

Cross-Border Investigations: A Look Back on 2017, and Ahead to 2018

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2017 was a year of transition and change in the world of cross-border investigations. In the U.S., the first year of the Trump administration brought questions about enforcement priorities and approach. In the U.K., the debate continued over whether lawyers' work in furtherance of internal investigations enjoys privilege protection. Globally, new enforcement authorities stepped forward, while companies worked to incorporate new guidance and enforcement priorities into their corporate compliance programs.

Looking back, we focus on five key themes from 2017:

- a) corporate resolutions;
- b) developments in legal privilege;
- c) corporate responsibility;
- d) cross-border inter-agency cooperation; and
- e) cross-border data transfers.

We also look to the future to address what we consider to be some of the key characteristics of the current cross-border investigations landscape that may influence significant developments in this field in 2018.¹

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Corporate Resolutions

A number of significant corporate resolutions were reached during 2017 which have provided companies with further guidance on the level of cooperation expected by criminal and civil authorities, primarily in Europe. Among the most noteworthy resolutions were the further high-profile deferred prosecution agreements (“DPAs”) entered into by the Serious Fraud Office (“SFO”) in the U.K. and, for the first time, the National Financial Prosecutor of France (“NFPP”).

In the U.K., the English High Court approved DPAs entered into between the SFO and two high-profile companies, one of which simultaneously announced an unprecedented resolution with the U.K. Financial Conduct Authority (“FCA”). Each case was significant in its own right, and together they provide further guidance on the level of cooperation expected by the U.K. authorities, and the manner in which that cooperation should be demonstrated.

- Rolls-Royce²

On January 17, 2017, the English High Court approved the terms of a DPA between the SFO and Rolls-Royce.³ The English DPA formed part of a series of coordinated resolutions concluding substantial and lengthy investigations of multi-jurisdictional corruption. Amongst other conditions, the DPA required Rolls-Royce to pay a penalty of £497 million, constituting – by some distance – the largest financial penalty imposed in any of the four DPAs approved by the English Courts to date.

² For Cleary Gottlieb’s previous Alert Memorandum concerning the Rolls-Royce resolution, see <https://www.clearygottlieb.com/-/media/organize-archive/cgsh/files/publication-pdfs/alert-memos/2017/alert-memo-201712.pdf>.

The Rolls-Royce case was of particular significance. Despite the SFO’s periodic rhetoric regarding the importance of self-reporting to a company’s chances of being invited to participate in DPA negotiations, Rolls-Royce was offered a DPA despite not having itself brought the misconduct to the attention of the SFO. Indeed, it is the first DPA to come before the English Courts where the company concerned had not voluntarily self-reported the misconduct to the SFO.⁴ Rather than learning of the misconduct from the company, the SFO’s investigation began in 2012 after it obtained information from the press.⁵ The High Court nevertheless held that the DPA was in the interests of justice, in large part due to the “*extraordinary co-operation*” demonstrated by Rolls-Royce during the subsequent investigation. Key reported components of Rolls-Royce’s cooperative behaviors included:

- a) Deconfliction by agreeing to defer internal investigation interviews with key witnesses until the SFO had first interviewed the individuals (as well as audio recording internal interviews where requested);
- b) disclosure of all internal interview memoranda (on a limited waiver of privilege basis); and
- c) providing all material requested by the SFO voluntarily (i.e., without statutory compulsion under a Section 2 Notice).⁶

Thus, although the fine levelled against Rolls-Royce is far higher than in any of the DPAs approved by the English Courts to date, the discount afforded to Rolls-Royce (of 50%)

³ Serious Fraud Office v Rolls-Royce Plc and Rolls-Royce Energy Systems Inc. (<https://www.judiciary.gov.uk/wp-content/uploads/2017/01/sfo-v-rolls-royce.pdf>).

⁴ *Id.* ¶ 21.

⁵ *Id.*

⁶ *Id.* ¶ 20.

matches the highest level of discount afforded in any of the DPAs approved to date.

