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GLOBAL CARTEL AND FRAUD INVESTIGATIONS AND THE PERILS OF COMPELLED TESTIMONY

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Introduction

In the past year, district and appellate judges in U.S. criminal antitrust cases have raised significant concerns about the use of compelled testimony during high-profile trial proceedings. The scenario involves cooperating government witnesses whose critical testimony against criminal defendants may be influenced by their exposure to compelled, potentially self-incriminating testimony of the same defendants in non-U.S. proceedings.

The Fifth Amendment right against self-incrimination is an age-old and fundamental protection for criminal defendants in U.S. cases,[2] but "next gen" issues are arising in highly complex global investigations that involve both U.S. criminal cartel and international fraud and/or competition prosecutions. In the U.S., a witness or target in a criminal investigation cannot be "compelled in any criminal case to be a witness against himself."[3] However, at the crowded intersection of global parallel investigations spurred on by greater international enforcer

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[2] U.S. CONST. amend V. The Fifth Amendment of the U.S. Constitution protects individuals from being compelled in any criminal case to be a witness against himself. The full text of the Amendment is as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

[3] *Id.*

collaboration, witnesses and targets may be compelled to give testimony in non-U.S. proceedings under different procedural rules. When testimony is compelled from individuals who are under investigation in more than one jurisdiction, there are substantive and procedural perils for both prosecutors and defense counsel in any subsequent U.S. criminal cases involving the same people.

This article begins with a brief overview of the current global enforcement landscape and protections afforded to U.S. defendants under the Fifth Amendment's right against self-incrimination. The article next explores the recent high-stakes litigation involving the significant implications for the government and defendants when there is compelled testimony in criminal trials, including the Second Circuit's recent decision in *United States v. Alle*n.[4] Finally, the article discusses the significant implications of these multi-jurisdictional procedural clashes, and describes ways in which defense counsel can issue-spot and respond to scenarios which compelled testimony may impact the ability to cooperate, testify, or defend clients in U.S. proceedings.

The New Norm: Global Parallel Investigations with Antitrust and Other Potential Charges

The current procedural issues with compelled testimony come on the heels of this increased cooperation by global enforcement and regulatory agencies to prosecute cartel and other related violations, including fraud and corruption. The LIBOR (London Interbank Offered Rate), foreign exchange currency, municipal bonds, and precious metals antitrust investigations

[4] United States v. Allen, 864 F.3d 63 (2d Cir. 2017). The Second Circuit reversed defendants' convictions after both had been sentenced. *See* United States v. Allen, 160 F. Supp. 3d 684 (S.D.N.Y. 2016); Superseding Indictment, United States v. Allen, 160 F. Supp. 3d 684 (S.D.N.Y. 2016). Allen and Conti appealed on the grounds that the Department of Justice relied on evidence from a cooperating witness, Paul Robson, that had been tainted by his review of their compelled testimony in a UK investigation. *See* Robson, Thompson, Motomura Complaint, United States v. Allen, 160 F. Supp. 3d 684 (S.D.N.Y. 2016).

are all examples of collaboration and cooperation among domestic enforcers (e.g., U.S. Department of Justice (DOJ) Antitrust Division, Securities and Exchange Commission (SEC), U.S. Commodity Futures Trade Commission (CFTC)) and also global enforcers (e.g., Serious Fraud Office (SFO), Financial Conduct Authority (FCA), European Commission (EC), and other agencies). These enforcement agencies have concurrent and sometimes overlapping jurisdiction, but do not necessarily observe due process and procedural protections that are perfectly aligned.

The policies of the DOJ Antitrust Division and other U.S. agencies, including the U.S. DOJ and FTC Antitrust Guidelines for International Enforcement and Cooperation (International Guidelines), encourage interagency cooperation to enhance efficiency, gain a better understanding of relevant facts, and achieve consistent outcomes.[5] While international cooperation between multi-jurisdictional agencies may yield significant results and certain efficiencies, the International Guidelines also stress that coordinated investigations can give rise to both substantive and procedural legal issues.[6] Such concerns may include confidentiality, tracking evidence, and otherwise taking the proper measures to protect the integrity of criminal proceedings as required by the U.S. Constitution.[7]

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[5] *See* U.S. DEP'T OF JUSTICE AND FED. TRADE COMM'N, ANTITRUST GUIDELINES FOR INTERNATIONAL ENFORCEMENT AND COOPERATION §5 (2017), https://www.justice.gov/atr/internationalguidelines/download [hereinafter INTERNATIONAL GUIDELINES]. The ongoing coordination between agencies occurs through a variety of formal and informal means, including Mutual Legal Assistance Treaties ("MLATs"), bilateral agreements, and memoranda of understanding. Best practices and frameworks for more effective agency coordination are also continually evaluated and developed via international institutions such as the Organization for Economic Cooperation and Development ("OECD") and the International Competition Network ("ICN"), an informal network of competition law enforcers. *See* ORG. FOR ECON. COOPERATION & DEV., RECOMMENDATION OF THE OECD COUNCIL CONCERNING INTERNATIONAL CO-OPERATION ON COMPETITION INVESTIGATIONS AND PROCEEDINGS (2014), https://www.oecd.org/daf/competition/2014-rec-internat-coop-competition.pdf; INT'L COMPETITION NETWORK, ICN GUIDANCE ON INVESTIGATIVE PROCESS (2015), http://www.internationalcompetitionnetwork.org/uploads/library/doc1028.pdf.

