

Global Investigations Review

The Practitioner's Guide to Global Investigations

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GIR

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Publisher's Note

The Practitioner's Guide to Global Investigations is published by Global Investigations Review (www.globalinvestigationsreview.com) – a news and analysis service for lawyers and related professionals who specialise in cross-border white-collar crime.

The guide was suggested by the editors to fill a gap in the literature – namely, how does one conduct such an investigation, and what should one have in mind at various times?

It will be published annually as a single volume and is also available online, as an e-book and in PDF format.

The volume

This book is in two parts.

Part I takes the reader through the issues and risks faced at every stage in the lifecycle of a serious corporate investigation, from the discovery of a potential problem through its exploration (either by the company itself, a law firm or government officials) all the way to final resolution – be that in a regulatory proceeding, a criminal hearing, civil litigation, an employment tribunal, a trial in the court of public opinion, or, just occasionally, inside the company's own four walls. As such it uses the position in the two most active jurisdictions for investigations of corporate misfeasance – the United States and the United Kingdom – to illustrate the approach and thought processes of those who are at the cutting edge of this work, on the basis that others can learn much from their approach, and there is a read-across to the position elsewhere.

Part I is then complemented by Part II's granular look at the detail of various jurisdictions, highlighting among other things where they vary from the norm.

Online

The guide is available to subscribers at www.globalinvestigationsreview.com. As well as containing the most up-to-date versions of the chapters in Part I of the guide, the website allows visitors to quickly compare answers to questions in Part II across all the jurisdictions covered.

The publisher would like to thank the editors for their exceptional energy and vision in putting this project together. Together we welcome any comments or suggestions from readers on how to improve it. Please write to us at:
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Preface

The history of the global investigation

Over the past decade, the number and profile of multi-agency, multi-jurisdictional regulatory and criminal investigations have risen exponentially. Naturally, this global phenomenon exposes corporations and their employees to greater risk of potentially hostile encounters with foreign law enforcement authorities and regulators than ever before. This is partly owing to the continued globalisation of commerce, as well as the increasing enthusiasm of some prosecutors to use expansive theories of corporate criminal liability to extract exorbitant penalties against corporations as a deterrent, and public pressure to hold individuals accountable for the misconduct. The globalisation of corporate law enforcement, of course, has also spawned greater coordination between law enforcement agencies domestically and across borders. As a result, the pace and complexity of cross-border corporate investigations has markedly increased and created an environment in which the potential consequences, both direct and collateral, for individuals and businesses are of unprecedented magnitude.

The guide

To aid practitioners faced with the myriad and often unexpected challenges of navigating a cross-border investigation, this book brings together for the first time the perspectives of leading experts from across the globe.

The chapters that follow in Part I of the guide cover in depth the broad spectrum of the law, practice and procedure applicable to cross-border investigations in both the United Kingdom and United States. Part I tracks the development of a serious allegation (whether originating from an internal or external source) through its stages of development, considering the key risks and challenges as matters progress; it provides expert insight into the fact-gathering stage, document preservation and collection, witness interviews, and the complexities of cross-border privilege issues; and it discusses strategies to successfully resolve cross-border probes and manage corporate reputation throughout an investigation.

Preface

In Part II of the book, local experts from 12 national jurisdictions respond to a common set of questions designed to identify the local nuances of law and practice that practitioners may encounter in responding to a cross-border investigation. We look forward to updating and expanding both parts of the book in future editions as the law and practice continues to evolve in this emerging field. *The Practitioner's Guide to Global Investigations* has been designed for external and in-house legal counsel; compliance officers and accounting practitioners who wish to benchmark their own practice against that of leaders in the fields; and prosecutors, regulators and advisers operating in this complex environment.

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Ireland

Carina Lawlor¹

General context and principles

- 1 Identify the highest-profile corporate investigation under way in your country, describing and commenting on its most noteworthy aspects as it relates to your country.

The Commission of Investigation into Irish Bank Resolution Corporation (IBRC), which was established by the government under Statutory Instrument No. 253 of 2015, is currently investigating IBRC, which was formed by the court-mandated merger of the now-defunct Anglo Irish Bank plc and Irish Nationwide Building Society.

This is a very significant investigation as it is connected to the collapse and subsequent wind-down of Anglo Irish Bank plc, a prominent Irish bank that collapsed in connection with the financial crash. The related trial of certain high ranking banking executives concerning their conduct before the bank collapsed was the longest criminal trial in the history of the state and resulted in penal sentences, which are rarely imposed in Irish business crime cases.

It is important both for the subject matter under investigation and also for the procedural conduct of such investigation in the future. In that regard, it has published a number of interim reports that have highlighted difficulties in conducting such investigations in Ireland, such as duties of confidentiality, privilege and the constitutional rights of persons implicated in the investigation.

- 2 Outline the legal framework for corporate liability in your country.

Corporations are separate legal entities and a company can be found liable for the criminal acts of its officers. Section 18(c) of the Interpretation Act 2005 provides that the term ‘person’

¹ Carina Lawlor is a partner at Matheson.

when used in legislation includes a corporate, unless otherwise specified. Companies can also be vicariously liable for the conduct of employees. Where the doctrine of vicarious liability does not apply, the state of mind of an employee can be attributed to the company in circumstances where the human agent is the 'directing mind and will' of the company, or when an individual's conduct can be attributed to the company under the particular rule under construction. A company can also be guilty of a strict liability offence, which is an offence that does not require any natural person to have acted with a guilty mind, such as health and safety legislation infringements.

