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INVESTIGATIONS WITH AN INTERNATIONAL DIMENSION

A. Introduction[1]

1.01 Three of the trends that have significantly affected risk (ignoring, for a moment, US civil litigation risk[2]) for large companies since about the year 2000 are:

- the degree to which regulators not only have increased powers but cooperate with each other in the application of those powers to a particular company or practice which is of concern—i.e. globalization of the regulatory regime;
- the increasing use of severe sanctions, particularly of a criminal or quasi-criminal nature, to control corporate behaviour; and
- the changing ethical environment, and the expectations of 'stake-holders', as to corporate behaviour and as to what represents acceptable levels of governance in entities that are of increasing power and impact on all aspects of economic and social life.

1.02 Despite these factors increasing corporate risk, public and regulatory perception has been that some companies, at least in some jurisdictions, continue to engage in infringing, and sometimes criminal, behaviour. It is unclear whether such continuing conduct is due to ignorance by those involved; a perception that the risks of detection are small; or competitive and profit pressures incentivizing those involved to take the risks: in reality, it will be a mix of all three.

1.03 In some jurisdictions (Italy is an example), the reaction of the regulators has been a combination of being prepared to use large sanctions where they can and a clearly signalled

[1] Contributors: Paul Lomas and Daniel Kramer.

[2] However, the kinds of events that give rise to investigations will usually, if there is a sufficient connection with the USA, raise the risk of related US civil litigation.

expectation that companies should 'put their house in order'. The combination of the facts that (i) corporate behaviour is still often far from compliant; (ii) the invasive requirements of governance and regulators are increasing; and (iii) regulators have expectations that companies should be more proactive in taking affirmative responsibility for addressing their internal issues effectively; mean that the demand for internal investigations is set to increase. These factors come together particularly forcefully when one considers investigations with an international dimension.

1.04 In such cases, a wide variety of the issues addressed in the chapters that follow interact in a way that substantially complicates the picture and may, on occasions, produce conflicts. Those conflicts may go beyond simply tensions as to what is desirable in different jurisdictions into the area where compliance with obligations in one jurisdiction may actually create difficulties with legal obligations in another.

1.05 It is, clearly, not possible to cover all the possible permutations of issues and jurisdictions. However, there are some themes that are frequently encountered, and which can usefully be analysed, which provide indications as to how these matters can be addressed generally.

1.06 Albeit something of a sweeping generalization, it is nevertheless highly material that there is a steady convergence not only of the expectations of regulators but also those of wider stakeholders that companies will be applying consistent ethical and behavioural standards around the world. The idea that a company, particularly one with major global brands, can take the stance that a practice which is prohibited or unacceptable in its home jurisdiction, or in others where it has a major economic presence, is nevertheless appropriate in a given local environment is becoming increasingly unsustainable.

1.07 This is, perhaps, particularly the case in such general areas as corruption and related business practices, antitrust or anti-competitive behavioural issues (there are increasingly few regions that do not have competition law requirements that are substantively aligned with EU/US standards), environmental standards, know your customer rules, and control of the quality of counter-parties. The proposition is perhaps less true in relation to highly regulated markets (like financial markets) where it may well be acceptable to follow a locally legitimate trading pattern even though it may be prohibited elsewhere. However, in relation to more general ethical and behavioural areas, the issue readily devolves to one of the integrity and quality of senior management, for example:

- did they know what was going on;
- if not why not;
- if they did, what view should regulators and stakeholders take of management that will permit behaviour that is unacceptable in their major markets because they think that they can 'get away with it' in local markets; and
- what does that say about their general approach to the business and the 'culture' of the organization?

1.08 From an investigation viewpoint, this has important implications. International investigations need to consider what thresholds they should apply to behaviour: local; overall 'normalized' corporate standards; or world leading best practice. It also means that the management and control of the investigation process has to ensure that the quality of the investigation itself is aligned with the standard that the company sets for its behaviour generally. This does not necessarily mean direct head office control; but it will usually mean

some supervision from an appropriately senior level in the company to ensure that the results are sensitive to these issues. This needs to be borne in mind when considering the issues discussed in this chapter.

B. Organization of an International Investigation

1.09 An international investigation must have one single point of management and control. Without that, the process is likely to be chaotic and the output and conclusions may not be credible or reliable. Accordingly, it is important from the outset to decide the location from which it is to be led, and the individual who is to be accountable for it. This applies both to the overall strategic direction and to the day-to-day operational management.

1.10 Where a problem is potentially sufficiently serious, the location of that internal accountability should usually be the audit committee or the management board, or a member of a similar body involved in the governance of the company, one of the directors (usually an independent director) or any of the statutory watchdogs contemplated by some continental European jurisdictions, such as an Italian board of statutory auditors or the supervisory body. However, not all issues require that 'weight' and it may well be that responsibility can be allocated at a lower level in the organization, usually within the legal, compliance, or internal audit function. Moreover, there are examples, which can work very successfully, of the appointment of a senior executive from an unrelated part of the business, perhaps with a taskforce, to address the issue in hand on behalf of the company.