[6] INTERNATIONAL GUIDELINES §5.

[7] *Id*.

While encouraging cooperation with other competition agencies, the International Guidelines make clear that the DOJ conducts "parallel" investigations with international competition agencies, rather than "joint" investigations," which may lessen the unduly compromise of the agencies' autonomy.[8] Among the important distinctions are that joint investigations may involve a broader scope of information sharing and shared charging and investigatory decision-making across agencies. Indeed, due to the closeness of investigatory processes, joint investigations can trigger significant discovery obligations for the prosecution to produce materials across other agencies, *i.e.,* from the entire "prosecution team" that charges a case. In contrast, parallel investigations allow agencies to engage in more cautious and limited sharing of evidence and generally preserve each agency's investigatory autonomy and independent charging decisions.[9] As such, each agency can direct its investigation in a manner that is consistent with its own particular procedural due process and charging requirements. With separate, but parallel investigations, companies and individuals understand that there may be communication and some level of information-sharing among agencies, however they have an expectation that they will be able to defend each investigation and appeal directly to each enforcer at the time of a charging or other case decision. For this reason, parallel (vs. joint) investigations have been viewed as more likely to avoid procedural difficulties at the charging or trial stages of cartel and other criminal cases.

[8] *Id*., at n.139. The sharing of evidence between agencies that is independently gathered does not generally turn a parallel investigation into a joint one. *See also* United States v. Finnerty, 411 F. Supp. 2d 428, 433 (S.D.N.Y. 2006) ("The mere fact that the Government may have requested and received documents [] in the course of its investigation does not convert the investigation into a joint one…").

[9] *See, e.g.*, U.S. v. Gupta, 848 F. Supp. 2d 491, 494-95 (S.D.N.Y. 2012) (distinguishing joint and parallel investigations by characterizing the former as one "where the Government and another agency decide to investigate the facts of the case together").

Nonetheless, there remain significant complexities in parallel investigations, including one that has potentially severe consequences for U.S. prosecutors: multiple enforcers taking testimony from the same company or individual. Although it is possible to conduct shared interviews in parallel investigations, it is also common for each agency to separately interview or otherwise seek testimony.

Whether an enforcement agency can compel individuals to give statements, and the manner in which the agency requests and records testimony varies significantly. For example:

- In U.S. criminal cartel investigations, prosecutors can seek sworn testimony in grand jury proceedings, which may require the government to provide testifying witnesses with immunity pursuant 18 U.S.C. §§ 6002[10] and 6003.[11] In the absence of immunity, testimony of potential targets would be compelled and would create Fifth Amendment issues. Outside a grand jury context, the DOJ also often interviews subjects of an investigation on a voluntary basis and provide "direct use" immunity to the subject being interviewed. What this means is that the DOJ is able to gain information via voluntary, non-compelled interviews and agrees not to use the subject's statements in any subsequent prosecution directly against the subject (e.g., introduced as evidence in criminal trial of the subject), unless it determines that the subject has engaged in perjury or obstruction.[12] Accordingly, core protections against the use of compelled testimony against a witness in criminal contexts continues to apply.

[10] 18.U.S.C. §§ 6002 (2009). Section 6002 sets forth the statutory authority for the issuance of an immunity order in court or other U.S. proceeding. Upon the issuance of a Section 6002 order, the witness may no longer refuse to testify on based his Fifth Amendment rights.

[11] 18.U.S.C. §§ 6003 (2010). Section 6003 describes the authority of the Department of Justice to request an immunity order when it is in the public interest for a witness to testify.

[12] The Department of Justice's Criminal Resource Manual outlines precautions that prosecutors should take to ensure that evidence from compelled testimony is not used in a way that taints prosecutions. See U.S. DEP'T OF

- The EC has no statutory power to compel statements from individuals or provide evidence under oath. Nevertheless, protections against compelled testimony are afforded by individual member states, the European Community law, and the European Convention. In *Orkem v Commission*,[13] the European Court of Justice recognized that, as a general matter, European Union law granted a certain degree of protection against self-incrimination for the purpose of respecting the rights of defense. The court held that the Commission cannot compel an undertaking to provide it with answers which might involve an admission on its part of the existence of an infringement that it is incumbent upon the Commission to prove.[14] Where an individual, acting on behalf of a legal person or in a personal capacity, makes a statement it is strictly speaking "voluntary." The EC may, however withhold immunity from, or decline to treat with leniency, a corporation which does not make its directors and employees available for interview.[15] During the course of the dawn raid, the Commission may require the individual to provide an oral explanation of the documents and information found, with the European Courts defining such authority to issues of the collection on facts or documents relating to the subject matter and purpose of the investigation, rather than an opportunity for the EC to ask

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JUSTICE, U.S. ATTORNEYS' MANUAL, CRIMINAL RESOURCE MANUAL § 726 (1997). The Manual counsels that prosecutors take three steps to avoid taint: first, prepare a signed memorandum summarizing the existing evidence against the witness before testimony is given; second, record the witness's testimony verbatim; and third, record the gathering of future evidence relating to the witness after testimony is given. *Id.*

[13] Case 374/87 *Orkem v Commission* [1989] ECR 3283.