3 In your country, what law enforcement authorities regulate corporations? How is jurisdiction between the authorities allocated? Do the authorities have policies relating to the prosecution of corporations?

An Garda Síochana (the Irish police) is the primary body for the investigation and prosecution of crime in Ireland, with a specialised wing for complex fraud-type offences (the Garda Bureau of Fraud Investigation). There are also a number of regulatory bodies with separate specific remit to investigate and enforce corporate crime. Such investigations are often carried out with the assistance of the police. These authorities include:

- the Office of the Director of Corporate Enforcement (ODCE), which monitors and prosecutes violations of company law;
- the Office of the Revenue Commissioners (the Revenue Commissioners), responsible for the collection, monitoring and enforcement of tax laws;
- the Competition and Consumer Protection Commission (CCPC), responsible for competition law and consumer protection;
- the Central Bank of Ireland, which regulates financial institutions;
- the Health and Safety Authority, which enforces occupational health and safety law; and
- the Office of the Data Protection Commission (ODPC), which is responsible for data protection law.

In terms of prosecution, offences are divided between summary (minor) offences and indictable (serious) offences. In general, regulatory bodies such as those listed above are authorised to prosecute summary offences directly. The Office of the Director of Public Prosecutions (DPP) is the relevant body for the prosecution of criminal offences on indictment, or for prosecution of summary offences outside the remit of regulatory bodies. The DPP has no investigative functions; the relevant investigating body prepares a file and submits it to the DPP for consideration. It is then solely at the discretion of the DPP as to whether a case will be taken.

4 What grounds must the authorities in your country have to initiate an investigation? Is a certain threshold of suspicion necessary to trigger an investigation?

This will depend on the statutory basis for that investigation. For the large part, investigations are initiated on the basis of a complaint alleging that an offence has been committed. Some bodies (such as the Standards in Public Office Commission) can only initiate investigations on foot of a complaint alleging an offence has been committed, where others, such as the

ODPC, can also initiate investigations on their own initiative. Different bodies use different factors to consider whether to initiate an investigation into a specific matter. For example, the GBFI has stated that they will assess whether or not to investigate a complaint on the basis of different factors such as the monetary loss involved, the international dimension to the complaint and the complexity of the issues of law or procedure that arise.

5 Does double jeopardy, or a similar concept, apply to prevent a corporation from facing criminal exposure in your country after it resolves charges on the same core set of facts in another country?

The long established principle of double jeopardy applies in Ireland. A corporation cannot be prosecuted twice for the same or similar offences on the same facts following a legitimate acquittal or conviction by an Irish court or by a court of competent authority in a foreign jurisdiction. There must be identity between the foreign and domestic offences. It is possible for the same course of conduct in an international setting to give rise to multiple separate offences in different jurisdictions.

The fact that a corporation entered into a DPA in a different country is unlikely to prevent prosecution in Ireland, which does not provide for the use of DPAs, unless the DPA was viewed as being equivalent to an acquittal or conviction.

Typically, the principle does not apply until proceedings are concluded. However, under the Criminal Justice (Money Laundering and Terrorist Financing) Act 2010 no proceedings may be initiated in circumstances where an individual has been charged under that Act in the absence of consent from the DPP.

6 Describe the principal challenges in your country that arise in cross-border investigations, and explain whether and how such challenges are dependent on other countries involved.

Cross-border investigations, whether by law enforcement, regulators or internal investigations by companies, pose challenges in every jurisdiction for practical, political and legal reasons. For investigations by Irish regulators and law enforcement agencies, the foremost consideration will be whether there is an existing framework for co-operation between Ireland and the other jurisdiction or jurisdictions. The Criminal Justice (Mutual Assistance) Act 2008, as amended, is the primary piece of legislation governing mutual legal assistance between Ireland and other countries. The extent of available co-operation under mutual legal assistance procedures is dependent on the identity of the corresponding state and the greatest level of co-operation is among other EU Member States. Co-operation with third countries (those outside the European Economic Area) is dependent on their ratification of relevant international agreements or the existence of a mutual assistance treaty agreed between them. Regulators and law enforcement can co-operate with their counterparts outside these formal procedures, and this will depend on the relationships between such bodies.

Investigations by regulators or law enforcement and by corporations can also encounter difficulties owing to different legal standards. For example, data protection laws in some countries can restrict the flow of information out of the country, and different levels of protection for private data may restrict the possibility of transfer between the jurisdictions.

Further, different rules can apply to matters such as the application of privilege and the constitutional protections owed to persons under investigation.

7 What bearing do the decisions of foreign authorities have on an investigation of the same matter in your country?

Investigations into similar matters in other jurisdictions are often the catalyst for investigations in Ireland. Irish authorities will usually try to co-operate with foreign investigation authorities, and the exchange of information through appropriate channels can aid an investigation greatly. Irish investigatory authorities will take notice of decisions of foreign investigatory authorities, but the weight given to such decision will vary depending on factors such as the similarity of the facts under investigation and the jurisdiction concerned. Ultimately, it will be a matter for the Irish authorities to determine whether and how to conduct their own investigations, and prosecutions and enforcement actions in other jurisdictions will at most be one of a number of factors considered.

8 Do your country's law enforcement authorities have regard to corporate culture in assessing a company's liability for misconduct?

Corporate culture can be relevant to considerations of proportionality. Authorities may not pursue a corporate prosecution if the conduct was of a 'lone wolf' individual and otherwise went against the corporate culture. It can also be a mitigating factor at sentencing. However, there are no strict rules and ultimately an ethical corporate culture will not block a prosecution for corporate misconduct.