1.11 The political reality is that, in an international investigation, there is likely to be defensive behaviour, whether between operating divisions, or, as is frequently the case, within business units in differing countries. Political sensitivities also arise when the company consists of formerly separate entities which have come together as a result of mergers or in the case of a joint venture. Such defensive behaviour can be extremely disruptive to the efficient conduct of an investigation, delaying the production of documents and the availability of witnesses, slowing the process, and reducing the quality of the output. For example, where a company does not have a fully integrated email or document management system, it may not be physically possible to obtain the necessary data without physical access (never mind consent) to the IT systems of a particular subsidiary. It is surprising how long seemingly fulsome commitments to cooperation can take to turn into actual delivery of data. This tendency is common where businesses have grown by acquisition and there is not a uniform culture or sufficient degree of trust internally.

1.12 The natural concerns that any investigation can be used as a 'witch hunt', or to settle 'old scores', or as a lever to bring about other changes, become exacerbated in such circumstances. These are essentially management, and not legal, issues, but they require careful handling since they can significantly hamper, or even frustrate, an investigation. It is usually the case that such issues need to be addressed by a mixture of:

- strong commitment from a high level in the organization to a successful and properly resourced investigation;
- vesting appropriate authority in those concerned and making it plain, in sensitive terms, that undermining the investigation would be serious misconduct;

- bilateral conversations with those executives in charge of the business units that might be the sources of dysfunctional behaviour to ensure that they are brought 'on-side' and are supportive—and then also supported, as necessary;
- making plain, in the cultural context, that effective resolution of difficult issues is a necessary part of business life in successful and ethical organizations and that professional management does and should participate fully in such exercises, which should improve the quality of the business in which they all work; and
- ensuring that the investigation's conduct and modus operandi, and the messaging associated with it, clearly show that it is an independent and objective process and will not be used for political ends by any part of the organization, including senior management.

1.13 Once the right governance framework has been set for an investigation, it is important to consider the necessary operational aspects. Although the detailed processes will reflect the issues raised in the various national chapters discussed below (particularly in the UK and US sections), it is frequently the case in international cases that the flow of data is considerably larger (and may well give rise to language and translation issues). It is, therefore, particularly critical that there is a clear, organized, and observed system for collecting information, across the various organizations involved, and holding it in one central location.

1.14 The data are usually held in a single database. Frequently, it will be in an external law firm or outside vendor/service provider since they tend to have the technical and human resources (the demands can be considerable) to organize such an operation. It is extremely difficult to build chronologies, to analyse relationships, to create scenarios, to prepare the documentary evidence necessary for discussion with witnesses etc unless there is a single database.

1.15 Such a system is also fundamental for responding comprehensively to regulatory inquiries. These inquiries may have short time frames, come from different sources, and cut across each other. A well-run investigation responds effectively to these requests, having the capability to produce accurate and complete responses and to maintain an audit trail of disclosures, by regulator, for the proper ongoing management of the regulatory relationship.

1.16 Ideally, the technology permits input direct from the various countries involved. The ability to add know-how and secondary information into the database and to integrate it with the document management system for the project can be invaluable. In an investigation having a truly international dimension, a further important consideration is how to convert various documents made in respective local languages into a database in one common language (English in most cases) carefully but efficiently. One of the major challenges in a large investigation (as in a substantial piece of litigation) is how to extract the key story from a great deal of detailed and fine grained information where no one individual is familiar with all the material. The team organization and the IT systems must interoperate to make this process as effective as possible.

1.17 There are certain confidentiality and other benefits from having the evidential material assembled in a law firm in a privileged relationship with the company. The degree of protection that is available to documents against regulatory attack varies across countries, but it is generally the case (particularly in civil law jurisdictions) that there is a particularly high degree of protection accorded to documents in the possession of outside lawyers.

1.18 An issue that is frequently of concern is whether, despite the value of a single database, it is risky, in terms of a potential defence, to move documents into a jurisdiction where they

may be more vulnerable to seizure or disclosure in any litigation. This is a judgement to be exercised on the specific facts. However, the following factors are usually relevant.

- Civil law jurisdictions do not generally have a discovery process or disclosure process. To the extent that they do, documents in the possession of external lawyers may be protected by the legal secrecy/privilege requirements as in the case of Spain or Italy—but this is not the case in Germany, where the protection only extends to documents that are subject to what is, in effect, client/attorney privilege.
- England and the US have a control based test for disclosure,[3] rather than a strict geographic test. Analytically, the location of the documents is irrelevant—although caution in this area is common ('why take any risk?'). Theoretically, however, there is also the issue of whether assembling a database brings documents under the ultimate control of a different entity, say one lower down the corporate structure, which is, itself, likely to be the subject of litigation when the original controller of the documents was not. This is, in practice, a rather unusual circumstance, but may pertain to certain cases.[4] To the extent that this is not an issue, however, there is no reason why a database cannot be assembled in England or the US.