Whether or not this case signifies increased flexibility in the SFO's approach going forward remains to be seen. However, it is clear that, where a company has not self-reported misconduct to the SFO, the bar will be set very high for a company to demonstrate that it has been sufficiently cooperative for the English Court to be satisfied that the approval of the DPA is in the interests of justice.

- Tesco Plc⁷

The Tesco resolution represents the first use by the FCA of its statutory powers to require a listed company to pay compensation in connection with market abuse. On March 28, 2017, Tesco Plc announced that, along with its subsidiary Tesco Stores Limited (“TSL”), it had entered into separate agreements with the FCA and the SFO concerning “false accounting” by TSL between February 2014 and September 2014.⁸ On the same date, the FCA issued its Final Notice against Tesco Plc, in which it determined that Tesco had committed market abuse contrary to section 118(7) of the Financial Services and Markets Act 2000.⁹ The misconduct concerned Tesco Plc's publication of a “false and misleading” trading statement in August 2014, which led to a “false market” being made in Tesco Plc shares between August 29, 2014

and September 22, 2014.¹⁰ Pursuant to the FCA's Final Notice, Tesco was ordered to compensate purchasers of Tesco Plc shares and bonds within the false market period.

Simultaneously with the announcement of its resolution with the FCA, Tesco announced that it had reached an in principle DPA with the SFO, pursuant to which TSL would pay a financial penalty of £129 million.¹¹ Full details of the DPA, which was formally approved by the English High Court on April 10, 2017, have not yet been published due to reporting restrictions in place pending the conclusion of criminal proceedings involving certain former Tesco executives concerning related issues.

Tesco was praised by the FCA for its “*extremely cooperative*” stance during the investigation.¹² By way of illustration, the FCA's Final Notice states that Tesco “*refrained, at the FCA's request, from interviewing witnesses or taking statements...[and]... disclosed voluntarily material which appeared to them to be significant to the FCA's enquiries*”.¹³ It is understood that Tesco has gone to similarly significant lengths to cooperate with the SFO's investigation. The details of Tesco's cooperation with the U.K. authorities will be of interest to those involved in cross-border investigations with a U.K. nexus and, combined with the Rolls Royce decision, may signal a move in the U.K. towards deconfliction

⁷ For Cleary Gottlieb's previous Alert Memorandum concerning the Tesco resolution, see <https://www.clearygottlieb.com/-/media/organize-archive/cgsh/files/publication-pdfs/alert-memos/problems-with-the-tesco-value-range.pdf>.

⁸ Tesco Plc, Deferred Prosecution Agreement in Relation to Historic Accounting Practices: <http://www.londonstockexchange.com/exchange/news/market-news/market-news-detail/TSCO/13173180.html>.

⁹ FCA Final Notice against Tesco Plc and Tesco Stores Limited, March 28, 2017: <https://www.fca.org.uk/publication/final-notice/tesco-2017.pdf>.

¹⁰ *Id.* ¶ 2.4.

¹¹ Tesco Plc, Deferred Prosecution in Relation to Historic Accounting Practices, March 28, 2017: <http://www.londonstockexchange.com/exchange/news/market-news/market-news-detail/TSCO/13173180.html>.

¹² FCA Final Notice against Tesco Plc and Tesco Stores Limited, March 28, 2017 <https://www.fca.org.uk/publication/final-notice/tesco-2017.pdf> ¶ 4.11.

¹³ *Id.*

and voluntary production being more commonly expected where a company seeks cooperation credit.

- France’s First DPA

In November 2017, the first French DPA was entered into between the NFPF and HSBC Private Bank Switzerland (“PBRs”). Under the terms of the DPA, PBRs was required to pay a financial penalty of EUR 300 million, following a lengthy investigation into tax evasion and money laundering dating back to 2013.¹⁴ Concomitantly, all charges¹⁵ against the holding company of the HSBC group, HSBC Holdings plc, were dismissed. The PBRs DPA is the first of its kind in France following the introduction into force in 2016 of legislation permitting their use.