9 What are the top priorities for your country's law enforcement authorities?

Each of the regulatory authorities listed above are concerned with the monitoring and supervision of activities within their competence. For example, the ODPC will be concerned with data protection while the Revenue Commissioners deal primarily with tax offences. Regulatory bodies typically publish their enforcement priorities for the year annually. For example, the Central Bank of Ireland has stated a current focus on, among other things, anti-money laundering and counter-terrorism financing compliance. The ODPC and the Central Bank of Ireland have both stated a current focus on cybersecurity.

10 How are internal investigations viewed by local enforcement bodies in your country?

Internal investigations are considered part of good corporate governance. However, companies are subject to reporting obligations in respect of certain offences and will therefore be required to escalate matters to law enforcement in certain circumstances (see question 36).

The Irish High Court ruled in *Mooney v. An Post* (1998) 4 IR 288 that the acquittal of an employee of criminal charges does not preclude employers from considering whether an employee should be dismissed on the basis of the impugned conduct. However, if criminal prosecution precedes an internal investigation, in general, internal disciplinary procedures are suspended to respect the individual's right to silence.

Before an internal investigation

11 How do allegations of misconduct most often come to light in companies in your country?

Specific points to note are as follows:

- Whistleblowers are protected by the Protected Disclosures Act 2014. Accordingly, great care must be taken not to violate these protections when allegations come to light in this way.
- Thematic reviews are typically carried out by regulators. By the time an allegation of misconduct has arisen on a thematic review or on foot of any other regulatory oversight, the company may not be able to remedy the matter or otherwise prevent an investigation or enforcement action. For example, the Central Bank of Ireland often bases its investigations under the Administrative Sanction Procedure under the Central Bank Act 1942, as amended, on matters which arose during thematic reviews.
- Where allegations arise through media reports, publicised litigation or other publicised external sources, there are more immediate public relations risks than where a matter arises internally. Companies should consider engaging a PR agency if there are significant reputational risks attached to any allegation of misconduct.
- As detailed below in response to question 36, a company will commit an offence if it fails to report certain suspected offences. Therefore the company itself may be obliged to report the conduct once it has a reasonable suspicion. If the company is a regulated entity, it may be required to make certain disclosures to its regulator or indeed consider a voluntary self-report. Further, auditors have additional disclosure obligations, and misconduct coming to light during their engagement may trigger a reporting obligation.

12 Are search warrants or dawn raids on companies a feature of law enforcement in your country? Describe any legal limitations on authorities executing search warrants or dawn raids, and what redress the company has if those limits are exceeded.

Search warrants and dawn raids are often used in investigations against companies, particularly by the CCPC and ODCE. Both company premises and private homes of relevant persons can be searched on foot of an appropriate warrant.

There are constitutional protections for persons subject to searches, particularly of private homes. Depending on the specific statute, a regulator or investigatory body would obtain a search warrant to enter a dwelling to conduct a search and to seize documents. There is a general requirement that there is some nexus between the investigation by the regulatory body of the offence in question and the dwelling in question. The body is only permitted to search the premises specified in the warrant and to seize items coming within the terms of the warrant.

Evidence seized outside the scope of a search warrant may, depending on the circumstances, be inadmissible at trial.

13 How can privileged material be lawfully protected from seizure during a dawn raid or in response to a search warrant in your country?

Privileged material is *prima facie* protected from examination by law enforcement or regulatory bodies. Specific statutes, such as the Companies Act 2014 and the Central Bank (Supervision and Enforcement) Act 2013, also provide for the protection of privileged information during investigations.

In practical terms, it can be difficult to determine during a seizure operation if material is privileged and sometimes the material will be isolated so that a claim of privilege can be assessed later.

The mechanism to assess whether privilege has been properly asserted will be dependent on the legislation under which the search warrant was granted. For example, the Competition and Consumer Protection Act 2014 provides a mechanism whereby material that is seized and which is claimed to be legally privileged is vetted impartially to determine whether privilege has been properly asserted.

14 Are there any privileges in your country that would prevent an individual or company from providing testimony? Under what circumstances may an individual's testimony be compelled in your country? What consequences flow in your country from such compelled testimony?

The Irish Constitution recognises a right to silence and the privilege against self-incrimination. Arrested suspects are brought into police custody for questioning 'under caution'. The suspect should be cautioned that they have the right to maintain silence, and anything they say may be used in evidence. However, the Criminal Justice Act 1984 (as amended) provides that in the case of arrestable offences, inferences can be drawn at trial from an accused's silence.

The right to silence can be abridged by statute, most often in the context of regulatory investigations, meaning that answers can be compelled. However, Irish courts have frequently held that statements given under statutory compulsion (such as in connection with a regulatory investigation attracting a civil penalty) cannot be used against that person in subsequent criminal proceedings, whereas voluntary statements can be.

15 What legal protections are in place for whistleblowers in your country?

The Protected Disclosures Act 2014 (the Protected Disclosures Act) protects whistleblowers. Where a worker makes a protected disclosure, the employer in question is prevented from dismissing or penalising the worker; taking an action for damages or an action arising under criminal law; or disclosing any information that might identify the person who made the disclosure. Further, the Act creates a cause of action in tort for the worker for detriment suffered as a result of making a protected disclosure. The definitions of 'protected disclosure', 'relevant wrongdoing' and 'worker' are quite broad and care should be taken to consider if the Act applies in every case of reported misconduct.