C. Self-reporting Issues

1.19 A clear and immediate tension arises on the threshold issue of self-reporting. Whilst, as discussed in the Introduction, the culture is progressively changing around the world, there are still big differences in the regulatory requirements associated with self-reporting. Perhaps more importantly, there are differences in the expectations, short of legal or regulatory requirements, as to whether it is attractive tactically or ethically for a company voluntarily to self-report.

1.20 This is critical because self-reporting is usually an immediate, or at least very early, decision. There is, generally, no retreat from a decision to self-report. It will strongly control the company's strategy on all future regulatory issues, and many other matters, including the litigation exposure.

1.21 A company must, moreover, proceed on the basis that self-reporting to one regulator constitutes self-reporting to all. With the exception, perhaps, of suspicious transaction reports under money laundering and anti-corruption legislation (which tend to be more of an administrative process), the working assumption has to be that regulators both within and across jurisdictions will communicate with each other, if not the actual text of any submissions or reports, the gist of the issue.

1.22 As described below, the gateways for the disclosure of information both within a jurisdiction and internationally are generally very wide. There is very little inhibition on disclosures that are genuinely for the proper purposes of the relevant agencies' duties. Any corporate problem which is more general in scope, and particularly one that gives rise to issues regarding the integrity of the company and its management, is likely ultimately to be the subject

[3] *Lonrho Ltd v Shell Petroleum Co* [1982] AC 173.
[4] *Schlumberger Holdings Limited v Electromagnetic Geoservices AS* [2008] EWHC 56 (Pat), unreported.

of discussions at the regulatory level. Those discussions may not take place immediately but are likely, at some stage, to involve a consideration of whether a particular issue merits the allocation of internal resources by another regulator.

1.23 In the antitrust field, self-reporting is essentially an issue of voluntarily seeking leniency or amnesty. Almost invariably if a company faced with infringements in a multi-jurisdictional context seeks leniency in any one jurisdiction, it will be doing so in many. It will usually do so as close to simultaneously as it can, for technical reasons associated with the priority that it obtains by being first and the risks of prejudicing its position if information leaks. The principal exception to this approach is in the rare situation of an infringement operating only within the EU where there is a certainty that the European Commission will be the only regulator that will exercise jurisdiction over the matter.

1.24 Moreover, any disclosure to a regulator runs the risk of publicity, in due course, leading to the risk of wider regulatory action at that later stage. Finally, it is usually regarded as simply not credible for a company to announce that it is cooperating with regulators in one country, but not to make the same commitment in relation to other jurisdictions.

1.25 The tension then arises where there is (i) a potential for there to be regulatory interest in a country that has a strong expectation of voluntary self-reporting but (ii) a much stronger likelihood of penalties in a jurisdiction where there is no such tradition. An example might be a potential corruption issue for the Italian subsidiary of a US company.

1.26 As described below, a common reaction in the US would be to self-report, to launch an effective investigation, to deal with matters as appropriate and to report the conclusions and actions to the Department of Justice (DOJ) or the Securities and Exchange Commission (SEC). In Italy, the culture has been different; regulators and prosecutors do not generally expect self-reporting; there are not the same regulatory benefits as in the US. Whilst the substantive internal actions may be the same for both the senior Italian and US management (cease the practice, take disciplinary action, etc), the consequences of two different systems will differ. In the US, the self-reporting may well lead to a process that can be largely handled through internal investigation and the relationship with the regulator, albeit possibly leading to penalties. In Italy, the result of the US self-reporting may well be an external criminal investigation into the business with considerable disruption to it, impacting the company's reputation and business performance, quite apart from the issue of prosecution of those involved. Had the Italian management been able to conduct the matter under the usual procedures in Italy, the problem might well have been resolved in exactly the same way internally, in terms of remedial steps for the future, but without the same exposure for the past. This distinction can, self-evidently, cause enormous internal tensions (including engaging the personal exposure of individuals). It requires extremely sophisticated and well-considered responses from management.

D. Regulatory Coordination

1.27 The phenomenon of regulatory coordination goes beyond the simple transmission of information between regulators and the concerns associated with self-reporting into active coordination between regulators. It also applies both to the allocation of responsibility and resources to deal with international problems and to the joint investigation and resolution

(i.e. prosecution) of particular problems. It is almost a uniform refrain from regulatory agencies that this is (i) beneficial and (ii) set to increase further.

1.28 In some cases, the structure for this coordination is institutional. A classic example is the European Competition Network of the national competition authorities of the EC member states and the European Commission established under the modernization regime.[5] However, equally important are:

- the various associations of securities regulators looking at major issues affecting the securities markets; and
- the activities of the Organisation for Economic Cooperation and Development which are particularly relevant in the anti-corruption field.

However, coordination is also happening at informal and bilateral levels with joint meetings, secondments of staff, exchange of data, and the like. The authors have experienced regulators being quite open that their decision as to whether or not to take an interest in a matter would depend on discussions with another regulator in which context they would review each others' evidence to obtain a common understanding and then consider the priorities of, political pressures on, and resources available to, each before discussing which of them might pursue a particular topic.