The PBRs DPA contains a number of noteworthy features. First, PBRs did not self-report the misconduct to the French authorities. Second, PBRs did not acknowledge its own criminal liability during the investigation. Third, PBRs is said to have offered “*minimal*” cooperation during the investigation. On these three points, however, the NFPF acknowledges that between the start of the investigation and December 2016, the French legal system did not provide a legal mechanism encouraging cooperative behaviors and they therefore cannot be considered as guidance for future DPAs.

In addition, there do not appear to be any ongoing remedial conditions with which PBRs must comply to uphold the validity of the DPA; on this point, the NFPF refers to the fact that a significant

remediation program has already been undertaken by HSBC further to a DPA in the United States.

The EUR 300 million penalty comprises two elements, namely:

- a “public interest” fine of approximately EUR 158 million (made up of approximately EUR 86 million in disgorgement of profits and an additional EUR 72 million by way of “penalty”); and
- “damages” for losses to the French tax administration of approximately EUR 142 million.

Reference to disgorgements of profits is a first in France and the NFPF is likely to use that basis for calculation of future penalties.

Although the PBRs DPA has some intriguing features, predictions as to the future direction and approach of the French authorities and Courts in considering DPAs are difficult to make given that the DPA process in France is in its early stages.

Developments in Legal Privilege

During 2017, the narrower approach taken by the English Courts (compared to the U.S. Courts) to legal professional privilege continued, following the trend of the 2016 decisions in *The RBS Rights Issue Litigation*¹⁶ and *Astex Therapeutics Limited v Astrazeneca*.¹⁷ In May 2017, in the case of *SFO v ENRC*,¹⁸ the English High Court handed down a landmark first instance judgment on the scope of English litigation privilege.

¹⁴ Cour D’Appel de Paris, Tribunal de Grande Instance de Paris, Parquet National Financier, PNF 11 024 092 018.

¹⁵ HSBC Holdings plc had been placed under investigation by the investigating magistrates inter alia for the offense of money laundering of tax fraud proceeds.

¹⁶ [2016] EWHC 3161 (Ch). For Cleary Gottlieb’s Alert Memorandum on the *RBS* decision, see

<https://www.clearygottlieb.com/-/media/organize-archive/cgsh/files/publication-pdfs/alert-memos/2016/alert-memo-2016112.pdf>.

¹⁷ [2016] EWHC 2759 (Ch).

¹⁸ [2017] EWHC 1017.

Under English law, litigation privilege protects confidential communications and documents created for the “*dominant purpose*” of “*adversarial proceedings*” that are in “*reasonable prospect*”. Litigation privilege represents the only route under English law through which communications between a party (or its agents) and third parties may be protected by legal privilege.

The *ENRC* judgment, which is currently under appeal, represents a significant narrowing of both the “*adversarial proceedings*” and “*dominant purpose*” aspects of the requirements for English litigation privilege. Briefly stated, and amongst other findings, the High Court held that:

- a) a criminal investigation by the SFO does not constitute adversarial proceedings for the purposes of litigation privilege (rather, the Court characterized it as a preliminary step that comes before any decision to prosecute);¹⁹ and
- b) documents created by a party during the course of a SFO investigation cannot, by virtue of the investigation alone, be said to be created for the “*dominant purpose*” of adversarial litigation (rather, the Court characterized the purpose of such communications to be the avoidance of such proceedings).²⁰

The effect of these findings (pending a successful appeal), is that a party under criminal investigation by the SFO will not be justified in asserting that, by virtue of the investigation alone, it has a reasonable contemplation of adversarial proceedings. Consequently, documents created by a party during an internal investigation (for example, interview memos), where that party is under criminal

investigation by the SFO, cannot be said to have been created for the dominant purpose of adversarial proceedings, and will therefore not be covered by legal privilege.

The *ENRC* judgment has proved controversial: in a letter to the Financial Times, the President of the Law Society of England and Wales described the outcome of the decision as “*deeply alarming*”.²¹ *ENRC* has been granted permission to appeal the Court’s decision, and the Court of Appeal will hear the decision in 2018. The Law Society has sought permission to intervene in the appeal, and its stance has been publicly supported by a number of legal practitioners in the U.K. and elsewhere. In addition, in *Bilta (UK) v Royal Bank of Scotland*,²² handed down in early 2018, the High Court questioned whether the *ENRC* decision is compatible with earlier Court of Appeal authority on the “*dominant purpose*” test, and refused to “*draw a general legal principle from [the approach taken in ENRC]*”, instead preferring to take a “*realistic, indeed commercial, view of the facts*” in assessing whether the dominant purpose test was satisfied.²³

Elsewhere, 2017 saw a number of further privilege decisions the findings of which are relevant to the conduct of cross-border investigations.

