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Corporate Crime

The U.S. DoJ wants to prosecute more individuals

Par Urs Zulauf le 30 September 2022

In its new Corporate Criminal Enforcement Policies memorandum of October 2022, the DoJ states that priority will be given to the prosecution of individuals, and stresses the importance of companies voluntarily disclosing information about the individuals involved. Only the cooperation of the company under investigation would enable it to benefit from mitigation or exemption from the penalty incurred. In proceedings against foreign companies, the importance of parallel prosecutions by foreign authorities, targeting both the companies and individuals concerned, is also emphasized. If the foreign authority's prosecution appears credible, the U.S. DoJ may waive prosecution of the company or individuals involved, or mitigate the penalties incurred.

Endless memos

Enforcement, and in particular criminal prosecution of domestic and foreign companies and their executives for violations of the law, is a recurring theme for the U.S. Department of Justice. The Deputy Attorney General (DAG) of the Department of Justice is accustomed to drafting memoranda in which he outlines the various aspects of the DoJ's corporate prosecution strategy. The contents of these memos are then incorporated into the American Justice Manual.

Since 1999, a dozen memos have dealt with corporate prosecutions and compliance monitoring. Lisa Monaco, the current DAG, presented her second memorandum on this subject on September 15, 2022, in a speech (text) at New York University, following on from the first dated October 2021.

Priority for criminal proceedings against individuals

The memo again addresses the thorny relationship between criminal proceedings directed against companies and those against their executives and employees. The memo emphasizes that the DoJ's priority is the prosecution of individuals. In future, the DoJ plans to prosecute and sentence the individuals involved in parallel with the proceedings against the company concerned. Exceptions to this principle must now be formally approved by DoJ senior management. It remains to be seen whether and to what extent the DoJ will be able to put this intention into practice.

The attribution of offences committed in large companies to the individuals concerned remains problematic. In the September 2015 Yates Memo, the DoJ explained that companies can only

be rewarded for their cooperation in criminal prosecutions if they provide prosecutors with the information needed to pursue the physical perpetrators.

The Monaco Memo 2022 now explicitly stresses that information about the individuals involved must be transmitted in a timely manner, i.e. at the time of discovery and not at a later date.

The memo underlines the growing importance of international cooperation in corporate criminal prosecutions. If a foreign criminal authority is willing to conduct criminal proceedings against an individual, the DoJ could forego prosecuting from the USA. The DoJ stresses, however, that its prosecutors will not easily waive criminal proceedings against individuals abroad. They will have to ensure that a sanction seems likely and that the foreign authority has the jurisdiction, interest and will to prosecute. Finally, they will also have to assess the sanction incurred and its incidental effects.

These explanations are interesting. People domiciled in Switzerland who could potentially be convicted in criminal proceedings in Switzerland and the USA for the same facts have a considerable interest in ensuring that criminal proceedings in Switzerland are credible and conducted in a timely manner. Criminal prosecution in Switzerland could thus provide protection against criminal prosecution in the USA. However, it is not certain that this is how it would work in practice. In any case, it seems important that both the authorities and the lawyers of the individuals concerned give serious thought to the subject and the consequences that may arise.

Corporate criminal liability

The memo attempts to determine the extent to which previous criminal and administrative sanctions, both domestic and foreign, should influence the penalties incurred in new proceedings against companies. These considerations will be a treat for the lawyers involved, who will be able to use them in their arguments. Time will tell whether the memo’s considerations will have a significant impact in practice.

The DoJ intends to reward companies more in order to encourage spontaneous disclosure of offences committed within their walls, full cooperation and rapid action to restore the situation within the company. Again, the details are important. In this context, the DoJ is committed to refraining from guilty pleas or the introduction of monitoring. In other words, even a timely spontaneous disclosure and full cooperation from the company cannot rule out high fines under a deferred prosecution agreement (DPA) or non-prosecution agreement (NPA).

The memo reiterates current practice : in the event of a criminal offence committed by employees, even excellent compliance programs and a good compliance culture within the company will not enable it to escape punishment. These efforts should, however, mitigate sanctions and avoid compliance monitoring.

In addition to the assessment criteria already set out in other directives in general, or for specific areas such as competition law, the memo formulates an additional criterion : that of the implementation of a remuneration system that promotes good compliance and sanctions reprehensible behavior (e.g. through bonus reductions and clawback schemes).

In addition, the DoJ requires restrictive policies concerning the use of personal cell phones and tablets, and encrypted messaging services for communication within the company. In this

context, proceedings brought by the US authorities against various banks have recently resulted in (not too) high fines (JP Morgan) or are currently underway (apparently targeting Morgan Stanley, Bank of America and UBS).

Monitoring

Once again, the memo deals with the monitoring that the DoJ can impose following the conclusion of an agreement to control the company's compliance. As already mentioned, this also applies to foreign companies. The memo describes the criteria for determining whether a monitoring system is necessary, as well as the process for selecting and vetting monitors by prosecutors. This last point is certainly judicious, but it confers on public prosecutors, on an ad hoc basis, the powers of supervisory authorities.

Transparency of DoJ enforcement

Last but not least, the DoJ hints at greater transparency in its enforcement measures. In principle, all criminal resolution agreements will be published, including the facts admitted by the company and the reasons why the DoJ entered into the agreement. In line with current practice, however, legal recitals will still not be published. US prosecutors dispense justice without giving reasons.

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The original German version of this article is available at urszulauf.ch.