16 What rights do employees possess under local employment law that determine how they are treated within a company if their conduct is within the scope of an investigation? What employment rights would attach if they are deemed to have engaged in misconduct? Does it differ for officers and directors of the company?

As a general matter, employees have a constitutional right to ‘fair procedures’ in any investigative or disciplinary process. This means that, among other things, the employee must be kept apprised of the investigation and must be permitted to participate in the investigation and make points in their defence.

The following specific protections may arise in the context of conduct related investigations and dismissals:

- **Unfair dismissal:** In general, an employee with one year’s continuous service may bring a claim for unfair dismissal. An employer cannot lawfully dismiss an employee unless substantial grounds exist to justify termination, such as the employee’s conduct. Regard will also be had to the reasonableness of the employer’s conduct and the extent of any failure to adhere to agreed procedures. A preliminary investigation is an essential precursor to a fair disciplinary process.
- **Discrimination:** Irrespective of length of service, an employee may bring a claim for discriminatory dismissal or discrimination based on any one of the nine discriminatory grounds contrary to equality legislation (i.e., gender, civil status, family status, sexual orientation, religion, age, disability, race (including colour, nationality and ethnic or national origin) and membership of the traveller community).
- **Whistleblowing:** See question 15.
- **Wrongful dismissal or High Court injunction:** An employee can seek a High Court injunction to restrain an employer from implementing a dismissal if the decision is not implemented correctly. An injunction maintains the *status quo* pending the determination of an overarching breach of contract claim. A similar order may also be brought to restrain an investigation or disciplinary hearing before matters even reach the dismissal stage. A challenge may be based on corporate governance grounds, the fairness of the procedures adopted or failure to terminate the contract in accordance with its terms.

To fairly dismiss for out-of-work misconduct, there must be a genuine connection between the employee’s offence and his or her employment. The connection must be such that it leads to a breach of trust or causes reputational or other damage to the employer. The rights do not differ for officers and directors who are employees.

17 Are there disciplinary or other steps that a company must take in your country when an employee is implicated or suspected of misconduct, such as suspension or in relation to compensation? Can an employee be dismissed for refusing to participate in an internal investigation?

The disciplinary process should, at a minimum, follow the WRC’s Code of Practice on Disciplinary and Grievance Procedures, the employer’s own procedures and involve the basic principles set out below.

- Advance written notice of any allegations, together with any supporting documentation, witness statements should be provided to the employee.

- The employee should be invited, in writing, to an investigation meeting to discuss the allegations and to put forward his or her response.
- The Investigation should go no further than to determine whether there is a sufficient factual basis to warrant a matter being put to disciplinary hearing.
- Suspension should only be imposed after full consideration of the necessity for it pending a full investigation of matters. It may be justified if it is to prevent repetition of the conduct complained of or interference with evidence; to protect individuals at risk from such conduct; to comply with any regulatory rule applicable to the individual or their role; or to protect the employer's business and reputation. Suspension must be for no longer than is reasonably necessary and on full pay and benefits.
- Depending on the investigation's outcome, the employee should be invited in writing to a disciplinary meeting to discuss the allegations and to put forward a response. Documents obtained during the investigation should be provided.
- The employee should be allowed to bring a colleague or trade union representative to any meetings.
- Any sanction must be proportionate and reasonable in the circumstances and should be confirmed in writing to the employee.
- A right of appeal to someone not previously involved should be provided.
- Unless the allegations are sufficient to constitute gross misconduct, the sanctions should progress from verbal warning to written warning to final written warning to dismissal. Summary dismissal will only be permitted where the circumstances genuinely constitute gross misconduct.

The extent to which an employer may take disciplinary action against an employee, up to and including dismissal, for failure to participate in an investigation will depend on the circumstances.

Commencing an internal investigation

- 18 Is it common practice in your country to prepare a document setting out terms of reference or investigatory scope before commencing an internal investigation? What issues would it cover?**

There is no statutory requirement for this document, but it would be considered general good practice. Depending on the circumstances, it may be useful to detail the purpose and scope of the investigation and to clarify the remit of the investigators' role. Matters to cover might include:

- the structure and methodology of the investigation;
- definition of the issues to be covered; and
- details of any engagement with legal counsel and related matters concerning privileged material.

If the investigation concerns employees of the company, it should go no further than gathering the relevant information or evidence to determine whether or not there is a sufficient factual basis to put particular allegations at a formal disciplinary hearing; be carried out in

accordance with any relevant internal procedures; and not reach factual conclusions on the evidence or decide whether the allegations are proved.

19 If an issue comes to light prior to the authorities in your country becoming aware or engaged, what internal steps should a company take? Are there internal steps that a company is legally or ethically required to take?

Depending on the severity of the issue, it would usually be prudent for a business to commence an internal investigation. The company is only under an obligation to share the results of such an investigation with the relevant authorities where it is required under a court order, statute, or as part of a self-report. A number of legislative provisions impose a positive obligation on persons (including businesses) to report wrongdoing in certain circumstances (see question 36).

It is also, of course, essential that any wrongdoing is ceased as soon as the company becomes aware of it, and that remedial measures are taken where appropriate. Care should be taken to preserve evidence of the wrongdoing, as a failure to do so could result in accusations of destruction of evidence, which can itself be an offence under certain legislation, such as pursuant to section 793 of the Companies Act 2014.

20 At what point must a company in your country publicly disclose the existence of an internal investigation or contact from law enforcement?

Privately owned companies are not required to publicly disclose the existence of internal investigations or contact from law enforcement.