In the U.S., on December 5, 2017, a federal magistrate judge in the U.S. District Court for the Southern District of Florida held, in *SEC v. Herrera*, an enforcement action brought by the Securities and Exchange Commission (“*SEC*”), that external lawyers for General Cable Corporation (“*GCC*”) had waived attorney work product protection when the firm had provided “*oral downloads*” of interview notes and memoranda to the SEC during a meeting with SEC

¹⁹ *Id.* ¶ 150.

²⁰ *Id.* ¶¶ 164-166.

²¹ Law Society will defend legal professional privilege, Financial Times, May 12, 2017:

<https://www.ft.com/content/437c3586-3647-11e7-bce4-9023f8c0fd2e>.

²² [2017] EWHC 3535 (Ch).

²³ *Id.* ¶ 66.

staff in 2013 while the SEC was investigating GCC.²⁴ In the same order, the Court held that providing similar access to GCC's auditor did not result in a waiver. The Court ordered the law firm to turn over to certain former employees of GCC, the defendants in *Herrera*, the interview notes and memoranda that were the subject of the oral downloads to the SEC. The law firm subsequently sought reconsideration of the order, asking the Court to limit its order to require production of only the attorney notes from the meeting with SEC staff along with the portion of an interview memorandum read to the SEC during the meeting.²⁵ On January 3, 2018, the parties settled the discovery dispute (the details of the agreement were not made public).²⁶

In Germany, it was reported that the Federal Constitutional Court ruled, in July 2017, that prosecutors in Munich cannot examine material seized from a law firm's offices during a raid because it may infringe on the legal privilege between the law firm and its client.²⁷ The decision was by way of interim injunction pending a substantive review.

In Canada, an International Centre for Settlement of Investment Disputes arbitration panel ruled in July 2017 that oil and gas company Niko Resources is not required to disclose findings from an internal investigation into corruption allegations on the grounds of legal privilege.²⁸ In doing so, the

Tribunal held that there was no indication that Niko's internal investigation was conducted for any purpose other than defending against the allegations.

The divergent approaches to legal privilege taken by courts in different jurisdictions provide significant challenges to those conducting cross-border internal investigations, and it is likely that 2018 will bring further developments in this area.

Corporate Responsibility

The Scope of Corporate Criminal Liability

The scope and threshold of corporate criminal liability is expanding in the U.K.. The Criminal Finances Act 2017 received Royal Assent on April 27, 2017. Among a range of other reforms, the Act creates two new corporate criminal offenses of failing to prevent the facilitation of tax evasion - a "domestic" offense and an "overseas" offense. In each case, the liability of an organization is dependent on its "associated persons", which include the organization's employees, agents and persons performing services for or on its behalf, having facilitated tax evasion when acting in their capacity as such.

- The "domestic" offense targets the failure to prevent associated persons facilitating

²⁴ Order on Defendants' Motion to Compel Production from Non-Party Law Firm, *SEC v. Herrera*, No. 17-cv-20301 (S.D. Fla. Dec. 5, 2017).

²⁵ Morgan Lewis' Motion for Clarification or Reconsideration of the Order on Defendants' Motion to Compel Production, *SEC v. Herrera*, No. 17-cv-20301 (S.D. Fla. Dec. 12, 2017).

²⁶ Order Following Resolution of Dispute Concerning Subpoena Served on Law Firm, *SEC v. Herrera*, No. 17-cv-20301 (S.D. Fla. Jan. 3, 2018). For Cleary Gottlieb's previous Alert Memorandum concerning *SEC v. Herrera*, see <https://www.clearygottlieb.com/~media/files/oral-downloads-of-counsel-interviews-waived-attorney-work-product-protection-from-disclosure.pdf>.