[14] *Id.*, ¶¶ 34-35. Subsequent to *Orkem*, the European Court of Human Rights has held that Article 6 of the European Convention similarly implies a privilege against self-incrimination in criminal proceedings. *See Funke v France* [1993] 16 Eur. Ct. H.R. 297 (1993). Because EU competition law does not recognize criminal offenses, it does not appear likely that the European Convention could itself constitute a legal ground for protection against compelled testimony for cartel conduct, even if otherwise applicable to competition law offenses adjudicated before community courts. *Cf.* Case T-112/98 *Mannesmannrohren-Werke v. Commission* [2001] ECR-II 729.

[15] Obtaining immunity requires an undertaking to "cooperate fully" with the EC's investigation whereas obtaining lower fines through leniency is conditional on undertakings acting in a "spirit of cooperation."

general questions to the individuals. Non-compliance with such requests can lead to fines amounting to up to 1% of the corporation's annual turnover.

- As an example of a member state, in Germany, like the United States, the right not to incriminate oneself is a constitutional principle implemented into the German Code of Criminal Procedure. While criminal offenses are limited to bid-rigging conduct, the German Code of Criminal Procedure generally applies to the Bundeskartellamt's cartel investigations.[16] For this reason, the Bundeskartellamt is not able to compel testimony when enforcing its anti-cartel laws in prosecutions of civil competition offenses.[17]
- In the United Kingdom, the right against self-incrimination is an established English common law right the Competition and Markets Authority ("CMA") must respect during criminal cartel proceedings.[18] It is "not an absolute right," as the CMA can compel production of existing documents or factual information.[19] The CMA cannot, however, require a party to provide answers that would require an admission that it has infringed

[16] *See* GERMANY, ANTI-CARTEL ENFORCEMENT TEMPLATE, INTERNATIONAL COMPETITION NETWORK CARTELS WORKING GROUP §2 (2015), http://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Mustertexte/Leaflet-ICN_Anti-Cartel_Enforcement_Template.pdf?__blob=publicationFile&v=9.

[17] *Id.* §10 ("In general the cartel participant has a right not to self-incriminate himself which is a basic constitutional principle in German Criminal law and also applies to administrative offences.").

[18] The FCA (e.g. financial cases) and SFO (e.g. major fraud, bribery, and corruption cases) can also bring criminal actions. Like the CMA, both the FCA and the SFO are empowered to compel testimony, even in criminal cases, under certain circumstances. While the FCA's enforcement—which, like the U.S. Consumer Financial Protection Bureau, has both a competition and anti-fraud mandate—is largely civil, it took its first criminal action in early 2017 against an unlicensed consumer lender. See Press Release, U.K. Financial Conduct Authority, FCA takes first criminal action against an individual acting as unlicensed consumer credit lender (last updated Feb. 6, 2017), https://www.fca.org.uk/news/press-releases/fca-takes-first-criminal-action-against-individual-acting-unlicensed-consumer.

[19] *See* COMPETITION AND MARKETS AUTHORITY, ANTI-CARTEL ENFORCEMENT TEMPLATE, INTERNATIONAL COMPETITION NETWORK CARTELS WORKING GROUP §107 (2016), http://www.internationalcompetitionnetwork.org/uploads/templates/cartel%20template%20uk.pdf ("The parties have the right to invoke the privilege of self-incrimination but it is not an absolute right. The CMA cannot require a party to provide answers that would require an admission that it has infringed the law, but it can ask questions about or ask for the production of any documents already in existence or information relating to facts, such as whether a given employee attended a particular meeting.").

the law without providing direct use immunity but, unlike the U.S., may use evidence derived from the testimony against the witness. Furthermore, statements obtained under compulsion in CMA's civil investigation are not admissible against an individual in the prosecution for criminal cartel offence.[20]

- The extent to which Japan's constitutional protections against compelled testimony in criminal cases apply to cartel conduct depends upon whether the conduct is brought criminally or civilly.[21] In only the latter case, the Japanese Fair Trade Commission (JFTC) may compel a witness to testify during the administrative investigative process. Specifically, the JFTC may order individuals concerned with a case to appear before the JFTC for interrogation, hearing, to make a statement, or to obtain a report from that individual.[22] If the individual does not comply with JFTC's request, that individual may be subject penalties.
- While South Korea offers protections for individuals against self-incrimination in criminal cases,[23] competition law offenses are not recognized as criminal offenses. Accordingly, the Korean Fair Trade Commission (KFTC) may summon interested parties or witnesses to a hearing and elicit their testimony. If the interested parties or witness fail to appear without just cause, that individual could be fined for negligence not exceeding 10 million Won. However, for conduct that the KFTC refers to the Korea's Prosecutor's Office, constitutional protections against self-incrimination will apply.

