

European Union - The prosecution of white collar crime

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Introduction

1. The EU has brought us much. The European single market is a blessing for most economies. Many people and businesses enjoy the benefits of the common market, but so do white collar criminals. The same advantages law abiding citizens receive from the Union, the white collar criminals can exploit for their own (selfish) benefit.

2. The risk of getting caught is relatively low. The risk of being punished, seeing the elaborate network of different legislative systems, is even lower. As a result, the EU is a breeding place for white collar crime. It is easy to understand why: it is much easier to dodge the complex rules and legislation of many different countries than to defraud in a system that is built for one single nation.

VAT Fraud

3. Whilst US lawyers are concerned about insider trading, corruption and bribery, the EU's main topic in white collar crime is VAT fraud. This is the theft of value added tax from a government by traders who exploit the way VAT is treated within multi-jurisdictional trading where the movement of goods between jurisdictions is VAT-free. This allows the fraudster to charge VAT on the sale of goods where the sale takes place in his own country, and then instead of paying this over to the government's collection authority, simply absconds, taking the VAT with him. In the UK alone the losses to the exchequer are estimated to be between £ 2 and 8 billion. With all the different legislative systems, definitions and tax laws, it is easy to find loopholes within the system. Not surprisingly these offences have a high priority in the EU.

4. Our firm is involved in the largest VAT fraud investigation in Europe. The case concerns a Dutch owned bank which was closed down by the authorities over 2 ½ years ago on suspicion of money laundering. The allegation is that the bank singlehandedly allowed for VAT fraud to exist given that it offered banking services to pretty much every single VAT fraudster after the regular high street banks refused to service them.

5. So, white collar crime, and VAT fraud in particular, is a serious concern for the EU and high priority has been given to this problem. The following approach is being adopted in an attempt to tackle it:

- Zero-tolerance with regards to white collar crime with stringent prosecution of people trying to obtain Community funds illegally;

- Securing and supporting a transnational strategy in different areas of crime prevention. For example in tax deductibility and auditing standards. Part of this approach is also to set up a European Public Prosecutors Office;

- And most importantly: bringing together the criminal law of all different countries in the EU, based on complete trust of each others system including agreeing on common definitions, incriminations and sanctions. Part of this is also to facilitate transnational prosecution, mutual legal assistance as well as easing EU extraditions. A lot of framework decisions are adopted to achieve this goal. Framework decisions are decisions by the EU which the member states have to implement in their own legislation.

Framework Decisions

6. The two most important Framework Decisions in this regard are:

* European Arrest Warrant: a framework decision making extradition procedures much shorter. Previously, the extradition procedure took 1 year in average. Under the new rules of the European

Arrest Warrant it takes only 43 days. Requesting countries no longer need to show there is a case to answer, member states can no longer refuse to extradite their own nationals, the political element of extradition has been abolished and a list of offences has been adopted for which dual criminality is no longer required for extradition. 'Fraud' (which is a quite wide definition) for example, is on that list. These are major changes!

* European Evidence Warrant: this is a framework decision for the purpose of obtaining objects, documents and data for use in criminal matters. Its purpose is to establish rules under which a Member State must recognise and execute a request to seize evidence issued by a judicial authority of another Member state. Originally retrieving evidence beyond borders was difficult and subject to numerous legislative boundaries, the so called Mutual Legal Assistance. Keyword for seizing evidence now is: mutual recognition – not assistance. Again, the same list of offences for which dual criminality is no longer required has been adopted. Some offences, like smuggling and intellectual property offences, have been added. Again, there is no requirement to state much of a case. In practice, this means that companies (not only the bank I mentioned earlier, but also US-companies based in the EU) can easily be subject to a search whilst the organisation doing the search doesn't have much of a clue about the origin of the investigation and the purpose of the request for evidence. For companies this means for example that they risk losing their entire administration without knowing the exact size of the investigation or the suspicion it entails.