Under the Irish Listing Rules, publicly listed companies listed on the Irish Stock Exchange (ISE) must, without delay, provide to the ISE any information that it considers appropriate to protect investors. The ISE may, at any time, require an issuer to publish such information within the time limits it considers appropriate to protect investors or to ensure the smooth operation of the market.

21 When would management typically brief the board of a company in your country about an internal investigation or contact from law enforcement officials?

Depending on the severity of the issue, it would usually be advisable to inform the board of significant suspicions, an internal investigation or contact from law enforcement officials as soon as practicable so that appropriate action can be taken. However, care should be taken if there is a possibility that any board members are implicated in the relevant conduct, in which case a subcommittee may be constituted to deal with the matter.

22 What internal steps should a company in your country take if it receives a notice or subpoena from a law enforcement authority seeking the production or preservation of documents or data?

It is advisable to immediately implement a document hold by suspending deletion policies and circulating document retention notices.

The company should review the request and consider the power under which it is exercised, and in particular if the request is voluntary or mandatory. This is because there are risks

associated with releasing documentation without being lawfully compelled to do so. External legal advice may be required in this regard.

An inventory should also be prepared listing the materials falling within the notice. The material should then be assessed for privilege. Lastly, copies should be retained of anything provided to the investigation authority.

23 How can the lawfulness or scope of a notice or subpoena from a law enforcement authority be challenged in your country?

The lawfulness or scope of a notice or subpoena from a law enforcement authority may be challenged in the Irish courts through judicial review proceedings, unless it is possible to reach a compromise with the law enforcement agency on the scope of the notice. It may also be possible to obtain an interim injunction in certain circumstances preventing the exercise of the notice, subpoena or warrant, or preventing the authority using information already obtained, until the court rules on the validity of the instrument.

Attorney–client privilege

24 May attorney–client privilege be claimed over any aspects of internal investigations in your country? What steps should a company take in your country to protect the privilege or confidentiality of an internal investigation?

Any requirement to disclose documents obtained through an internal investigation to the Irish authorities is qualified by legal professional privilege. In Ireland, documentation may attract legal professional privilege either in the form of legal advice privilege or litigation privilege. Legal advice privilege arises over confidential communications between lawyer and client that are created for the sole or dominant purpose of giving or seeking legal advice, even if there is no actual or potential litigation. Litigation privilege applies to communications between a lawyer and a client made in the context of contemplated or existing litigation or regulatory action. As it is the broader form of legal professional privilege and also covers communications with third parties, such as experts, litigation privilege is the preferable form of privilege to assert in the context of internal investigation, provided there is actual or contemplated litigation or regulatory action.

The main ways to protect privilege is to involve lawyers in internal investigations at an early stage, although it should be noted that privilege cannot be created over existing documents after their creation merely by involving lawyers. To ensure that existing privilege is not lost, it is important to limit the disclosure or sharing of materials to essential persons only. Legal advice should not be summarised or copied and shared by non-legal persons. If privileged materials need to be shared with third parties, it is important to use appropriate confidentiality agreements.

25 Set out the key principles or elements of the attorney–client privilege in your country as it relates to corporations. Who is the holder of the privilege? Are there any differences when the client is an individual?

Legal professional privilege applies equally to individuals and companies and belongs to the client. See question 24.

26 Does the attorney–client privilege apply equally to inside and outside counsel in your country?

Both in-house and external counsel attract legal professional privilege where the criteria for legal professional privilege are met. However, in the context of the investigation of competition breaches by the European Commission internal communications with in-house counsel are not considered legally privileged.

27 To what extent is waiver of the attorney–client privilege regarded as a co-operative step in your country? Are there any contexts where privilege waiver is mandatory or required?

Asserting legal professional privilege is a legal right and the fact of its assertion should not be held against a party. However, if the materials over which legal professional privilege are being asserted are central to any enforcement investigation (such as a party defending certain conduct on the basis that it was taken on foot of legal advice), it may appear unco-operative to refuse to disclose such material. In such case, disclosure could, in fact, be in a party's strategic interest. Any decision to waive privilege should be carefully considered, as once waived, legal professional privilege is lost. It is generally recommended that waiver should be limited to those materials strictly necessary and should be made on a limited and specified basis, namely a general waiver of all legal professional privilege in respect of a particular matter is not advisable.

28 Does the concept of limited waiver of privilege exist as a concept in your jurisdiction? What is its scope?

It is possible waive privilege on a limited basis. However, care should be taken as privilege can inadvertently be lost in such circumstances. The scope of the waiver should be clear, limited and in writing, and of utmost importance is that confidentiality in the material should be maintained.

29 If privilege has been waived on a limited basis in another country, can privilege be maintained in your own country?

If the waiver of privilege was appropriate, limited and restricted, it should not defeat the overall assertion of legal professional privilege. However, this will depend on the extent and nature of the waiver in each case.

30 Do common interest privileges exist as concepts in your country? What are the requirements and scope?

Common interest privilege does exist in Ireland. It is important that common interest privilege is expressly asserted and that the third party is aware of the necessity of preserving privilege in the materials received, such as by not disclosing it to any other persons outside the common interest circle.

31 Can privilege be claimed over the assistance given by third parties to lawyers?

Third-party communications are only protected against disclosure in the context of litigation privilege. Litigation privilege can be asserted over third-party communications where the dominant purpose of the communication is in anticipation of existing or contemplated litigation.

Witness interviews

32 Does your country permit the interviewing of witnesses as part of an internal investigation?

Witnesses can be interviewed in internal investigations and are often seen as an integral part of the fact-finding exercise of an investigation. However, the internal investigation would not be able to compel witnesses to attend, except to the extent that employees can be requested to co-operate in the context of their employment.