[20] Enterprise and Regulatory Reform Act 2013 c. 24, §26A.

[21] *See* NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 38 (Japan).

[22] Act on Prohibition of Private Monopolization and Maintenance of Fair Trade (Act No. 54 of April 14, 1947)

[23] *See* DAEHANMINKUK HUNBEOB [HUNBEOB] [CONSTITUTION] art. 12, §2 (S. Kor.).

Competition authorities are increasingly in coordination with other U.S. government enforcers, including agencies with securities, commodities, consumer protection, and other anti-fraud investigatory powers, such as the SEC, CFTC, and State Attorneys General. These agencies can seek to compel testimony in civil investigations conducted in parallel with criminal grand jury proceedings. For example:

- Civil and regulatory agencies in the U.S., for example the SEC and CFTC, also have the ability to compel testimony and evidence, but face the same legal restrictions if a subject or target is the subject of a criminal proceeding and/or has criminal exposure. Fifth Amendment protections are triggered when civil and regulatory investigations seek to compel information that could be self-incriminating.[24]
- The Financial Conduct Authority (FCA) (e.g. financial cases) and Serious Fraud Office (SFO) (e.g. major fraud, bribery, and corruption cases) can also bring criminal investigations, and are empowered to compel testimony in certain circumstances, subject to protections against self-incrimination and legal privilege (Legal Professional Privilege (LPP)).[25] While the FCA's enforcement—which, like the U.S. Consumer Financial Protection Bureau, has both a competition and anti-fraud mandate—is a regulatory

[24] *See, e.g.*, SEC v. Dunlap, 253 F.3d 768, 770-78 n. 15 (4th Cir. 2001) (upholding subject's invocation of Fifth Amendment privileges in the face of contempt orders in an SEC investigation to testify and produce material); CFTC v. Garcia, No. 2:15–cv–237–FtM–38CM, 2015 WL 3453472 (M.D. Fla. May 29, 2015) (recognizing a subject's Fifth Amendment privilege in restricting the CFTC's efforts to compel an accounting of documents and information that implicated the subject personally).

[25] *See* Hannah von Dadelszen, Serious Fraud Office, Joint Head of Fraud, "The Serious Business of Fraud" (January 19, 2017) (describing authority and limitations of compelling evidence in fraud investigations), https://www.sfo.gov.uk/2017/01/19/the-serious-business-of-fighting-fraud/

agency, it took its first criminal action in early 2017 against an unlicensed consumer lender.[26]

In these instances, defendants must affirmatively assert their Fifth Amendment privileges to stay any request for testimony.

***Kastigar and Predecessor Cases*: U.S. Legal Framework Regarding Compelled Testimony and Immunity**

Although many countries have constitutional and other due process protections to prevent criminal targets and defendants from being forced to give self-incriminating testimony, issues with compelled testimony are arising more frequently in U.S. cases. This is due to the number of individual criminal prosecutions charged and that have the potential to go to trial. In the U.S., as in some jurisdictions, corporate entities do not have constitutional rights against self-incrimination and therefore corporate cartel prosecutions do not trigger the same concerns.

Under the Fifth Amendment and U.S. federal criminal law, an individual cannot be forced to testify as a witness against himself in a criminal case,[27] and previously compelled testimony from that individual – or evidence that derives from that compelled testimony – cannot be used against him.[28] The implication of these legal restrictions is that once compelled testimony is introduced into complex parallel investigations, prosecuting agencies face

[26] *See* Press Release, U.K. Financial Conduct Authority, FCA takes first criminal action against an individual acting as unlicensed consumer credit lender (last updated Feb. 6, 2017), https://www.fca.org.uk/news/press-releases/fca-takes-first-criminal-action-against-individual-acting-unlicensed-consumer.

[27] U.S. CONST. amend. V. This article focuses on testimony compelled in the course of parallel government investigations by government agencies, but there are also other testimonial settings in which witnesses can exercise their Fifth Amendment rights and/or other protections in criminal cases. Individuals under criminal investigation can refuse to testify in civil proceedings or other settings in which sworn testimony is required. In addition, public employers cannot fire or discipline employees for refusing to incriminate themselves, and have a duty to advise employees of their right to silence in this context, or "*Garrity* rights." *See* Garrity v. New Jersey, 385 U.S. 493 (1967); Kalkines v. United States, 473 F.2d 1391, 1398 (Ct. Cl. 1973).

[28] United States v. Allen, 864 F.3d 63, 91 (2d Cir. 2017).

formidable hurdles in insulating their indictments from defense attacks based on the Fifth Amendment.