1.29 A number of the most prominent corporate scandals of recent years have been the subject of overt coordinated regulatory behaviour. Examples include:

- the joint resolution by the SEC and the FSA of the allegations against Royal Dutch/Shell in relation to the disclosures of its petroleum reserves. A solution was agreed with both regulators in a single process, concluded in London and then jointly announced;
- the coordinated announcement of early resolution of antitrust investigations by the OFT and the DOJ against British Airways and Virgin in relation to the fuel surcharges price fixing and the coordinated criminal prosecutions in the marine hose cartel;
- the coordination between the various criminal authorities around the world in relation to the United Nations Oil for Food corruption allegations and the arrangements whereby the criminal authorities for the home states of the various companies identified in the Report of the Independent Inquiry into the United Nations Oil for Food Programme (the 'Volcker Report') would decide how to take responsibility for investigating whether there had been corruption in relation to trading with Iraq under the programme;
- the BAE sales practices allegations; and
- the announcements in relation to Libor activities.

1.30 This degree of coordination means that a 'divide and rule' strategy for addressing the interests of regulators, if, indeed, it were ever very attractive, is becoming, increasingly, rarely of any relevance. Rather, what is needed is a coherent strategy which considers the actual or potential interests of the various regulators.

1.31 Such a strategy has always to take specific account of the likely approach of US regulators given their resources and powers, particularly to project their activities and interests outside the borders of the US when there is the necessary relationship with matters of interest

[5] Council Regulation (EC) No 01/2003 of 16 Dec 2002.

to them. However, one of the effects of the increasing degree of regulatory activity elsewhere in the world by non-US regulators (and the enhanced powers, and aggressive use of those powers in some areas, to impose very substantial fines) is that any such assessment has to be increasingly sensitive to the non-US exposure. Whilst criminal sanctions still lag behind US standards, in the antitrust and financial areas the differentials have reduced, if not disappeared.

1.32 Accordingly, one of the critical aspects of an international investigation, whether in the context of regulatory action somewhere in the world or conducted on a wholly internal basis for governance reasons, is to consider what a balanced overall regulatory strategy would be as and when needed. It may, of course, well be the case that no self-reporting is appropriate and the issue is rather whether a regulator will take an interest in the matter for other reasons. But the issue of self-reporting needs to be considered from the viewpoint of each potentially interested regulator and the resulting strategy needs to take account of the potential interests of all.

1.33 In practice, it is frequently the case not only that multiple self-reporting is appropriate but that large companies will want to be proactive in managing the resulting regulatory climate. This will mean not only selecting the regulator who is first approached, but developing a clear plan as to which other regulators might have an interest in the matter and defining an approach to them so that the exposure is controlled. This may well be in the interests of the company concerned. If there is a serious issue and a company may well have been at fault, it is often the case that there is an interest in resolving the issue as quickly and effectively as possible and that it is not in shareholders' interests for there to be rolling successive regulator processes. It may be highly attractive to seek to wrap the matter up in one resolution, with one PR and capital market impact, leading more quickly to reduced uncertainty as to the company's exposure and risk.

1.34 One of the trends that is of considerable assistance in this respect is the increasing frequency of institutions in Europe to reach settlements. This phenomenon still lags behind the very active practice in the US. But both as a matter of administrative convenience, pushing the limits of administrative powers, and also by virtue of change to the legal powers accorded to them, regulators in Europe are increasingly interested in reaching settlements. BAE and Barclays are two prominent examples. However, the antitrust authorities in the UK are now actively interested in 'early resolution' approaches as seen in the dairy cartel allegations.

1.35 Moreover, effective 30 June 2008, the European Commission introduced its cartel Settlement Procedure under which parties to an EU cartel investigation that agree to admit liability and waive certain procedural rights can receive a reduced fine and expedited resolution of the proceedings.[6] In addition, under the Settlement Procedure, the Commission can reach a settlement with some of the alleged infringers whilst others continued to defend the proceedings.

1.36 There are, naturally, many tactical issues associated with entering into such a process including:

- the nature of the disclosures made in any negotiation process and the risks thereby created;
- the vulnerability of submissions to third-party discovery;

[6] Commission Regulation (EC) No 622/2008, 2008 OJ (L 171) 3 (amending Regulation (EC) No 773/2004, concerning the conduct of Settlement Procedures in cartel cases).

- the nature of the admissions that have to be made to reach a settlement, the factual statements that would be made by the regulator in any further process or decision and the possible scope for a 'plea bargain' with admissions on some matters and the regulator dropping its case on others; and
- the interrelationship of these matters with the substantive defence, particularly if a settlement 'fails', and/or the position of parties that choose not to settle.

These matters lie outside the scope of this book and are treated more fully in the texts focused on the regulator concerned, for example dealing with antitrust or financial services procedure.

