	 UK	 France
How is the amount of financial penalty determined?	The amount of financial penalty is generally determined by the United States Sentencing Guidelines and by agreement between the enforcement agency and the company or individual.	It is intended that any financial penalty under a DPA shall be broadly comparable to a fine that the court would impose following a guilty plea. Companies that enter into DPAs can expect a reduction of one-third or potentially a further reduction in some cases, however, any reduction will very much depend on the discretion of the judiciary.	Where an agreement is reached, the fine imposed on the company may be up to 30% of its average annual turnover for the three years prior to the offence being committed.
What additional terms and conditions can be imposed on the company?	DPAs include terms and conditions generally tailored to a particular case or company, including: <ul style="list-style-type: none"> <input type="checkbox"/> Financial sanctions <input type="checkbox"/> Enhanced compliance procedures <input type="checkbox"/> Corporate monitorship <input type="checkbox"/> Terms concerning ongoing cooperation 	A bespoke list of terms and conditions may be included in a DPA to suit a particular case or company, including: <ul style="list-style-type: none"> <input type="checkbox"/> Financial sanctions <input type="checkbox"/> Enhanced compliance procedures (possibly including a monitor) <input type="checkbox"/> Terms concerning ongoing cooperation 	The company may also be ordered to: <ul style="list-style-type: none"> <input type="checkbox"/> Implement a compliance program under the control of the French Anti-Corruption Agency, for a period of three years <input type="checkbox"/> Indemnify any victims
Does this form of settlement extinguish personal criminal liability?	No – implicated individuals may still be criminally liable for the relevant offences.	No – implicated individuals may still be criminally liable for the relevant offences.	No – implicated individuals may still be criminally liable for the relevant offences.
Is information about the settlement publicly available for the relevant offences?	Yes – generally, DPAs are publicly available and are published in several ways, including public court records and on the enforcement agency's website.	Yes – transparency is a key aspect of the DPA regime, and agreements are published on the SFO's website.	Yes – judicial agreements will be published on the French Anti-Corruption Agency's website.

 Czech Republic	 Belgium	 Germany	 Poland
There is no legal provision regarding mitigation of punishment under the agreement so any financial penalty should be comparable to a penalty that the court would impose in regular proceedings. Any reduction will be at the discretion of the Public Prosecutor.	The financial penalty should be proportional to the severity of the offence. In any case, the maximum penalty should be equal to the maximum fine set out in the Criminal Code for the offence in question (multiplied by the living mechanism ("décimes additionnels /opdecieren")). In the case of violations of the Social Criminal Code, the financial penalty may not be lower than 40% of the minimal administrative fine, multiplied by the number of workers concerned.	-	-
The company will also be required to: <input type="checkbox"/> Make a declaration in which it admits to committing the offence in question	The company will also be ordered to: <input type="checkbox"/> Indemnify any victim (or, at least, accept civil liability and pay any uncontested civil damages) <input type="checkbox"/> Pay any relevant taxes and social charges (in cases involving tax fraud or social charges) <input type="checkbox"/> Return any benefits obtained from the offence in question <p>The company may also be ordered to pay the costs (or part of any costs) of analysis or expert investigation required during the proceedings in question.</p>	-	-
No – implicated individuals may still be criminally liable for the relevant offences.	No – implicated individuals may still be criminally liable for the relevant offences. <p>Under Belgian law, if a company is held criminally liable for an involuntary offence, only the person (between the company and the implicated individuals) who committed the most serious offence will be sentenced.</p> <p>If the offence is voluntary, the judge can decide whether to sentence both the company and the implicated individuals.</p>	-	-
No – the agreement will not be publicly available, however, it will appear on the criminal record of the company.	No – the settlement will be registered in a company or individual's criminal records, but public administrations and members of the public cannot access this information (this can only be accessed by members of the judiciary and the police).	-	-