²⁷ German constitutional court blocks prosecutors from using seized Jones Day documents, Global Investigations Review, July 27, 2017:

<https://globalinvestigationsreview.com/article/1145054/german-constitutional-court-blocks-prosecutors-from-using-seized-jones-day-documents>.

²⁸ Niko Resources (Bangladesh) Ltd; Bangladesh Petroleum Exploration & Production Company Limited v. Bangladesh Oil & Gas Mineral Corporation, ICSID Case. No. ARB/10/11 and RB/10/18, <https://www.italaw.com/sites/default/files/case-documents/italaw9020.pdf>.

the evasion of *UK* tax, irrespective of where the facilitation takes place.

- The “*overseas*” offense targets the failure to prevent associated persons facilitating the evasion of *non-UK* tax. Broadly, however, an organization can only be guilty of this offense if: (i) it is incorporated, formed or carries on business in the U.K.; or (ii) conduct constituting part of the facilitation took place in the U.K.. This offense also requires “*dual criminality*”, meaning that the behavior of the evader and the facilitator must be a crime in both the relevant foreign jurisdiction and the UK.

An organization will have a defense to either offense if it can establish that: (i) it had reasonable “*prevention procedures*” in place when the underlying offense was committed; or (ii) that it was unreasonable to expect the corporation to have any prevention procedures in place at the time of the offense.²⁹

Both offenses came into force on September 30, 2017. The new offenses follow a similar model to section 7 of the Bribery Act 2010, which created a corporate offense of failing to prevent bribery (subject to an “*adequate procedures*” defense), and constitute the U.K.’s most recent attempt to ease the difficulties of the “*identification principle*” (namely, the principle of English law, applicable in the majority of cases, that, for a company to be convicted of a criminal offense, it must be shown that the company acted through a person sufficiently prominent to be considered the “*directing mind and will*” of the company).

²⁹ For Cleary Gottlieb’s previous Alert Memorandum discussing the new corporate criminal offenses see: <https://www.clearygottlieb.com/news-and-insights/publication-listing/uk-corporate-criminal-offences-of-failing-to-prevent-facilitation-of-tax-evasion-10-18-17>

³⁰Corporate Liability for Economic Crime: Call for Evidence

Separately, between January and March 2017, the U.K. Ministry of Justice ran a consultation on the case for reform of the law on corporate liability for economic crime.³⁰ The consultation sought evidence on the extent to which the identification principle is deficient as a tool for effective enforcement of the criminal law against large modern companies. The results of the consultation are awaited.

Whistleblower Protections

2017 also saw developments in efforts to protect whistleblowers. In the U.S., the Commodity Futures Trading Commission (“CFTC”) adopted amendments to the rules governing its whistleblower program, which had been established by amendments to the Commodities Exchange Act (“CEA”) enacted as part of the Dodd-Frank Wall Street Reform and Consumer Protection Act in 2010.³¹ These recent amendments significantly strengthen the provisions concerning the protection of whistleblowers. Whereas the CFTC had previously taken the position that it lacked statutory authority to bring an enforcement action for retaliation against whistleblowers, the amendments make clear that, in addition to private enforcement, the CFTC itself may enforce the CEA’s anti-retaliation provisions, which generally prohibit employers from taking certain adverse actions against whistleblowers because they provided information to the CFTC in accordance with law or assisted the CFTC. The amendments also prohibit anyone from taking any action to impede an individual from communicating with the CFTC’s staff about a possible violation of the CEA, including by enforcing, or threatening to

<https://www.gov.uk/government/consultations/corporate-liability-for-economic-crime-call-for-evidence>.

