#26: Exotic settlement agreements

A relatively new phenomenon in fraud cases is the multi-jurisdictional settlement agreement. Various of these agreements – in which a suspect settles prosecution with multiple countries – have been subject of media attention and therefore it is unlikely that they escaped the attention of professionals in this field. Also in the Netherlands the phenomenon of multi-jurisdictional settlement agreement has set foot on the ground. A settlement with a Dutch company and the US authorities resulted in a transaction of USD 795 million of which the Dutch authorities got their fair share (USD 397,5 million). A profitable deal for the Dutch as this deal – according to a letter of the Dutch Minister of Justice to the government – made it possible for the Dutch authorities to reach their financial goals in the fight against fraud. In principle, these agreements however do not lead to the result that all parties involved are 'off the hook'. Various entities and private persons are still under criminal investigation by the Dutch authorities. In our opinion it is wise to guarantee their rights of defense in an early stage of the investigation, as every party involved has an interest that possible future issues deriving from such an investigation and settlement agreement land on their feet. Time to take a closer look into this phenomenon.

The Dutch authorities reveal in the press release the offenses VimpelCom allegedly committed. From the criminal investigation by the FIOD it shows that VimpelCom paid bribes to Uzbekistan government officials in 2006 in order to enter the Uzbekistan telecom market. After entering the market and around the expansion of the telecom licenses and 3G and 4G frequencies again bribes have been paid. Besides bribes of USD 114,5 VimpelCom also paid USD 30 million to charity of which some

were related to the government officials. According to the Dutch authorities these facts can be qualified as forgery and corruption.

Parallel to this investigation the Department of Justice (DoJ) of the United States and the Securities and Exchanges Commission (SEC) were conducting an investigation into the same facts. The DOJ charged VimpelCom with conspiracy to violate the antibribery and books and records provisions of Foreign Corruption Policy Act (FCPA). There was also a separate count of violating the FCPA's internal controls provisions. Ultimately this led to a settlement agreement between the company and the Netherlands and the United States.

Whether criminal offenses have been committed by the company or not we will never know. Even though some might feel that entering into such a settlement agreement equals admitting being guilty, this is not the case. At least not in the Netherlands. With a settlement agreement ("transactie") both parties – the prosecution service in the Netherlands and VimpelCom – achieve certainty about this case and avoid a dragging legal procedure. However there is no legal conviction. The settlement in the United States is different of nature; the company agreed to pay a criminal penalty to the DoJ.

This multi-jurisdictional settlement agreement is not the only one of its kind. For instance a large construction company in Brazil – Odebrecht – in 2016 settled with the Swiss, Brazil and the United States and paid a penalty also in relation to bribery of government officials. This was a consequence of the so called Brazilian led investigation into corruption 'Operation Car Wash'.

The phenomenon of multi-jurisdictional settlement agreement characterizes itself for extensive cooperation between multiple jurisdictions in their fight against fraud, especially corruption. As stated in the introduction this does

not mean that the jurisdictions lose possible offenses of private persons – such as directors or board members – out of sight. This also applies to the VimpelCom case. The prosecution service in the Netherlands stated in their press release that the investigation into the suspicions of private persons is still ongoing. These persons might face a public prosecution for facts of which their employee has settled.

The phenomenon of multi-jurisdictional settlement agreements in the Netherlands is expected to develop further. Experience with internal investigations of companies is likely to be part of this development. As is the (desirable) development of policy on self-reporting or self-disclosure. In our opinion in this phase it is crucial that the interest of the private persons – who might face prosecution later on – are guaranteed. This means that during the internal investigation employers should already recognize and respect these rights Not only from a duty of care perspective of the employer towards the employee. Also from the overall interest of the defense of the company. After all, the company also has an interest – even if it is only reputational – that future trials against their (former)employees land on their feet.

Do you have any questions about this subject or are you confronted with a related issue and would you like to discuss this with us? Please feel free to contact us via boezelman@hertoghsadvocaten.nl and boer@hertoghsadvocaten.nl.