The scope of the Fifth Amendment's protections and treatment of compelled testimony in criminal cases have evolved over a series of U.S. Supreme Court cases beginning with its 1892 decision in *Counselman v. Hitchcock*.[29] In *Counselman*, the Court first explored concepts of use and derivative use immunity in the context of a witness who had refused to testify in a grand jury proceeding regarding alleged railway tariff violations by several companies and other individuals. A predecessor of the current U.S. Code during *Counselman* precluded use of the witness's statements against him in any criminal proceeding. However, the Court found that had the witness testified,

> [The statute] could not prevent the obtaining and the use of witnesses and evidence which should be attributable directly to the testimony he might give under compulsion, and on which he might be convicted, when otherwise, and if he had refused to answer, he could not possibly have been convicted.[30]

Given that potential for use of the witness's incriminating statements to obtain other evidence against him, the Fifth Amendment should be read broadly to protect the witness from giving self-incriminating testimony in the grand jury proceeding, even if that particular proceeding was not focused on the witness and the statute provided some protection. As the Court stated: "But a mere act of Congress cannot amend the Constitution, even if it should engraft thereon such a proviso."[31]

[29] Counselman v. Hitchcock, 142 U.S. 547 (1892).

[30] *Id.* at 564.

[31] *Id.* at 565.

In *Malloy v. Hogan*[32] and *Murphy v. Waterfront Commission of New York Harbor*,[33] the Supreme Court considered the Fifth Amendment's protection against self-incrimination in the context of U.S. federalism. In *Malloy*, the Court evaluated whether the Fifth Amendment's protection against compelled testimony applied to state criminal cases. Employing the doctrine of "reverse incorporation," the Court held that the Fifth Amendment did apply to state-level prosecutions, and insisted that "it would be incongruous to have different standards determine the validity of a claim of privilege based on the same feared prosecution, depending on whether the claim was asserted in state or federal court."[34] In a related case, in *Murphy*, the Court addressed whether testimony compelled upon grant of immunity by a state authority can be used against the witness in a federal case.[35] Overruling prior case law, the Court made clear that the protection against self-incrimination applies to criminal cases across jurisdictions: "[A] state witness may not be compelled to give testimony which may be incriminating under federal law unless the compelled testimony and its fruits cannot be used in any manner by federal officials in connection with a criminal prosecution against him."[36]

In 1972, the Supreme Court again revisited the scope of the Fifth Amendment and restrictions on compelled testimony in *Kastigar v. United States*.[37] By that time, Congress had passed a statute, 18 U.S.C. § 6002, which had been drafted to meet "the conceptual basis of *Counselman*, as elaborated in subsequent decisions of the Court, namely, that immunity from the

[32] Malloy v. Hogan, 378 U.S. 1 (1964).

[33] Murphy v. Waterfront Comm'n of New York Harbor, 378 U.S. 52 (1964).

[34] *Malloy*, 378 U.S. at 11.

[35] *Murphy*, 378 U.S. at 53 (inquiring "whether one jurisdiction within our federal structure may compel a witness, whom it has immunized from prosecution under its laws, to give testimony which might then be used to convict him of a crime against another such jurisdiction").

[36] *Id.* at 79.

[37] Kastigar v. United States, 406 U.S. 441 (1972).

use of compelled testimony and evidence derived therefrom is coextensive with the scope of the privilege."[38] In *Kastigar*, several individuals had been granted use and derivative use immunity pursuant to Section 6002, but nevertheless refused to give testimony in a federal proceeding because they had not been given "transactional immunity," i.e., immunity from prosecution for any offenses relating to the testimony (regardless of whether there is an independent source of evidence unrelated and not derivative of any self-incriminating testimony). As the Court explained: "Transactional immunity, which accords full immunity from prosecution for the offense to which the compelled testimony relates, affords the witness considerably broader protection than does the Fifth Amendment privilege. The privilege has never been construed to mean that one who invokes it cannot subsequently be prosecuted."[39] The Court therefore held that although Section 6002 was coextensive with the Fifth Amendment's protections, transactional immunity was not constitutional required in order for the individuals to testify.

The Court's decision also laid the groundwork for a procedural process through which a charged defendant can challenge the government's use of evidence on Fifth Amendment grounds. The Court noted in *Kastigar* that "[o]ne raising a claim under this statute need only show that he testified under a grant of immunity in order to shift to the government the heavy burden of proving that all of the evidence it proposes to use was derived from legitimate independent sources." [40] Following *Kastigar*, courts have held "*Kastigar* hearings" when previously immunized witnesses challenge the government's evidence, after which the court determines whether all the government's evidence against the individual "is derived from a legitimate source

[38] *Id.* at 452-53.

[39] *Id.* at 453.

[40] *Id.* at 461-62.

wholly independent of the compelled testimony."[41] In other words, evidence used against an individual in a criminal proceeding should not be 'tainted' or from the fruits of that person's compelled testimony. Once a defendant establishes that he has been compelled to testify and that the U.S. Government had access to such testimony, the defendant has no burden to prove that a hearing is required. The highly fact-specific burden is upon the U.S. Government to show by a preponderance of evidence that no use of the compelled testimony from the individual was utilized in the proceedings.[42] The prosecution's burden is not insurmountable, however, and it need not show that it had no exposure to the immunized testimony, rather demonstrate the integrity of the charges by showing that it had independent evidence that was not tainted.[43] To protect these rights of the individual against self-incrimination, a trial court may hold a *Kastigar* hearing pre-trial, mid-trial, or post-trial after a jury verdict. The court may hear testimony or review declarations of agents and prosecutors, and receive significant evidentiary briefing during the course inquiring into the content as well as the source of the grand jury or trial witness testimony. Where there has been a question of taint, the DOJ may have taken internal measures to document the path of their investigations, including drafting memoranda describing the sources of evidence, the dates upon which the evidence was obtained (in particular after any

[41] *Id.* at 460.