³¹ The revised rules are available at <http://www.cftc.gov/idc/groups/public/@lrfederalregister/documents/file/2017-10801a.pdf>.

enforce, a confidentiality agreement or pre-dispute arbitration agreement with respect to such communications. Additionally, the amendments clarify that the anti-retaliation provisions apply to actions taken by an employer after a whistleblower reports internally but before reporting to the CFTC. Further, the amendments notably broaden the requirements concerning eligibility for awards to whistleblowers.³²

In Italy, Law 179/2017 (“Law 179”) entered into force on December 29, 2017, modifying Legislative Decree No. 231/2001 (“Decree 231”) to require companies that have adopted a corporate compliance program to integrate whistleblowing procedures. While this legislation does not impose a general obligation to implement whistleblowing procedures, those companies that have adopted a compliance program pursuant to Decree 231 must modify that program in accordance with the new requirements. In particular, to be compliant with the new regulation, companies implementing a compliance program must provide for the following: more than one whistleblowing channel able to protect whistleblowers’ identity, of which at least one has to be computerized; the prohibition of acts of discrimination or retaliation against whistleblowers; and disciplinary measures for those who retaliate against a whistleblower and for the whistleblowers who intentionally or with gross negligence file false or unsubstantiated reports of violations. Although Law 179 does not require companies to adopt a corporate compliance program, companies that have adopted one, but where that program does not integrate the amended Decree 231 requirements, run the risk that their compliance program will not act as a defense against liability in circumstances where it would otherwise do so. Law 179 therefore incentivizes companies with an existing compliance program to adopt the revised Decree 231 measures.

³² For Cleary Gottlieb’s previous Alert Memorandum discussing the amendments to the CFTC’s whistleblower rules, see <https://www.clearygottlieb.com/~media/organize->

Cross-Border Inter-Agency Cooperation

Those involved in investigations-related work in recent years will have observed global authorities taking an increasingly coordinated approach towards the investigation and prosecution of economic misconduct. In this regard, a number of developments in 2017 provided further guidance on the permissible parameters of inter-authority coordination and the limits of the use of evidence obtained by authorities overseas.

In the U.S., on July 19, 2017 the Court of Appeals for the Second Circuit overturned the convictions of Anthony Allen and Anthony Conti, former employees in London of Coöperatieve Centrale Raiffeisen–Boerenleenbank B.A. (“Rabobank”), for conspiracy to commit wire and bank fraud, as well as several counts of wire fraud, for allegedly manipulating the London Interbank Offered Rate (“LIBOR”). In 2013, Allen and Conti had been interviewed under compulsion in the U.K. by the FCA as part of an investigation into LIBOR. Refusing to comply with a compulsory interview request in the U.K. is a criminal offense.

In overturning the convictions of Allen and Conti, the Second Circuit’s opinion focused on the government’s use at trial of testimony from a witness (who worked with Allen and Conti at Rabobank) who had, prior to trial, reviewed transcripts of the interviews of Allen and Conti conducted by the FCA. The Second Circuit held that that the government’s use of the compelled testimony from the FCA violated Allen and Conti’s rights under the Fifth Amendment, stating that “*the Fifth Amendment’s prohibition on the use of compelled testimony in American criminal proceedings applies even when a foreign sovereign*

[archive/cgsh/files/2017/publications/alert-memos/cftc-approves-amendments-to-whistleblower-rules-6-1-17.pdf](https://www.clearygottlieb.com/~media/organize-archive/cgsh/files/2017/publications/alert-memos/cftc-approves-amendments-to-whistleblower-rules-6-1-17.pdf).

has compelled the testimony.”³³ The Court also held that if the government calls a witness who has been substantially exposed to a defendant’s compelled testimony, *Kastigar v. United States* requires the government to prove “that the witness’s review of the compelled testimony did not shape, alter, or affect the evidence used by the government.”³⁴ The Court found that the government did not meet that burden in this case.³⁵ This decision highlights a challenge to prosecutions in U.S. courts that arise from cross-border investigations in which overseas governments are conducting parallel investigations, where the procedures used in those investigations may differ from those used in U.S. criminal investigations.³⁶

Elsewhere, in the U.K., the SFO continued its investigation into Unaoil and related companies and individuals, one of its largest investigations to date, for suspected bribery, corruption, and money laundering. Having obtained blockbuster funding from the U.K. Treasury to pursue its investigation, the SFO has closely collaborated with numerous overseas authorities to obtain intelligence and evidence. Notably in this regard, Unaoil and related entities sought judicial review of the SFO’s initial Mutual Law Assistance request made to the Monegasque authorities in March 2016. Unaoil claimed that the SFO’s Letter of Request to the Monegasque authorities failed to disclose important information and had misled Monegasque police into carrying out a wide-ranging raid that amounted to a “fishing expedition.”³⁷

³³ *United States v. Allen*, 864 F.3d 63, 68 (2d Cir. 2017).

