Recent U.S. Court Decision on Witness Statements to Law Enforcement Agencies Has Significant Implications for European Criminal Defense Strategy

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In a recent decision with serious implications for European criminal defense practitioners in European–U.S. cross-border investigations, a U.S. Court of Appeals recently overturned LIBOR-rigging convictions against two London-based bankers in the U.S. because the cooperating witness for the U.S. Department of Justice (DOJ) had, before testifying, reviewed the defendants' statements, which had been lawfully obtained by UK authorities. As explained below, this decision is critically important to European criminal defense practitioners representing potential subjects and targets of cross-border investigations because it demonstrates how subtle distinctions between criminal investigation procedures in the U.S. and Europe can make the difference between conviction and dismissal in the U.S.

Right to Remain Silent

The Fifth Amendment of the U.S. Constitution establishes a total and complete right to remain silent. This means that, if questioned by U.S. law enforcement authorities, a person has the right to not provide any answers or information, and no inference may be drawn against that person for any reason in a criminal court. In addition, if a U.S. court order compels a person to testify, the Fifth Amendment prevents the use of the statements against that person, as well as the use of any evidence derived from the statements. In this way, the U.S. offers total and complete protection of silence in connection with criminal matters.

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In other jurisdictions, the right to silence is qualified. A recent U.S. case, *United States* v. *Allen*, examined interrogation procedures in the UK. There, the UK Financial Conduct Authority (FCA) had compelled investigation targets to appear and answer questions. Under UK law, not only can the refusal to answer questions result in imprisonment, but the authorities may use the compelled answers to gather more evidence and use that evidence against the target. Other jurisdictions have procedures similar to the UK or otherwise allow a court to draw adverse inferences against a target from his or her silence when questioned by law enforcement authorities. Such procedures are different from the U.S. constitutional model.

Thus, evidence legally obtained in European countries that would be admissible in European courts may be toxic to a U.S. criminal prosecution, which is what recently caused a U.S. court to overturn convictions of London-based bankers in the U.S.

Tainted Evidence

During late 2011 and 2012, the DOJ and numerous other government authorities, including the UK FCA, were investigating LIBOR rigging. As part of its investigation and consistent with its standard procedures, the FCA compelled two British traders of Rabobank, Anthony Allen and Anthony Conti, to answer questions under threat of proceedings for contempt of court. Consistent with UK law, they were *not* given immunity from their statements being used to develop other evidence that could be used against them.

The FCA also began enforcement proceedings in the UK against a third Rabobank employee, Paul Robson. During these proceedings, as per its routine practice, the FCA disclosed to Robson the relevant evidence against him — including Allen and Conti's compelled statements. Later, per an agreement with the DOJ, the FCA stayed the UK enforcement proceedings against Robson, who was then charged in the U.S.

In the U.S. case, Robson pleaded guilty to wire fraud and submitted to voluntary interviews with the DOJ. He became a key cooperator. The DOJ then charged Allen and Conti in the U.S. Consistent with the Fifth Amendment, the DOJ did not use their compelled statements from the FCA against them to obtain an indictment from a grand jury, nor did the DOJ use those statements at trial or to develop other information (in fact, the DOJ and FCA had agreed on a "wall" between their investigations, allowing the DOJ to voluntarily interview them first so the DOJ could not possibly rely on statements later compelled from them under UK law). Instead, the DOJ relied heavily on Robson's information to indict Allen and Conti, with Robson ultimately testifying as the DOJ's "star witness" against them at trial. They were convicted.

On appeal, the U.S. Court of Appeals for the Second Circuit, sitting in New York City, reversed the convictions and dismissed the indictments. Why? Because even though the DOJ had not relied on any of Allen and Conti's compelled statements at trial, its cooperator, Robson, had, in fact, reviewed those compelled statements before testifying. That, the court found, violated the U.S. Constitution, because: (1) the Fifth Amendment prohibits the use of a defendant's compelled testimony against him in criminal proceedings in the U.S., even if that testimony was compelled by a foreign sovereign in an entirely legal manner under its own laws; and (2) the Fifth Amendment applies not only to a defendant's compelled statements but also to evidence derived from that testimony — such as the testimony of Robson, the cooperator who had reviewed that evidence before testifying.

In reversing the convictions, the court rejected the DOJ's argument that precluding such evidence "could seriously hamper the prosecution of criminal conduct that crosses international borders." While recognizing that "so-called cross-border prosecutions have become more common," and that the DOJ has gone so far as to embed U.S. prosecutors in foreign law enforcement agencies, the court nevertheless determined that the risk of error in such coordination must fall on the U.S. authorities, rather than on the "subjects and targets" of the investigations.

Implications for European Criminal Defense Practitioners

Although the U.S. Court of Appeals placed the burden of risk of error in cross-border investigations on the authorities, rather than the "subjects and targets" of the investigations, the practical reality is that the risks — and benefits — of error fall on the European subjects and targets of cross-border investigations, who now need to keep the U.S. perspective in mind during cross-border investigations. This is because interrogation procedures in various jurisdictions have subtle variants that may be less protective of the right to silence than U.S. procedures. Thus, European criminal defense practitioners must be vigilant when representing individuals in cases that may, or already do, involve U.S. authorities. Otherwise, these individuals might inadvertently put themselves in worse positions with respect to the U.S. or miss out on a strategy that puts them in a better position.

Below are three different strategies that European criminal defense practitioners may wish to consider when representing subjects or targets of investigations involving potential U.S. aspects:

1. *Keep the U.S. cooperation option open.* In certain situations, cooperating with U.S. authorities is the best way to reduce or eliminate a client's sentencing exposure. A U.S. prosecutor's favorite weapon is a cooperating witness, and the DOJ has an established track record of offering substantial leniency to

cooperators in exchange for testimony against others. Therefore, before allowing a client to review discovery materials from local authorities, a European criminal defense practitioner should be certain that the materials would not be considered tainted under U.S. criminal law. This is so even for evidence lawfully obtained outside the U.S. If the client reviews material that would be regarded tainted in the U.S., then the DOJ may not be able to use the client as a witness, and the client may not obtain any leniency.

2. *Make U.S. cooperation less likely*. When a client may have little or no criminal exposure, but is a potentially valuable witness to U.S. authorities who does not want to become involved as a witness in a U.S. criminal case, it may make sense to allow that client to fully review all discovery material provided by local authorities, consistent with local procedures and laws. A client is under no U.S. legal obligation to refrain from fully exercising his or her disclosure rights in his or her local jurisdiction in order to prevent an evidentiary problem in a U.S. court.

3. *Use an aggressive discovery strategy if the client is charged in the U.S.* Europeans charged in the U.S. with crimes supported by evidence and witnesses from outside the U.S. need to attempt to exploit this potential pitfall for prosecutors. This needs to be set up during the discovery process, when counsel should specifically request documents from the DOJ relating to materials from non-U.S. jurisdictions disclosed to witnesses. In addition, counsel should use various other U.S. procedural rules to request foreign authorities to disclose materials given to potential DOJ witnesses. If counsel is able to establish that a DOJ witness has reviewed materials which were obtained outside the U.S. in a manner inconsistent with the Fifth Amendment, then the witness may be precluded from testifying at all.

Conclusion

The potential impact of the *Allen* case is far-reaching; the issues raised are present in essentially every case involving a cross-border element. Therefore the burden is on European criminal defense practitioners to very carefully understand and consider U.S. criminal law when representing clients in cross-border investigations, even before it is clear that the U.S. may become involved.