[42] United States v. North, 910 F.2d 843, 872-873 (D.C. Cir. 1990). The court in *North* also held that the U.S. Government may also meet this burden by showing that the item is harmless beyond a reasonable doubt.

[43] *See, e.g.*, United States v. Catalano, 491 F.2d 268, 272 (2d Cir. 1974) (rejecting the suggestion that "access to grand jury testimony ipso facto prevents the government from carrying its burden under *Kastigar*); see also United States v. Fisher, 700 F.2d 780, 785-86 (2d Cir. 1983) (declining to dismiss defendant's conviction where there was no indication defendant's compelled statements were introduced at trial and there was no indication defendant's arrest was prompted by such statements).

testimony has been compelled), and also protocols taken to keep transcripts of compelled testimony in a secured location to avoid inadvertent access.[44]

Upon the court's evaluation under *Kastigar*, if the court finds that the government failed to meet its burden to show that charges were supported by independent evidence not tainted by the compelled testimony, the charges against an individual may be dismissed or a new trial ordered. Even where charges are dismissed, courts may still allow the DOJ to re-charge defendants where there is an indication that a case could be brought based on evidence that has not been tainted by compelled testimony.[45] Conversely, where the government can show that any violation was harmless, no relief may be granted. For example, if a grand jury would have indicted the defendant even absent the tainted evidence, courts may uphold convictions.[46] In most instances, *Kastigar* inquiries involve highly fact-intensive evaluations of the investigative record, sometimes going back to early stages of a grand jury proceeding.

Recent U.S. Decisions Involving Compelled Testimony

In long-running multi-jurisdiction parallel investigations, in involving dozens of corporate targets and hundreds of potential subjects and targets who may be interviewed numerous times, it may become nearly impossible to avoiding the taint of compelled testimony. The stark consequences of this investigatory and procedural challenge are reflected in the U.S. Court of Appeals for the Second Circuit's recent reversal of criminal convictions and dismissal of

[44] *See* USAM Criminal Resource Manual 720, 726 (Avoiding Taint); USAM 9-23.130.

[45] This was the case in a high-profile federal investigation involving employees of the defense contractor Blackwater. After the district judge dismissed indictments on the grounds that the evidence had been tainted by compelled statements given to the U.S. Department of State, the Court of Appeals for the D.C. Circuit vacated the decision in part because the district court had improperly treated the compelled testimony "as single lumps and excluding them in their entirety when at most only some portion of the content was tainted[.]" See United States v. Slough, 641 F.3d 544, 550-51 (D.C. Cir. 2011). Of five defendants in the case, the DOJ dismissed charges against one and the four other defendants were re-tried and convicted several years later.

[46] *See* United States v. Rivieccio, 919 F.2d at 812, 816 n. 4 (2d Cir. 1990); United States v. Pelletier, 898 F.2d 297, 303 (2d Cir. 1990).

indictments in *United States v. Allen*.[47] After two defendants, Anthony Allen and Anthony Conti, were tried and convicted of federal criminal charges stemming from the global LIBOR investigations, the Second Circuit reversed the convictions after finding that the cases had been tainted by the testimony of a witness, Paul Robson, who had "substantial exposure" to compelled testimony of the defendants in a parallel UK investigation.[48]

The global LIBOR investigations involved parallel inquiries by numerous U.S. and non-U.S. enforcement authorities, including the DOJ Antitrust and Criminal Divisions and the FCA. The Second Circuit's opinion focused in on specific procedural aspects of how interviews were conducted and testimony obtained from the three individuals in separate FCA and DOJ interviews:

> The FCA's interviews were compulsory; they were conducted under a grant of direct (but not derivative) use immunity, and a witness's failure to testify under such terms could result in imprisonment. In order to avoid potential problems under Kastigar, the DOJ took care to conduct their interviews wholly independently of the FCA's interviews and their fruits. Specifically, the FCA agreed to procedures to maintain a "wall" between its investigation and the DOJ's investigation, including a "day one/day two" interview procedure in which the DOJ interviewed witnesses prior to the FCA. In accordance with that protocol, the FCA interviewed Robson (on January 17, 2013), Conti (on January 25, 2013), and Allen (on June 20 and 21, 2013), among others.[49]

As a refusal to testify before the FCA carried the possibility of imprisonment, the testimony of Allen and Conti was considered by the Second Circuit to have been compelled and not voluntary. The FCA subsequently initiated an enforcement action against the third individual, Robson, which included the disclosure of the compelled testimony obtained from the Allen and Conti interviews. Robson reviewed some of this testimony provided by the FCA. On a parallel track,

[47] United States v. Allen, 864 F.3d 63 (2d Cir. 2017).

[48] *Id.* at 66.