³⁴ *Id.* at 68-69. See *Kastigar v. United States*, 406 U.S. 441 (1972).

³⁵ *Allen*, 864 F.3d at 101.

³⁶ For Cleary Gottlieb’s previous Alert Memorandum concerning *United States v. Allen*, see <https://www.clearygottlieb.com/-/media/organize-archive/cgsh/files/2017/publications/alert-memos/second->

In rejecting Unaoil’s claim in March 2017, the High Court affirmed that, in issuing a Letter of Request to a foreign authority, the U.K. authorities are not bound by a “duty of candour” to disclose information pointing towards the innocence of the suspect, as it would be “peculiarly inappropriate” for it to do so, leading to “unwarranted complexity.”³⁸ This decision reinforces both the high threshold for a challenge to the actions of the U.K. enforcement authorities, as well as the flexibility afforded to the U.K. authorities in pursuing cross-border crime.

Cross-Border Data Transfers

The nature of a cross-border investigation frequently involves data privacy issues, and 2017 saw significant developments in this regard.

In the U.S., the Supreme Court granted certiorari in October 2017 in *United States v. Microsoft Corp.* to review a dispute over whether the U.S. federal government has a right to access data held by Microsoft abroad. In July 2016, the Second Circuit Court of Appeals had reversed the district court’s denial of Microsoft’s motion to quash a warrant to access a customer’s emails stored on a server in Dublin, Ireland. The warrant was issued in December 2013 under Section 2703 of the Stored Communications Act (“SCA”), in connection with a criminal investigation into a drug trafficking scheme. The Second Circuit cited the presumption against extraterritoriality articulated by the Supreme Court in *Morrison v. National Australia Bank Ltd.*³⁹ and *RJR Nabisco, Inc. v. European Community*⁴⁰, and concluded that the warrant constitutes an “unlawful extraterritorial

[circuit-reverses-rabobank-libor-convictions-over-foreign-compelled-testimony-7-21-17.pdf](https://www.clearygottlieb.com/-/media/organize-archive/cgsh/files/2017/publications/alert-memos/second-circuit-reverses-rabobank-libor-convictions-over-foreign-compelled-testimony-7-21-17.pdf).

³⁷ *R (Unaenergy Group Holdings & others) v SFO [2017] EWHC 600 (Admin)*, ¶ 11.

³⁸ *Id.* ¶¶ 31-34.

³⁹ 561 U.S. 247 (2010).

⁴⁰ 136 S. Ct. 2090 (2016).

application” of the SCA insofar as it directs the seizure of content stored on servers outside of the United States.⁴¹

In January 2017, the Second Circuit denied the government’s request for a rehearing *en banc*.⁴² Before the Supreme Court, the Government argues that Section 2703 of the SCA permits the Government to compel U.S. service providers to disclose electronic communications within their control to authorities inside the U.S., regardless of where the communications are stored, and that such disclosure constitutes domestic conduct.⁴³ Microsoft argues that the Government’s position amounts to an extraterritorial application of the SCA, and also argues that compelling the disclosure of electronic information stored abroad creates a direct conflict with foreign laws protecting data privacy.⁴⁴ More than twenty amicus briefs have been submitted in support of Microsoft; the *amici* include technology companies, legal experts, members of Congress, European lawmakers, and European lawyers associations.⁴⁵ Oral argument will be heard on February 27, 2018.⁴⁶

