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Companies face conflicting expectations when investigating conduct under Israeli jurisdiction

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It is no secret that parallel corporate compliance investigations involving multiple enforcement agencies pose unique challenges. Companies embroiled in multilateral investigations have to navigate a host of sometimes conflicting obligations and expectations on issues including privilege, data privacy and cooperation with enforcement authorities, not to mention concerns that when it's time to pay fines and penalties, multiple enforcers will "pile on" to ensure receipt of their fair share of monetary recovery. In Israel, these challenges are exacerbated by the potentially conflicting expectations of Israeli and foreign enforcers concerning the scope and progression of corporate internal investigations, on the one hand, and cooperation in foreign government investigations, on the other.

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The stakes for companies seeking to navigate these challenges are high. Israeli authorities are increasingly investigating companies for fraud and corruption, focusing on conduct occurring in Israel as well as conduct abroad. This led watchdog Transparency International to classify Israel in 2018 as one of only seven "active" anti-corruption enforcers around the world, when just three years earlier it was considered one of the globe's least active enforcers. As such, understanding conflicting guidance and expectations from Israeli and other enforcers is critical for any company facing a risk of a cross-border investigation involving Israeli authorities.

Israeli authorities may view internal investigations as obstruction of justice

As background, in Israel it is standard practice for a company to suspend all or part of its internal investigation while local authorities conduct a parallel criminal investigation. This practice appears not to be firmly rooted in any legislative prohibition, case law, guidance from enforcement agencies or past enforcement precedent. Rather, it is largely based on informal understandings as informed by general practice and experience, driven by an underlying concern that continuing to investigate after Israeli authorities have commenced a criminal investigation could expose a company to charges for obstruction of justice.

For example, we are aware of Israeli counsel advising companies not to issue document preservation notices identifying the issues under investigation and to abstain from reviewing employee emails and documents, interviewing employees or otherwise assessing any underlying misconduct that Israeli authorities are investigating in parallel. In some instances, companies may even refrain from firing employees accused of misconduct because the company is unable to investigate and verify the allegations.

Guidance from the Israeli Attorney General's Office issued in 2013 on parallel investigations would appear to support such a general approach and in recent years, a number of Israeli and foreign companies have accordingly limited their internal investigations, generally citing provisions in Israeli law and advice from counsel as the reasons for such decisions.

The recent case of German engineering company ThyssenKrupp presents an example of how concerns over Israeli limitations on internal investigations may constrain a company's ability to investigate allegations fully. In 2018, Israeli police reportedly referred ThyssenKrupp to the Israeli public prosecutor's office for possible violations of anti-corruption laws in connection with an Israeli submarine contract. Contrary to typical practice, ThyssenKrupp told reporters that it "was not permitted to carry out investigative measures in Israel" due to concerns with provisions of Israeli law, and as a result could only reach preliminary conclusions as to the events under investigation.

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For companies facing scrutiny from US or UK enforcers, and other enforcement authorities that have established similar frameworks for cooperation in government investigations, these limitations can have significant consequences. Suspending or limiting an investigation can hinder a company's ability to cooperate fully with investigators and provide facts relevant in a parallel investigation, which can affect both how a government investigation proceeds and its ultimate resolution. Curtailing an investigation may also prevent the company from taking remedial actions, which can affect various aspects of an investigation's resolution and potentially put management and the board in a challenging position in discharging their fiduciary duties.

Below, we address these challenges and offer practical advice to companies on how best to navigate them.

International enforcement authorities want companies to investigate

Enforcers in the United States and many other countries seek to incentivise companies to conduct fulsome internal investigations and provide the facts learned from those investigations to investigators. Declining to pursue an internal investigation, or limiting its scope, can leave a company with fewer options toward resolution, facing higher penalty amounts and the exclusion of more favourable resolution vehicles, such as deferred prosecution agreements, non-prosecution agreements and declinations.

In the US Principles of Federal Prosecution of Business Organizations, for example, the US Department of Justice (DOJ), explains that "[i]n order for a company to receive any consideration for cooperation … [a] company must identify all individuals substantially involved in or responsible for the misconduct at issue, regardless of their position, status or seniority, and provide to the Department all relevant facts relating to that misconduct." If a company "declines to learn of such facts … its cooperation will not be considered a mitigating factor" by the DOJ, and the DOJ will not support any cooperation-related reductions of penalties at sentencing. Not receiving cooperation credit can have a significant effect on how much a company ultimately pays in an enforcement action resolution and can impact other aspects of a resolution (such as whether the DOJ will impose an independent compliance monitor).

Under the US Sentencing Guidelines, if a company receives credit for cooperating in the government's investigation, it gets a deduction in its "culpability score", which in turn determines the multiplier used to determine the applicable fine range. Additionally,

apart from credit under the sentencing guidelines, under the DOJ's Foreign Corrupt Practices Act Corporate Enforcement Policy, companies are eligible for additional, discretionary "discounts" of up to 50% from the low-end of the applicable sentencing guidelines range if, among other things, the company fully cooperates. Because corporate criminal fines in the US are typically based on the amount of pecuniary gain a company realises from the offence in question, in cases involving significant fines, cooperation credit can easily result in reductions in fines on the order of hundreds of millions of dollars.