7. Besides that, we mustn't forget that every search in the computer system of a company directly causes it to be a cross-border search. For example, in the Dutch bank case the F.I.O.D., the Dutch fraud investigation agency, held company searches at different locations. Their strongest interest was, of course, the computer system of the bank. Without noticing (or maybe with noticing but without saying anything about it) detectives were all over the company computer systems with servers all over the world (including the US) taking copies of everything. As you can imagine, this raised a number of questions concerning jurisdiction. You won't be surprised to hear that the S.E.C. is showing interest in the case as well as a result of information of interest to the US, which was obtained from company servers in the States based on supposedly Dutch jurisdiction.

8. So you understand that the easier national authorities get the permission for those searches (on request of member states) the bigger the risk for our (and likely also your) clients.

9. As you can see, to face the problems concerning cross border fraud, the EU appears to be determined to cooperate as much as possible to come to one combined approach. They think: If we just rely on each others decisions, everything will be ok. Nevertheless, and maybe fortunate for our clients, this joined approach is easier said than done. Mutual acceptance and recognition is far from straightforward. The consultation preceding the European Arrest Warrant and the European Evidence Warrant revealed a lot of problems between member states. For example, how can you compare and combine the legislative system of the UK common law system to the Germanic system of the Netherlands and Germany?

10. To give you another example: Germany opted-out six of the 32 offences (including terrorism, racism and environmental crime) on the named list of the European Evidence Warrant on the basis that there was no EU-wide definition of these crimes. Quite right too, since the lack of EU-wide definitions of terrorism, or more important in this setting, fraud, causes an instant problem. Member states simply do not (yet) agree on this. For example, Belgium requires for some offences of Fraud the additional subjective element of being explicitly aware that the offender is not entitled to the grant when he receives it. Austria on the other hand requires for fraud proof of the additional subjective element of enrichment. Luxembourg requires the subjective element of intention. And to finish it, in Latvia money laundering isn't even a criminal offence...

You see where we have a problem.

11. And I haven't even mentioned the severe blows the EU received in previous and recent elections. It looks like EU-citizens aren't too keen on the idea of mutual recognition as the European Parliament itself. Which, I must say, isn't that surprising. For example, a colleague of mine once had a client facing extradition to Latvia for the offence of 'stopping a horse and cart from leaving to the market'. I had trouble picturing this. I'm thinking of a women standing in front of a horse shouting to her husband: no, your not allowed to go to the market, you have to take care of the

children! Or something like that. It's a case which stimulates your imagination, but you understand the problem these cases raise in mutual recognition.

12. By the way the Dutch court of Amsterdam found a way to prevent extradition stating that this 'offence' wasn't dual criminal and of course not on the mentioned list.

Conclusion

13. What is in it for you, I hear you think? Why do we in the US have to worry for a second, especially given the fact that the EU doesn't even agree on a simple definition like fraud?

14. True, but in my opinion it is just a matter of time until the EU figures it all out and joins hands in a cooperative approach to white collar crime. It appears to me to be an unstoppable train. The European Arrest Warrant has been implemented and is quite efficient. The European Evidence Warrant will come into force within the foreseeable future. Both framework decisions can be regarded as sea changes in the way the EU seeks to fight white collar crime. Already we notice that search and seizure of evidence in large fraud cases (on request of member states) are carried out with the bare minimum of judicial involvement (no more than the signing of the search warrant).

15. And it is not just that. As I already mentioned, our clients can forget about obtaining information regarding the investigation they are under of they are providing information for, just because the national authorities don't have the information we ask for and refer us to the foreign authorities requesting the search. Our experience in the Dutch bank case confirms this. Additionally, the S.E.C. is showing a lot of interest in the results of these searches as I said earlier.

16. So your clients in the US with affiliated companies in the EU, must fear this as well. The more cooperative EU member states become, the less information your clients (within the EU but also outside), will get and in practice the more easier their administrations will be seized, with all the (terrifying) consequences involved.

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