33 Can the attorney–client privilege be claimed over internal witness interviews or attorney reports in your country?

Reports that contain legal analysis, advice or conclusions, or which are prepared in contemplation of or in connection with litigation, can be protected by legal professional privilege.

34 When conducting a witness interview of an employee in your country, what legal or ethical requirements or guidance must be adhered to? Are there different requirements when interviewing third parties?

It is important that witnesses are warned of the nature of the interview, whether they are implicated in any wrongdoing and, crucially, of any possible consequences for them of the investigation process. For example, if it is possible that an employee will be sanctioned or dismissed if wrongdoing is upheld, the employee must be apprised of this risk. It would also be important to note that any lawyers present are acting for the company and not for the employee, who may, in some cases, have their own legal representation.

Existing employees have a greater right to fair procedures as they are more likely to face the possibility of an adverse outcome, such as dismissal. However, it is best practice to accord equal fair procedures to all interviewees.

35 How is an internal interview typically conducted in your country? Are documents put to the witness? May or must employees in your country have their own legal representation at the interview?

It is good practice to ensure that any documents of relevance to the witness are put to them. ‘Interview by ambush’ is contrary to fair procedures and open to challenge, particularly by employees.

Employees have no statutory right to legal representation at witness interviews. However, if the employee or witness is, or may become, the subject of the investigation, the employer should consider advising the employee or witness to have legal representation to minimise the risk of a later legal challenge to the investigation process. Further, if the person requests

permission to have legal representation, the company only refuse this request if considered strictly necessary. This should be assessed case by case.

Reporting to the authorities

36 Are there circumstances under which reporting misconduct to law enforcement authorities is mandatory in your country?

A number of legislative provisions impose a positive obligation on persons (including businesses) to report wrongdoing in certain circumstances. Most significantly, section 19 of the Criminal Justice Act 2011 provides that a person is guilty of an offence where he or she fails to report information which he or she knows or believes might be of 'material assistance' in preventing the commission of, or securing the prosecution of another person in respect of, certain listed offences, including many corporate crimes. The disclosure must be made 'as soon as practicable', and a person who fails to disclose such information may be liable to a fine or imprisonment of up to five years, or both.

Other mandatory reporting obligations include duties on:

- persons with a 'pre-approved control function' to report breaches of financial services legislation;
- designated persons (auditors, financial institutions, solicitors) to report money laundering offences;
- auditors to report a belief that an indictable offence has been committed;
- auditors or persons preparing accounts to report theft and fraud offences; and
- all persons to report any offence committed against a child.

37 In what circumstances might you advise a company to self-report to law enforcement even if it has no legal obligation to do so? In what circumstances would that advice to self-report extend to countries beyond your country?

A company might be advised to self-report, in Ireland or overseas, to mitigate the risk of prosecution or any potential sentence that may be imposed by a court. There are no express provisions for immunity or leniency in prosecution under Irish law, but self-reporting can be considered a mitigating factor. The DPP does have discretion to grant immunity in certain circumstances. Some regulatory regimes, such as the Central Bank's Administrative Sanction Procedure, also consider self-reporting as a mitigating factor affecting the level of sanctions.

The exception is the Cartel Immunity Programme operated by the CCPC, which allows a member of a cartel to apply for immunity in return for co-operating with the CCPC. Only the first member of a cartel to come forward can avail of the programme and must meet strict eligibility criteria.

In terms of extraterritorial self-reporting, an Irish company may self-report to authorities in other jurisdictions that have immunity or leniency programmes if the conduct in question could also be investigated or prosecuted by such authorities. For example, the European Commission also runs a cartel immunity programme and an Irish company may self-report to the Commission to avail of this.

38 What are the practical steps you need to take to self-report to law enforcement in your country?

It is important that a company has considered its risks and, as far as possible, investigated the matter before making a report. A report can be made in writing, such as by letter to the appropriate authority. The report should include all evidence in the company's or individual's possession which would assist the Irish police or regulator. The report should also include the contact details of the relevant person, the date and time of the suspected offence and the address at which the suspected offence occurred. It would also be prudent to ensure that any data deletion policies are suspended during this time so that materials are retained should the police have further queries following the report.

Responding to the authorities

39 In practice, how does a company in your country respond to a notice or subpoena from a law enforcement authority? Is it possible to enter into dialogue with the authorities to address their concerns before or even after charges are brought? How?

Dialogue may start with the authority once a notice has been received and analysed. For example, the company may wish to address concerns such as the scope of the request, the legal basis or the deadline for compliance. It is important that care is taken with such communications, as they can set the tone for the engagement with the authority and may be relevant for any subsequent court challenge or dispute that may arise.

40 Are ongoing authority investigations subject to challenge before the courts?

Ongoing investigations may be subject to challenge in the courts, usually through an application for judicial review. It is also possible to seek injunctions, typically on an interim basis, to protect legal rights while the underlying challenge is resolved.

41 In the event that authorities in your country and one or more other countries issue separate notices or subpoenas regarding the same facts or allegations, how should the company approach this?

Each request should be treated separately as the legal basis for the request will likely be different. A request which may appear to compel disclosure of documents may not in fact have legal effect if it is from outside the jurisdiction and the procedures for compelling such information cross-border (such as the procedures under the Criminal Justice (Mutual Assistance) Act 2008, as amended, see question 43) are not engaged. It is generally not advisable to release information, particularly personal data within the meaning of the Data Protection Acts 1988 and 2003, in the absence of lawful compulsion. 'Package disclosures' are therefore usually inadvisable as documents one agency has a legal right to obtain may not be within the compulsory power of another agency. That said, where requests are made from different authorities, it is important to have a consistent approach with regard to how requests are treated and what arguments are made to authorities.