In Europe, during 2017, companies and their advisors have continued to prepare for the entry into force of the General Data Protection Regulation (“GDPR”), which overhauls the current E.U. data protection regime. The GDPR, which

comes into force on 25 May 2018 through directly effective E.U. legislation, will: (i) expand the territorial reach of E.U. data privacy legislation; (ii) increase the compliance burden of those companies subject to it; (iii) introduce more onerous requirements for consent by individuals to cross-border data transfers; (iv) introduce notification requirements in the event of data breaches; and (v) increase the penalties for breach of E.U. data protection legislation.⁴⁷

Looking Ahead to 2018

Looking ahead, we expect that those involved in cross-border investigations will observe further significant developments in 2018 that will inform and refine the manner in which such investigations are approached and can be conducted by authorities and thus impact how internal investigations should be conducted. In particular, key developments in 2018 may arise out of some or all of the following features of the cross-border investigations landscape:

First, we expect to see further significant corporate resolutions that will provide additional guidance to corporations on the expectations of global authorities, and the level of cooperation required to achieve certain resolutions. A number of countries, including Singapore, Australia and

⁴¹ *Matter of Warrant to Search a Certain E-Mail Account Controlled and Maintained by Microsoft Corp.*, 829 F.3d 197 (2d Cir. 2016).

⁴² *Matter of Warrant to Search a Certain E-Mail Account Controlled and Maintained by Microsoft Corp.*, 855 F.3d 53 (2d Cir. 2017).

⁴³ Brief for the United States on Writ of Certiorari at 12-16, *United States v. Microsoft Corp.*, No. 17-2, 2017 WL 6205806 (Dec. 6, 2017).

⁴⁴ Brief for Respondent on Writ of Certiorari at 11-14, *United States v. Microsoft Corp.*, No. 17-2, 2018 WL 447349 (Jan. 11, 2018).

⁴⁵ *United States v. Microsoft*, Complete List of Amici Signatories, [https://blogs.microsoft.com/datalaw/wp-](https://blogs.microsoft.com/datalaw/wp-content/uploads/sites/149/2018/01/Complete-List-of-Amici-Signatories_FINAL-4.pdf)

[content/uploads/sites/149/2018/01/Complete-List-of-Amici-Signatories_FINAL-4.pdf](https://blogs.microsoft.com/datalaw/wp-content/uploads/sites/149/2018/01/Complete-List-of-Amici-Signatories_FINAL-4.pdf) (last visited Feb. 12, 2018).

⁴⁶ For Cleary Gottlieb’s previous blog post concerning *United States v. Microsoft Corp.*, see <https://www.clearyenforcementwatch.com/2018/01/accessing-servers-abroad-global-comity-data-privacy-implications-united-states-v-microsoft/>.

⁴⁷ For Cleary Gottlieb’s previous Alert Memoranda discussing the GDPR, see <https://www.clearygottlieb.com/-/media/organize-archive/cgsh/files/publication-pdfs/alert-memos/alert-memo-pdf-version-201650.pdf> and <https://www.clearygottlieb.com/-/media/organize-archive/cgsh/files/publication-pdfs/alert-memos/2017/cybersecurity-in-the-eu--the-new-regime-under-the-gdpr-and-nisd-5-5-17.pdf>.

Canada, are currently considering adopting DPA procedures of their own.

Second, with the entry into force of the GDPR, we expect the increasing prominence of data privacy issues within cross-border investigations to continue, along with the challenges of meeting authorities' expectations to receive overseas data in a timely (and often expedited) manner whilst simultaneously managing a company's exposure under increasingly extensive and wide-ranging data privacy regimes.

Third, we expect that global authorities will continue to coordinate on complex global investigations, including through exchanges of evidence, although we expect such coordination to be pursued with an increased sensitivity towards the integrity of the evidence exchanged and its admissibility for the purposes for which it was sought.

Fourth, we expect the expansion of corporate responsibility to continue apace, including a lowering of thresholds for establishing corporate criminal liability and continued attempts to maintain and protect corporate whistleblowers.

Finally, we expect that legal privilege issues will continue to constitute a core focus for those involved in cross-border investigations. In particular, for companies conducting cross-border investigations, jurisprudential developments in this area during 2018 will need to be closely monitored and analyzed with a view to plotting the safest course through what is, and will likely remain for some time, an area of risk and uncertainty.

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