[49] *Id.* at 76 (footnotes omitted).

the DOJ's criminal prosecutors investigated all three individuals, charging Allen and Conti in an indictment. Robson pleaded guilty to the DOJ criminal fraud charges, and became a cooperating witness for the DOJ's investigations, including providing the DOJ with evidence which it would ultimately be used to prosecute Allen and Conti in the U.S. In pre-trial proceedings, defense counsel raised *Kastigar* issues and the district court held a two-day *Kastigar* hearing, but did not dismiss the charges prior to trial.

The use of evidence by the DOJ that was derived from Robson during the three-week trial against Allen and Conti turned out to be pivotal in the reversal of the convictions of Allen and Conti. Robson testified in the grand jury in the U.S. that led to the charges against Allen and Conti, and at the subsequent criminal trial, the Second Circuit found that "Robson was the sole source" for certain material aspects of the trial testimony of an FBI agent, FBI Special Agent Jeffrey Weeks.[50] That evidence from Robson included that Allen had instructed LIBOR submitters in London to consider the positions and requests of Rabobank traders, and that Robson sat near Conti and was aware that Conti set U.S. dollar LIBOR rates using his own positions as a reason or justification. In this trial, the defendants did not argue at trial that it was permissible to accommodate requests of traders in setting LIBOR, so factual evidence to prove they had done so was probative. Both Conti and Allen were convicted by the jury in the Southern District of New York.

After convictions by the jury, Allen and Conti appealed, arguing that use of the evidence obtained from Robson violated their Fifth Amendment rights. Finding that their testimony was compelled by the FCA and that the evidence provided by Robson to the DOJ was tainted by exposure to the compelled testimony, the Second Circuit reversed Allen and Conti's convictions.

[50] *Id.* at 68.

Among the key holdings is that U.S. Fifth Amendment protections extend to scenarios involving the use of testimony compelled by a foreign enforcement agency. In addition, the Court held that the government does not meet its burden of showing that its charges are not shaped, altered or affected by compelled testimony merely with the generalized denial of the taint by the witness, in this case, Weeks and Robson. Upon reversal, the DOJ urged the Second Circuit to rehear its three panel decision, arguing the decision would inhibit the U.S.'s ability to bring international cases. The Second Circuit denied the US government's petition for a rehearing and its ruling currently still stands.[51]

U.S. v. Allen could have a chilling effect in the short term on the DOJ's willingness to seek out active simultaneous coordination with overseas agencies that have parallel authority to bring criminal and other charges, such as fraud or corruption. As the Second Circuit's *Allen* decision made clear, even if testimony is compelled by a foreign sovereign, traditional Fifth Amendment doctrine continues to apply.[52] The ruling in *Allen* is not limited to simply compelled testimony, and extends beyond to the fruits of all the illicit testimony, i.e., evidence that derives from the compelled testimony. Types of evidence other than testimony, including but not limited to the identities of potential witnesses, the location of documents or other leads, may all be impermissibly obtained by US authorities, and therefore could all be subject to Fifth Amendment challenges.

Following on the heels of *Allen*, another judge in the Southern District of New York ordered the U.S. Government to hold a *Kastigar* hearing to demonstrate that the evidence to the grand jury in return of the indictment was not obtained directly or indirectly from the defendants'

[51] The U.S. government has until February 2018 to seek review by the Supreme Court.

[52] 864 F.3d at 66.

compelled testimony. In *United States v. Matthew Connolly and Gavin Campbell Black*,[53] the presiding judge, U.S. District Judge Colleen McMahon, declined to dismiss the indictment, but granted the defense request for a *Kastigar* hearing in response to arguments that Gavin Campbell Black was compelled to provide testimony to the FCA. Judge McMahon was not persuaded by the U.S. Government's argument that Fifth Amendment protection was only applicable to testimony compelled by the U.S., and not to foreign sovereigns. The court ruled that that the U.S. Government's unsworn representation that no witness and no members of the prosecution team were exposed to Black's compelled testimony was not sufficient to deny the defendant a *Kastigar* hearing. The *Kastigar* hearing in *Connolly* began on December 13, 2017, and another hearing date has been set for February 2018. The evaluation by a U.S. court in this second case will shed further light on how high of a burden the government faces in proving its charges can be insulated from investigatory events in a parallel international investigation.[54] *Allen*, *Connolly*, and other Circuit decisions in high-profile U.S. criminal cases illustrate the complexity that the government faces when testimony and other evidence compelled from potential targets.[55]

Defense Counsel: Practice Points for Potential Compelled Testimony Scenarios

In starting to evaluate the longer-term implications for defense counsel from decisions like *U.S. v. Allen* and prior cases involving the evaluation of taint under *Kastigar*, there are four baseline points that are clear:

[53] Decision and Order on Defendants' Pretrial Motions, United States v. Connolly, No. S1 16 CR 370 (Oct. 19, 2017).