- 42 If a notice or subpoena from the authorities in your country seeks production of material relating to a particular matter that crosses borders, must the company search for and produce material in other countries to satisfy the request? What are the difficulties in that regard?**

The appropriate response will depend on the nature of the request and the relationship between the company subject to the request and the entities holding the documents across borders. If the company in receipt of the request has the power to compel production, such as from a branch of subsidiary, it may be required to do so. However, generally speaking the entity to which the request is addressed will be the only body with an obligation to respond.

- 43 Does law enforcement in your country routinely share information or investigative materials with law enforcement in other countries? What framework is in place in your country for co-operation with foreign authorities?**

Irish law enforcement and regulatory bodies are known to share information on an informal basis with equivalent bodies in different jurisdictions.

In terms of formal procedures, the Criminal Justice (Mutual Assistance) Act 2008, as amended, is the primary piece of legislation governing formal mutual legal assistance between Ireland and other countries. The extent of available co-operation under mutual legal assistance procedures is dependent on the identity of the corresponding state. The greatest level of co-operation exists between Ireland and other EU Member States. Co-operation with third countries (those outside the European Economic Area) is dependent on their ratification of relevant international agreements or the existence of a mutual assistance treaty agreed between them.

- 44 How would you advise a company that has received a request from a law enforcement authority in your country seeking documents from another country, where production would violate the laws of that other country?**

In such circumstances, it would usually be prudent to advise the company not to provide the documents. The company should, however, ensure that it is not violating any laws in its own jurisdiction by doing so. The company should inform the requesting authority of the basis for the decision to refuse the request for documents.

- 45 Does your country have data protection statutes or blocking statutes? What related issues are implicated by complying with a notice or subpoena?**

Data protection is regulated in Ireland primarily by the Data Protection Acts 1988 and 2003. Irish data protection laws reflect EU data protection laws and protect the personal data of individuals from disclosure in certain circumstances. The transfer of data outside Ireland is restricted, but there is no outright 'block' preventing all transfers. The main implication of Irish data protection law is that companies may be reluctant to release materials in the absence of a legal obligation.

Irish law also recognises a broad 'right to privacy', which is protected by the Irish Constitution, the Charter of Fundamental Rights and the European Convention on Human Rights. In certain circumstances, this can restrict the disclosure of data even where the disclosure would be in compliance with the Data Protection Acts.

Further, care should be taken when releasing documents that relate to any type of contractual relationship, as there may be confidentiality terms in the contract or engagement terms that could be violated by the disclosure. A party should always be mindful that if it releases information without being compelled to do so, it is not protected from claims that it has breached Irish data protection legislation or breach of confidence claims.

46 What are the risks in voluntary production versus compelled production of material to authorities in your country? Is this material discoverable by third parties? Is there any confidentiality attached to productions to law enforcement in your country?

As outlined above, there are risks attached to voluntary production of documents, and it is generally not advised unless there are compelling reasons to do so. In particular, as noted above, a company may be in breach of the Data Protection Acts 1988 and 2003 if it releases materials that contain personal data in the absence of lawful compulsion, and may also be in breach of confidence if it releases confidential material without being compelled to do so. There may also be other contractual consequences for a company releasing certain materials voluntarily. There is no automatic confidentiality attached to materials disclosed to law enforcement, unless restrictions have been agreed to that effect. Accordingly, material provided to authorities voluntarily may be shared with other authorities or used for purposes other than the initial basis of the request. Materials obtained on foot of a compulsory power are subject to greater protections. However, once material is in the possession of an authority there is nothing to prevent a third party from seeking the material such as through a non-party discovery order.

Global settlements

47 Prior to any settlement with a law enforcement authority in your country, what considerations should companies be aware of?

Although deferred prosecution agreements do not exist in Ireland, settlements are possible with certain regulatory bodies. For example, the Central Bank of Ireland commonly uses settlements to resolve investigations brought under the Administrative Sanctions Procedure under the Central Bank Act 1942, as amended. The company should balance the seriousness of the charge, the effect of a conviction and the strength of the case against it, against the terms of the settlement, such as the quantum of any fine and whether there is publicity associated with the settlement. Care should be taken with regard to a settlement under the Cartel Immunity Programme, to ensure that the stringent eligibility criteria are met before engaging with the CCPC.

48 What types of penalties may companies or their directors, officers or employees face for misconduct in your country?

Irish criminal legislation typically provides for monetary fines or terms of imprisonment for offences. Given the nature of corporate entities, which cannot be imprisoned, the most common form of sanction against a corporate entity is a fine. However, while less common,

Irish legislation also provides for specific remedies such as compensation orders and adverse publicity orders under health and safety legislation.

A common sanction in the context of business crime are restriction and disqualification orders. Under Section 839 of the Companies Act 2014, where a person has been convicted of an indictable offence in relation to a company, or convicted of an offence involving fraud or dishonesty, that person may not be appointed to, or act as, an auditor, director or other officer, receiver, liquidator or examiner or be in any way, whether directly or indirectly, concerned or take part in the promotion, formation or management of any company.

As discussed further at section 51 below, companies convicted of certain offences may be excluded from participation in public tenders for a specific time.