The DOJ underscored the importance of conducting a fulsome internal investigation in its recent decision declining to prosecute New Jersey-based Cognizant Technology. The alleged misconduct supposedly reached the highest levels of the company but the DOJ declined to prosecute the company. Instead, in its declination letter, the DOJ highlighted the company's early voluntary disclosure and "full and proactive cooperation in this matter (including its provision of all known relevant facts about the misconduct)." Limiting its investigation or not fully pursuing the facts would likely have resulted in a different outcome for Cognizant.

Other international enforcement authorities similarly tie a company's internal investigation to the possibility of cooperation credit and more favourable resolution terms. For example, the UK's Serious Fraud Office has afforded companies significant discounts on monetary penalties (such as 50% in the case of engineering company Rolls-Royce) on account of cooperation, among other factors. Similarly, in investigations by the World Bank Integrity Vice Presidency, conducting a corporate internal investigation of the alleged misconduct and sharing the relevant facts with investigators can qualify a company for a penalty reduction of 33% or more off of the total fine. As more countries such as France adopt resolution vehicles similar to the US deferred prosecution agreement, internal investigations and cooperation will continue to be a driver for resolution outcomes.

The solution

Against the backdrop of cooperation frameworks outlined above, companies facing parallel cross-border investigations involving Israeli and foreign enforcement authorities face a challenging risk calculus: how to balance potential exposure in Israel for obstruction of justice against the potential consequences of losing cooperation credit with foreign enforcement authorities. As an initial matter, consultation with counsel experienced in handling parallel investigations is critical to successfully navigating potential conflicts between the expectations of Israeli and foreign enforcement authorities. With that as a background assumption, we offer several steps that may help companies navigate such conflicts.

First, if possible, move quickly to conduct a thorough internal investigation, or at least start one, *before* Israeli authorities surface. Obviously, timing is everything here, and while this may not be possible in cases where Israeli authorities are involved at the outset of a company's internal investigation, in many cases, a company may have a period of months, or more, before enforcers surface. In this period, a company can take critical steps to ensure that it preserves its ability to obtain cooperation credit down the road. Most importantly, a company can take steps to preserve relevant data and

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documents that may be relevant in a foreign enforcer's investigation. While it is often desirable to conduct interviews after reviewing a substantial amount of relevant documents, if the circumstances suggest that Israeli authorities will enter the picture imminently, a company may move to conduct interviews of key witnesses sooner than it would in ideal circumstances.

Second, do not assume that the pendency of an Israeli investigation means that *all*investigative and remediation activity must cease. Rather than simply hitting pause on an internal investigation, companies should prepare a detailed list of investigative steps that would reasonably be taken if permitted. They should also seek advice from Israeli counsel on whether they may proceed with any. If counsel's advice is that certain or all of these steps cannot proceed without unreasonable legal risk of being found to have obstructed the Israeli investigation, that should be thoroughly documented and the company should revisit those questions as the investigation unfolds. Just as in the context of data privacy restrictions, companies should expect that US and other enforcement authorities will pressure-test the company's position that it cannot take certain steps. These foreign enforcement authorities will assess the company's cooperation with reference to what they are seeing other companies do in similar circumstances. Companies should also be creative in considering alternative approaches that may not run afoul of Israeli law. For example, if the investigation in Israel is focused on an Israeli subsidiary of a US company, consider whether the US parent may take independent steps to investigate without undue risk of exposure for obstruction of justice in Israel.

Third, the company should engage in ongoing dialogue with enforcers in Israel and abroad. Open dialogue about the legal limitations imposed on the company's investigation will help manage expectations. It will also ensure that authorities don't misconstrue a company's conduct as a sign that the business doesn't take the allegations seriously and doesn't want to cooperate. Open dialogue with enforcers helps in the United States when the DOJ asks a company to "deconflict" or wait to interview certain witnesses until after the government has already spoken with them. Similarly, active and early conversations with Israeli authorities about the company's planned investigation may protect the company against the misperception of attempted obstruction and allow the company more freedom to take the investigative steps it needs to in order to comply with outside obligations.

While enforcement authorities are sometimes reluctant to give companies clear guidance on steps that may or may not be taken, in our experience, this type of dialogue will often allow a company to get enough of a read to make a risk-based decision on how to proceed, and generally helps to build credibility and good will with enforcement authorities. With respect to non-Israeli enforcement efforts, if the company is in a position where it cannot take certain steps that it might wish to take if so permitted, it should engage with the enforcement authority to explain the limitations on its investigation, armed with advice from Israeli counsel.

Fourth, even if the company decides to limit parts of its investigation, it should still be free, without undue risk of obstruction charges in Israel, to undertake a review of its compliance programme in Israel and abroad. For example, companies may seek to conduct risk assessments, and where appropriate, clarify existing policies, provide

additional training and implement and test policies and controls. All of these steps have the potential to enhance a company's compliance programme, minimise the risk of recurrence of misconduct and also position the company to earn credit in a resolution for appropriate remedial actions.

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