[54] The hearing will resume in February or March, when FCA officials are available to testify. Judge McMahon, who is trying the case, has been reported as saying that she was "not thrilled with the way I've been treated by the trial team," in reference to factual discrepancies in the DOJ filings and affidavits. *See* Jody Godoy, *Ex-Deutsche Traders' Libor Trial Delayed by Taint Inquiry*, Law 360 (Dec. 14, 2017), https://www.law360.com/articles/994990/ex-deutsche-traders-libor-trial-delayed-by-taint-inquiry.

[55] *See, e.g.*, United States v. Slough, 641 F.3d 544 (D.C. Cir. 2011)); United States v. Gallo, 859 F.2d 1078, 1082 (2d Cir. 1988).

1. The Fifth Amendment's prohibition on use of compelled testimony in U.S. criminal cases applies even where a foreign sovereign (i.e., enforcement agency) has compelled the testimony in its own parallel proceeding.
2. In U.S. cases, if the government presents a cooperating witness who has had substantial exposure to a defendant's compelled testimony, it is required to show under the *Kastigar* standard that the witness's review of compelled testimony did not shape, alter, or affect the evidence used by the government.
3. A mere denial of taint by the witness who has been exposed to the compelled testimony is not sufficient to meet the prosecution's burden of proof.
4. The government's failure to meet its burden under *Kastigar* may result in dismissal of charges prior to trial, or as in *Allen*, after a jury verdict and sentencing.

There are several important practice points for cooperating corporate counsel in cartel investigations:

- A corporate entity does not have Fifth Amendment rights in the U.S., so there may not be a direct defense based on compelled testimony that would result in dismissal of corporate charges. However, there are still implications. First, to the extent that the DOJ considers facilitating employee testimony as part of complete and effective cooperation, corporate counsel must remain aware of potential compulsion of its witnesses in other jurisdictions and ready to resolve procedural issues, if possible. Such compulsion may undermine the cases for which the DOJ seeks the company's cooperation. In the same way that U.S. defense counsel advise the DOJ of deposition subpoenas that create procedural issues, defense counsel should also raise early with the other agencies that the DOJ should be in the loop on any testimony being sought outside of the DOJ criminal

investigation. There may be no way to halt the interviews, but the DOJ should be aware before the interviews occur.

- Second, in follow-on civil litigation, companies may be in a position to support the assertion of individual employees' Fifth Amendment rights not to testify in depositions. When and if the same employees are compelled to provide testimony in other government proceedings, this may be support plaintiffs to raise waiver arguments in civil litigation, i.e., that any self-incrimination protection has been waived and civil depositions can be taken, or for discovery of the sworn transcripts.
- It is worth evaluating whether the company can proactively negotiate the disclosure of information without a sworn interview or testimony of employees in another jurisdiction. For example, voluntary interviews with employees that are not sworn, disclosure of limited company work product in lieu of an interview, or where possible, and requests for simultaneous joint interviews with criminal and civil authorities. There are several creative ways that enforcers can coordinate to avoid procedural issues created by parallel proceedings.
- If testimony is to be compelled from employees in any jurisdiction or otherwise taken in multiple investigations simultaneously, corporate counsel should know the rules for each jurisdiction, how the testimony is recorded, and whether it will be available to corporate counsel on tape or by transcript. In defending multi-front parallel investigations, it is critical to understand whether there are significant inconsistencies in testimony from the same individuals across parallel investigations, should there be criminal trials or civil cases in the U.S. for which the case files from other jurisdictions may become the subject of discovery and/or pre-trial disputes.

For individual counsel, the implications of compelled testimony in parallel investigations are perhaps even more significant:

- As with a cooperating corporate counsel, for individual defense counsel for a cooperating witness who has already pleaded guilty, any exposure to compelled testimony may make the client unusable as a witness at any trial and more generally, undermine effective cooperation. For a client that has pleaded guilty, concerns over taint and procedural difficulties may make it more difficult to advocate for a strong government statement and submission at sentencing (*See* U.S.S.G. 5K1.1), which in the U.S. is essential to a defendant's chance for a sentencing reduction.
- Individual defense counsel with a client under investigation and in a pre-charge posture with the DOJ will want to evaluate:
  - i. If the client is compelled to give testimony in another proceeding, whether the client's testimony will be shared with the DOJ in some form and if so, what Fifth Amendment challenges should be made prior to charging?
  - ii. Post-charging, whether there are grounds for a *Kastigar* hearing, *e.g.*, and a motion to dismiss the charges if it is possible that witnesses or agents have been exposed to compelled testimony. If so, there may be pre-trial discovery of client statements to be sought pursuant to Rule 16 of the Federal Rule of Criminal Procedure, 18 U.S.C. § 3500 (§3500 or *Jencks* material), and other grounds for disclosure by the prosecution. Hold the government to its burden of having documented and preserved a record of the integrity of its investigation based on non-tainted evidence.
  - iii. Whether the client's compelled statements could become discoverable in civil litigation, and potentially lead to inclusion as an individual civil defendant.

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The impact of compelled testimony is yet another procedural wrinkle – among many – in global multi-front enforcement that is the new norm. As parallel investigations by global enforcers continue at a greater scope and complexity than ever before, prosecutors and defense counsel alike will need to remain aware of the potential perils (and defense opportunities) of cross-border sharing and use of evidence.