1.37 However, this type of process clearly enhances the development of multi-jurisdictional regulatory settlements. In circumstances where the Commission has taken jurisdiction over a multi-jurisdictional cartel providing, to the extent possible, one regulatory interlocutor in Europe (in place of the many national competition regulators), there is the possibility of a single settlement for the whole of Europe and for the US. There is, increasingly, close liaison between the Commission and the DOJ. There are occasional high-profile divergences of assessment, particularly in the merger control or behavioural field, but in the cartel investigation area, joint resolution is clearly now foreseeable, at least on a transatlantic basis.

E. Capital Market Issues

1.38 A subtle tension can arise in relation to differing capital market reporting requirements. This is particularly sensitive: reporting to the capital markets and to shareholders is a critical aspect of governance and senior management's crucial relationships with the owners of the business. A failure to handle such disclosures properly can, itself, give rise to a separate infringement and a fresh 'satellite' investigation by regulators concerned about market transparency.

1.39 The issue arises in the international context where a company's shares are quoted on different exchanges or it has other appropriately registered or listed securities, for example debt instruments or American Depositary Receipts (ADRs) which are subject to different reporting requirements. In a sense, this is no more than a manifestation of the inherent tensions in having more that one reporting regime that arise from accessing different capital markets. However, in the context of an 'out of the ordinary' event (like a possible accounting restatement, the discovery of possible corruption of a significant degree, cartel infringement, or a serious ethical violation that impacts on the company's reputation for integrity), there can be particular issues associated with the speed and detail of any notification requirements.

1.40 This issue needs to be considered on the precise facts, with sophisticated advice on the requirements of each market. Such advice will almost always include the views of the corporate brokers or investment bankers advising on securities listing issues for the company concerned. In the UK, a failure to follow the advice of that broker is, of itself, highly indicative of a breach of the UK disclosure requirements.[7] However, some general observations may provide overall guidance.

[7] See the FSA decision of 9 Dec 2005 in the case of Eurodis Electron plc.

1.41 Within Europe, the disclosure requirements have been converging, partially as a result of practice but largely as a result of EC Directives harmonizing the law in this respect. The underlying policy is one of continuous update of the markets in relation to price-sensitive information, subject to limited short-term protections and safe harbours in appropriate circumstances—which will not normally apply to issues of this nature.

1.42 Thus, the company will often be under an obligation in Europe to make a disclosure as soon as possible, even if not all information is known and it is possible that the markets may overreact. It is generally not an excuse that it is not clear what should be announced because the investigation has not yet established what may have happened. It is sufficient that the risk profile of the company in relation to the particular issue has changed because of the (assumed to be non-trivial) risk that there has been some such incident. However, this issue has to be considered in each case. In Italy, for example, the position is a little more liberal and the Consob will permit a degree of delay if insufficient information is known or if it may change and there is a risk of market confusion or corporate disruption.

1.43 A critical aspect is the precise wording of any announcement. Not only will markets (and their regulatory authorities) vary in the nuances of what needs to be said, but it is important that announcements are phrased in terms that, given the continuous update philosophy, do not then commit the company to issue frequent progress reports on the investigation, where it is going and what it is finding. It is simply not in the best interests of the company that the evolving risk assessment (which is inevitable, as the facts are uncovered) should be conducted under public scrutiny. Thus, the crafting of the announcements to ensure that they disclose information to the markets properly, but do not put the company in a position of having disclosed so much detail that it then has to publish changes to that detail, is important.

1.44 However, within the US the position is different. The US has a system of periodic disclosure, rather than continuous disclosure. As a general matter, the obligation to notify the market is triggered by a periodic disclosure obligation (e.g. a quarterly reporting obligation to the SEC), the need to correct a prior disclosure that was incorrect when made, or the need to disseminate broadly material information that was selectively disclosed to a smaller group. The result often is that the obligation to disclose information arises first outside the US, forcing an earlier disclosure of the information in the US than would have occurred if other jurisdictions were not involved. Although these tensions are usually manageable in practice, they require careful consideration at a senior level.

F. Data Protection Issues

1.45 Data protection issues give rise increasingly to frustrating and diverting problems for investigations. Not only has the legislation become more complex and varied, it has been more strictly enforced. As investigations become more international, the distinctions between the different regimes are more often being encountered. This topic is dealt with in each chapter and Chapter 2 gives an overview of the position across Europe.

1.46 Data protection issues pose inherent tensions for an investigation. The interests of the company and, indeed, of a regulator in obtaining as quickly as possible, perhaps without prior notice (to minimize the risk of tampering), all of the relevant data, some of which may be of

a highly sensitive nature, conflict directly with the principles of data protection law which is precisely about controlling the disclosure of sensitive personal data.

1.47 Since most of this law is derived from EU legislation, it might be hoped that it would be consistent across Europe. Unfortunately, it is not. First, the EC Directive concerned is particularly general in its terms. Since directives are implemented by member states to achieve their objectives, but with a discretion as to the precise method and detail, there are inherent national differences in implementation. In this case, given the generality of the drafting of the legislation in question, there is particular latitude at a member state's disposal—and they have availed themselves of it. Secondly, the directive is of a minimum harmonizing nature, such that member states are entitled to impose stricter criteria. This has led to considerable differences as those states which are politically more aligned with the protection of the individual have passed stringent laws, whereas those of a more invasive culture have been less restrictive.