	 US	 UK	 France
Are there any alternatives to this form of settlement?	<input type="checkbox"/> Non-Prosecution Agreements (NPAs) <input type="checkbox"/> Cooperation Agreements <input type="checkbox"/> Civil settlement <input type="checkbox"/> Non-criminal regulatory action	<input type="checkbox"/> Civil Recovery Orders <input type="checkbox"/> Non-criminal regulatory action	<input type="checkbox"/> For criminal offences the public prosecutor may, of his or her own motion or at the request of the party concerned use the procedure of CRPC (appearance on prior admission of guilt), in relation to any person summoned to this end or brought before the prosecutor, where this person admits the matters of which the person is accused. However, if the agreement is validated by the French court, it will have the effect of a sentencing judgment. Victims are entitled to claim damages before the French court but are not involved in the agreement entered into the public prosecutor and the relevant party.

 Czech Republic	 Belgium	 Germany	 Poland
<p>Czech law provides for certain sanctions that are specific to legal entities, including:</p> <ul style="list-style-type: none"> <input type="checkbox"/> Dissolution of the legal entity <input type="checkbox"/> Prohibition from participating in public tenders or receiving subsidies <input type="checkbox"/> Publication of the relevant judgment <p>In the case of "misdemeanors" (i.e., all negligent crimes and such intentional crimes for which the criminal code prescribes a sentence of imprisonment with the upper limit of up to five years), the court (or the public prosecutor in the course of the preliminary proceedings) can approve a "settlement agreement" ("Dohoda o narovnání") if all of the following occur:</p> <ul style="list-style-type: none"> <input type="checkbox"/> Both, the company and the injured party agree, <input type="checkbox"/> The company makes a declaration that it committed the crime in question. <input type="checkbox"/> The company indemnifies any injured party. <input type="checkbox"/> The company returns any unjust enrichment obtained by committing the crime. <input type="checkbox"/> The company pays certain amount defined by specific law as a financial support for victims of crimes. <input type="checkbox"/> The court considers the settlement agreement to be sufficient with regard to, among other factors, the seriousness of the crime. <p>Once the settlement agreement is approved, the criminal proceedings are suspended. The settlement agreement is not publicly available, and it will appear on the criminal records of the company only upon a request of state authorities.</p>	<p>In addition to the above settlement regime:</p> <ul style="list-style-type: none"> <input type="checkbox"/> The Belgian Financial Services and Markets Authority (FSMA) has the authority to supervise certain financial and economic matters, and may impose administrative fines. <input type="checkbox"/> Under Belgian law, there is a criminal mediation process which enables the public prosecutor to order the indemnification of any identified victims and/or the performance of community service. Criminal mediation is available to both companies and individuals. 	<ul style="list-style-type: none"> <input type="checkbox"/> In certain circumstances, administrative fines may be imposed on a company for criminal or administrative offences committed by its directors, officers or management staff. <input type="checkbox"/> Failure to prevent business related offences being committed by subordinates can constitute such an administrative offence. <input type="checkbox"/> German criminal law may also permit an order to be granted confiscating the proceeds obtained by a company from a crime. <input type="checkbox"/> In certain circumstances, companies involved in administrative or criminal proceedings may reach a "mutual understanding" with authorities in relation to certain facts or assumptions. 	<ul style="list-style-type: none"> <input type="checkbox"/> In certain circumstances, companies may be held liable for the criminal conduct of individuals acting on their behalf and/or representing the company, if the company benefitted or could have benefitted from the individuals' conduct. ■

Luděk Chvosta

Partner, Prague

T +420 255 771 111

E lchvostasr@whitecase.com

Nathalie Colin

Partner, Brussels

T +32 2 239 25 32

E ncolin@whitecase.com

Darryl Lew

Partner, Washington, DC

T +1 202 626 3674

E dlew@whitecase.com

Ludovic Malgrain

Partner, Paris

T +33 1 55 04 15 25

E lmalgrain@whitecase.com

Jonathan Pickworth

Partner, London

T +44 20 7532 1663

E jonathan.pickworth@whitecase.com

Karl-Jörg Xylander

Partner, Berlin

T +49 30 880911 9507

E kxylander@whitecase.com



WHITE & CASE

whitecase.com

© 2017 White & Case LLP