

US anti-piling policy to tackle overlap in multi-jurisdictional investigations

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U.S. DOJ Deputy Attorney General Rod Rosenstein has announced a new enforcement [policy](#) to discourage “piling-on” in multi-jurisdictional enforcement. This is the latest in a series of recent policy announcements by the DOJ on criminal enforcement (see [In Context](#)). Given the growing extraterritorial powers of various national enforcement authorities, companies are often exposed to multiple investigations into the same alleged misconduct in different jurisdictions, and may face overlapping fines. The policy has been added to the U.S. Attorneys’ Manual and addresses the coordination and cooperation between national and foreign enforcement to avoid duplicative penalties.

Increasingly, the international and extraterritorial scope of criminal enforcement leads to multiple simultaneous or consecutive investigations by different authorities worldwide. As a result, companies often face duplicate penalties for the same alleged misconduct. In May 2018, the U.S. DOJ announced a new policy addition, aimed at addressing and counteracting the piling-on of fines, to the U.S. Attorney’s Manual. The policy encourages coordination and cooperation between national US enforcement agencies and their foreign counterparts.

According to Deputy Attorney General Rod [Rosenstein](#), the policy aims “to enhance relationships with our law enforcement partners in the United States and abroad, while avoiding unfair duplicative penalties.”

The Policy

The most salient parts of the policy are as follows:

- government criminal enforcement cannot be used for purposes other than those related to the investigation and prosecution of an alleged crime. Consequently, the authorities may not threaten to prosecute in order to compel the companies to increase the amount paid in a civil settlement
- the various departments within the DOJ are required to coordinate with one another
- the DOJ should coordinate their investigations with other US and foreign enforcement authorities
- authorities must take into consideration the following factors in evaluating and determining whether a duplicative penalty is justified: “egregiousness of a company’s misconduct; statutory mandates regarding penalties, fines, and/or forfeitures; the risk of unwarranted delay in achieving a final resolution; and the adequacy and timeliness of a company’s disclosures and its cooperation with the Department”

Developments in other jurisdictions

Many other jurisdictions have also recognised the importance of cooperating in multi-jurisdictional criminal enforcement. A number of coordination centres have been set up worldwide to facilitate the multi-lateral cooperation between regulatory authorities, including the International Anti-Corruption Coordination Centre, the Anti-Corruption Network for Eastern Europe and Central Asia, and the Global Focal Point Initiative. There have also been enforcement cases where multiple authorities coordinated and eventually shared the fine. For example, in *Telia*, a global settlement was reached between Telia and the DOJ, the SEC, the Dutch DPPS and the Swedish Prosecution Authority, and the disgorgement was divided between the involved agencies (see [In context](#)). At the same time, there are some jurisdictions which on occasion seem to be moving in the opposite direction. In a recent [judgment](#) in the *Vitol* case, the Paris Court de Cassation rejected a double jeopardy argument, and upheld the fine imposed by French authorities, despite *Vitol*’s earlier plea deal in the US.

Practical implications

In terms of where it stands now, the DOJ policy is based on recommendations and suggestions, and does not specify how it will be applied and implemented. In addition, it does not indicate what level of credit, if any, the company will receive in exchange for cooperation when settling with foreign authorities. Another criticism of the policy is that some of the criteria on which the consideration is to be based are subjective, for example “egregiousness of a company’s misconduct”.

This policy, nevertheless, highlights the DOJ’s attempt to increase certainty in international criminal enforcement, in addition to existing guidance on the presumption of declination and reduction in penalties. This policy is certain to benefit companies facing enforcement in multiple countries. Companies should still, however, be mindful that some jurisdictions may not follow a similar policy, which can result in the continued practice of piling-on of enforcement penalties.