1.48 Moreover, the US does not have the same concerns. A major conflict automatically arises, therefore, between the expectations of US regulators and European legislation protecting data. This is enhanced by the fact that, unlike Canada, the US is not regarded as having a sufficiently rigorous data protection regime to be accorded the necessary counter-party status under the European regime.

1.49 The difficulties in this area have been recognized by the US agencies who have described EU data protection law as one of the most serious procedural issues that they have to face when dealing with international investigations. Those issues surfaced in the SWIFT case in 2006, where the European authorities were in favour of protecting European data from being disclosed to the US even when sought in connection with terrorist investigations in the US.

1.50 As described elsewhere in this chapter, similar issues have arisen in US litigation. In *Société Internationale pour Participations Industrielles et Commerciales, SA v Rogers*,[8] the US Supreme Court recognized that criminal exposure (including for data protection reasons) was a valid factor to be taken into account when enforcing subpoenas. However, it is not the only factor that is considered and does not constitute a per se bar to enforcement.

1.51 The authors are aware of circumstances where European/US disclosure issues have been resolved by the use of anonymized data. However, the circumstances where this will be acceptable are limited. This is not a universal solution and will usually only be of assistance where an agency is engaged in a broader exercise rather than an analysis of specific infringements.

1.52 The position within Europe is complicated by inconsistent rules and expectations. Particularly critical is the issue of whether employees have given consent and, specifically, whether consent can be dealt with generically in an employee contract or has to be more specific (see the position in France for example). A cautious position is that, strictly, the individual consent of current employees affected is required in order to conduct internal investigations (including the collection and review of their emails and hard copy documents)

[8] 357 US 197 (1958).

unless the scope of that investigation is pursuant to a legal obligation and is strictly limited to such.

1.53 There are some country-specific issues that give rise to difficulties. In Germany it has been argued that where consent is required for disclosure, this means the consent of both the sender and the receiver of an email, which is usually highly impractical. Similar issues apply in Belgium, although the regulator seems to take a pragmatic attitude in practice, provided there are genuine needs for the data access and processing. However, there are also issues in Belgium as to whether the works council needs to be informed of the data collection.

1.54 In the Netherlands, the usual interpretation is that prior consent from the Dutch regulator is required before data processing starts. This is unwieldy in practice and causes significant potential problems. France, theoretically, also has a prior notification scheme although it is unclear under French law whether it is necessary when the purpose of the data handling is bona fide for the company understanding its business rather than for the exploitation of the employee's personal data. Theoretically, large fines can be imposed, but the history has been of more pragmatic behaviour by the French authorities. French law also suggests that the employee should be entitled to review data before it is transmitted to the investigation to extract purely personal material. This, again, poses practical difficulties. France is one of the most complex jurisdictions (and one of the most favourable to employees) in this respect.

1.55 Particular problems occur in the case of Switzerland which, of course, is not an EU member state and not subject to the Directive. It is not a jurisdiction covered in this book but it, famously, has particular confidentiality legislation which impacts on data collection. Swiss legislation protects business secret information, according rights to the company concerned. It can be interpreted to apply to the disclosure even by a subsidiary to its parent company. It raises clear issues in relation to the disclosure to non-Swiss regulators. A solution, although it impacts on the efficient conduct of an investigation, is to hold the evidence in Switzerland, have the Swiss company instruct external lawyers to review the data, and then to ask them to report in ways that avoid breaching Swiss law. However, that is not an attractive modus operandi.

1.56 As can be imagined, this web of data protection obligations gives rise to considerable angst in the conduct of any investigation. These issues are not automatically resolved by being responsive to requests made by a regulator based in another member state and, as the following chapter discusses, can be strictly enforced against the activities of non-EU regulators. Moreover, and with reference to the defensive behaviour discussed above, there is considerable ability for a local business to deploy data protection arguments when it does not want to release data to an investigation. This can require enormous tact, management pressure and skill to ensure that data protection arguments are reduced to true legal points and not inflated for tactical reasons.

1.57 Data protection will often require specific specialist legal advice for the jurisdiction in question, considering the issues in the context of the particular investigation. In practice, there have usually been solutions to data protection issues, albeit sometimes involving the company taking a difficult risk assessment when the position is unclear. However, it is an issue that always requires careful consideration for each investigation and, particularly, in international investigations.

G. Employee Issues

1.58 One of the most sensitive issues that arises in an international investigation is the treatment of employees of different nationalities with different cultural expectations within a process that has to be of uniform quality and penetration. Very few companies have an international corporate culture that truly overrides national expectations in such delicate areas.

1.59 In the US, the tradition and expectations have generally been much harsher than elsewhere. In part, this comes from the frequent 'employment at will' basis of company/employee relationships. There is also a greater expectation of the need for companies to be seen to be taking quick and decisive action. This environment stems largely from the clearly articulated expectations of regulators, as reflected in the DOJ's Principles of Federal Prosecution of Business Organizations[9] and the SEC's Seaboard doctrine,[10] which led companies to refuse to pay legal fees of staff subject to regulatory attack and to dismiss people early in the investigation rather than keeping them under the corporate umbrella.