49 What do the authorities in your country take into account when fixing penalties?

Sentencing of corporate crimes is largely a function for the courts. There is no express provision under Irish law for immunity or leniency in prosecution. If a business is found guilty of an offence, a wide range of factors may be taken into account at the discretion of the court. Mitigating factors include whether the company ceased committing the criminal offence on detection or whether there were further infringements or complaints; whether remedial efforts to repair the damage caused were utilised by the company; the existence of a compliance programme; and whether the company itself reported the infringement before it was detected by the prosecuting authority. Additionally, in imposing any sentence, the court must comply with the principle of proportionality as set out in *People (DPP) v. McCormack* [2000] 4 IR 356.

Certain sanctions, such as those available to the Central Bank under the Administrative Sanction Procedure or the CCPC in connection with cartels, can be expressed as a percentage of turnover. This allows the size of the entity to be considered when penalties are imposed.

50 Are non-prosecution agreements or deferred prosecution agreements available in your jurisdiction for corporations?

Non-prosecution agreements and deferred prosecutions are not available in Ireland.

51 Is there a regime for suspension and debarment from government contracts in your country? Where there is a risk of suspension or debarment or other restrictions on continuing business in your country, what are the options available to a corporate wanting to settle in another country?

The 2014 EU Public Sector Procurement Directive was transposed into Irish law by the European Union (Award of Public Authority Contracts) Regulations 2016. Under these Regulations, companies must be excluded from public procurement for a specific period where they have been convicted of certain offences. The Regulations also provide for offences which carry discretionary debarment. The offences include offences under EU law, meaning that a company should take care when settling charges in another country, as doing so could, depending on the offence, trigger these exclusion rules.

The Regulations enable companies to recover eligibility to bid for public contracts by demonstrating evidence of 'self-cleaning', such as the payment of compensation to the victim, clarification of the facts and circumstances of the offence, co-operation with the

investigating authority, and the implementation of appropriate measures to prevent further criminal offences or misconduct.

52 Are 'global' settlements common in your country? What are the practical considerations?

It is possible for a domestic authority to reach a resolution as part of a coordinated approach with an overseas authority. If a party wishes to reach a settlement with authorities in another country or countries, it should, however, be aware that such an agreement may not prevent Irish authorities from continuing to pursue a prosecution.

53 Are parallel private actions allowed? May private plaintiffs gain access to the authorities' files?

A defendant may be subject to simultaneous civil and criminal proceedings arising out of the same set of circumstances. There is no obligation on the courts to adjourn the civil proceedings pending the completion of the criminal proceedings. Civil proceedings are, however, commonly adjourned pending the outcome of the criminal case. As there are different burdens of proof in civil and criminal matters, the outcome of civil and criminal proceedings will not necessarily be the same. It is also possible, although rare, for individuals to initiate private criminal prosecutions by issuing a summons pursuant to the Petty Sessions (Ireland) Act 1851 in certain limited circumstances.

Authorities are not obliged to disclose their files to such persons unless the particular file is generally open to the public or a court order has been obtained.

Publicity and reputational issues

54 Outline the law in your country surrounding publicity of criminal cases at the investigatory stage and once a case is before a court.

The Irish judiciary are extremely protective of the accused's right to a fair trial and will prohibit or stay a trial if necessary. This sometimes occurs in respect of high-profile cases where the extent of publicity affects the ability of the defendant to have a fair jury trial. A recent example is the trial of a high-profile former executive of Anglo Irish Bank, which was adjourned and rescheduled due to concerns of adverse publicity surrounding the trial.

Reports that undermine legal proceedings can amount to contempt of court. Further, any reporting that goes beyond a faithful account of the court proceedings could give rise to defamation claims.

55 What steps do you take to manage corporate communications in your country? Is it common for companies to use a public relations firm to manage a corporate crisis in your country?

In larger companies, corporate communications are generally managed by a team of marketing professionals, and it is common for companies to employ public relations companies where there is a risk of negative publicity.

56 How is publicity managed when there are ongoing, related proceedings?

It is important that any public statements issued by the company do not potentially prejudice ongoing criminal proceedings or investigations. Statements issued by a company in such circumstances should be brief, factual and approved by a company's legal advisors. Care should also be taken that no comments are made that potentially identify any persons, as there could be a risk of defamation proceedings if the statement incorrectly implies that the person has committed any wrongdoing.

Duty to the market

57 Is disclosure to the market in circumstances where a settlement has been agreed but not yet made public mandatory?

As discussed above, the ISE may require an issuer to publish information within such time limits as it considers appropriate to protect investors or to ensure the smooth operations of the market.

Appendix 1

About the Authors

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Matheson

Carina Lawlor is a partner in Matheson's commercial litigation and dispute resolution department and head of the regulatory and investigations group. Having trained with a London City firm, Carina has an international perspective. Her clients include regulators, international companies and a number of the world's leading financial institutions. She has particular experience and specialist knowledge in administrative and public law, investigations and inquiries compliance, white-collar and business crime and corporate offences, banking and financial services disputes, and anti-corruption and anti-bribery legislation.

Carina also advises a wide range of clients in relation to data protection and privacy and document disclosure issues. She has acted in numerous judicial review proceedings and advises on all aspects of administrative decision-making and fair procedures. Carina also advises our international banking and financial services clients and domestic clients on crisis management and reputational issues.

Carina is a contributing author to a number of publications and regularly gives presentations on investigations, data protection and privilege. She is consistently ranked by leading legal directories, including *Chambers*, *The Legal 500* and *Best Lawyers*, as one of the top disputes lawyers in Ireland.

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