1.60 That said, firing staff can have the effect of making it more difficult for the company or a regulator to have access to people with important information and make it harder to uncover, and fix, problems. It may, therefore, also be seen as adverse by some regulators as putting witnesses (particularly when they are outside the US) beyond the reach of the US regulators. It is not unknown to give a regulator prior warning of a dismissal of a key person so that the regulator has the opportunity to object to the company's proposal and/or to interview the individual first.

1.61 However, the pressures in the US may more frequently lead to:

- a prompt dismissal, or at least suspension, of potentially liable staff;
- much less support for the staff involved, in terms of legal fees and extending corporate protection;
- a much more formalized investigation process, with employees being more frequently and more formally given 'Miranda' or 'Upjohn' style warnings (discussed below[11]), and therefore expecting them, and more adversarial interview processes; and
- a more legalistic relationship, with parties more frequently being separately represented or that separate representation occurring at an earlier stage in the process.

1.62 In the UK, the position is a little less formal. The civil litigation culture is (currently) significantly less aggressive than in the US and regulatory expectations are very different. Whilst it would be common (indeed, it is usually recommended) to suspend staff who might be at fault (or to put them on 'gardening leave'), the value of maintaining the employment relationship (with its benefits of cooperation, confidentiality, and fiduciary duty) is highly rated. Save in clear and egregious cases, staff are not generally dismissed until the end of a formal disciplinary process which will usually follow a corporate investigation.

1.63 Whilst it may be necessary to recommend separate representation, it tends to happen at a slightly later stage in the development of a potential conflict of interest where it is actually

[9] United States Attorneys' Manual § 9-28.000.
[10] SEC Release Nos 34-44969, AAER-1470 (23 Oct 2001).
[11] See the discussion in paras 3.193 et seq.

clear that the witness concerned is making statements and admissions against his own interest which he would not do, particularly given the likely disclosure of that data more widely, if he were separately advised. There would more often be an arrangement that the company pays the legal fees, albeit sometimes with aggressive terms as to repayment in the case that dishonest behaviour or a failure to cooperate is established. There is, generally, a greater expectation of corporate support for the individual, particularly in cases where there is no evidence of any direct personal benefit (i.e. fraud against the company) but rather of someone, even if wrongly, seeking to enhance the company's position.

1.64 In terms of conducting interviews, however, the process would usually be generally similar as regards the US and the UK, although perhaps a little less aggressive in the UK. Employees are prepared to accept, but may not like, questioning in some detail as to their behaviour, a thorough review of documents, an analysis of corporate performance and potential failings. Warnings as to the privileged and confidential nature of the conversation, the duties of the lawyers being to the company and not to the witnesses, and the right of the company to use the information as it wishes are common practice. This reflects a certain overlap with the litigation tradition. As common law jurisdictions, with an emphasis on discovery/disclosure and on oral, or at least witness, evidence, there is generally a certain recognition of what an investigation process involves, of why it is necessary, and of how it is fairly conducted.

1.65 However, in continental Europe (for legal reasons) and Japan and, to an extent, China (for legal and cultural reasons) the approach is very different, being less invasive. Complex social legislation tends to entrench employee rights to a significant degree. It would be rarer that an employee would be separately represented, but much more common that legal costs would be paid. Summary dismissal or suspension is rare and the employee issues can take much longer to resolve.

1.66 This difference reflects a number of issues. The social democratic norm over the past 50 years has created certain cultural expectations. Moreover, the litigation context is different, with a lower level of claims and/or lower value—and less often targeting the individuals. Where there are claims, parties rely more heavily on their own internal documentary evidence to support their own positive case without there being a general obligation to reveal documents to the other side or cross-examination of witnesses. Regulators have tended to focus on companies and their responses to requests for information rather than going direct to individuals and expecting to interview them personally. This has tended to mean that employees find an investigation process much more alien and intimidating than perhaps might be the case in the US or the UK. Their behaviour is more difficult to predict and the management of the process tends to require more care and attention. This requires considerable cultural sensitivity.

1.67 This emphasizes the enhanced need, reflected in some of the chapters below, to adopt an interview process that is aimed at winning the confidence of the employees concerned. In these jurisdictions, particularly, it is more effective to be jointly (with the employees) seeking information and understanding than to be engaged in an adversarial process to produce 'evidence'. An aggressive cross-examination technique aimed at forcing admissions and trapping an employee into inconsistencies and 'breaking' him as a witness is rarely the most sophisticated approach in an investigation, in any jurisdiction, but this is particularly so in those jurisdictions with a more employee-friendly legal system and tradition. It can be strongly counterproductive. That is not to say that the investigation does not 'have teeth'

and that it is not necessary to be firm and committed in the questioning—but the style has to be highly sensitive to the cultural context.

These differences in approach have quite significant implications for the conduct of international investigations. It is necessary, so far as possible, to reconcile various objectives. **1.68**

First, it is fundamental that the company gets to the truth of what occurred. That means that these cultural and legal issues cannot be used as an excuse for not investigating to a consistent level of detail. A regulator in the US or in the UK may accept that certain rights and powers of an employer do not exist in other jurisdictions (so that some things simply cannot be done) but will expect that a company will have used all the means at its disposal to establish all the relevant facts in an investigation. Moreover, it is suggested that credible senior management in an international business, being held to global ethical and governance standards, will have to impose similar requirements for gathering information and evidence around the world and can only make decisions based on full rather than partial data.[12] **1.69**

Secondly, the effective conduct of an investigation is likely to require that local staff or external advisers conduct, or are involved in, the investigation in the jurisdiction concerned. Flying in 'an investigation team' from other jurisdictions, particularly without the necessary language skills and with different cultural expectations, runs a very significant risk of creating defensive and frustrating behaviour and producing highly sub-optimal results. Given the need for integration and the sharing of information, it may well be that a member of the central investigation team is present; but it is likely that the best results will be obtained with a significant 'local' contingent as part of the investigation. This is particularly the case as it will usually be better to conduct the investigation in the witness's mother tongue. It is, for obvious reasons, usually advisable to retain as appropriate, strong local counsel on employment, data protection, and criminal law issues. **1.70**

Thirdly, and consistently with the above, it is necessary to focus on equivalence of result and output rather than becoming overly fixated on identical processes. Thus, a degree of pragmatism may be required. **1.71**

Fourthly, whilst the disciplinary processes will have to follow local requirements, it is often desirable to strive to achieve equivalent, and rationally related, sanctions across the different jurisdictions. This may well mean, so far as possible, a degree of normalizing of both interim sanctions (e.g. suspension, withholding of bonuses or promotion) as well as any final sanction, seeking to achieve a result that is right for the organization and non-discriminatory across jurisdictions rather than meeting each local expectation exactly. **1.72**

H. Privilege Issues

A similar split is seen in the area of privilege (and the waiver of privilege) to that observed in the area of employee issues. The US tends to have its own very sophisticated rules; the UK (and Hong Kong) have a similar common law approach but it is applied and operated in a rather different way to that seen in the US; India has similar rules but they do not grant **1.73**

[12] Whilst not a legal issue, the internal organizational behavioural aspects of differing standards and the governance implications will usually be highly unattractive.

effective protection; Europe, Brazil, Japan, and China have a different philosophy—but it tends to lead, paradoxically, to what can be, in some cases, a higher degree of protection for lawyer related communications. In the context of an international investigation, these differences manifest themselves in a number of respects.

Creation of privilege or confidentiality

1.74 Where an investigation is conducted in anticipation of litigation, a broad range of communications, including with third parties, will usually attract privilege. However, care needs to be taken in a number of respects.

1.75 The US does not have an equivalent of the 'who is the client' issue that has arisen in UK privilege law after the Court of Appeal decision in *Three Rivers DC v The Bank of England*.[13] In the UK, this means that, at a stage before litigation privilege is available, there is a risk that communications between lawyers and witnesses who are not part of 'client team', although employees of the client company, may not attract legal advice privilege even if they are clearly for the purpose of giving legal advice to the company. This is particularly relevant in the context of the common UK practice of taking statements from witnesses which are sent back to them (sometimes many times) in draft for comment.

1.76 In this area, the degree of protection may be less than is available in the US. In the context of an investigation, in particular in a major transatlantic investigation, where a considerable amount of the output from the legal team is constituted by records of the evidence (or, at least, information) obtained from client employees in different jurisdictions, this can give rise to material having different levels of protection. Conversely, however, in the US, it is customary practice not to send employee witnesses draft statements of their evidence but for the legal team to keep a record in their own files. To enhance the protection of such output under the 'work product' doctrine, it is common for those notes not to simply be a transcript of the interview but expressly to incorporate the personal views of the legal team involved so that there is clearly legal work product incorporated as well as the purely factual record. Irrespective of whether this is also inherently a prudent practice in the UK, it is clearly a sensible precaution in a US/UK investigation.

1.77 In some senses, the position in Europe, Brazil, Japan, and China is much more conducive to the efficient conduct of investigations. Here the doctrine is generally one of fundamental confidentiality of the lawyer's work and the inviolability of his records and work product whilst it is in his possession. The lawyer may not be able to waive that confidentiality even with the consent of the clients (although that is not always the case—see Germany). The protection is accorded a degree of respect (albeit varying) by regulators (and in litigation, to the extent that disclosure of documents is required). However, there are regulators that are known to take an aggressive line in this area such as the Italian Consob and IAA and this issue does need to be considered on a case-by-case basis. Nevertheless, in the classic situation of an investigation being conducted by a local law firm, with attorneys interviewing employees and considering the evidence, provided the work product is retained within the law firm, it is relatively safe from regulatory or litigation claims for disclosure. Contrast this with the US, where until recently regulators often requested that companies produce investigative

[13] [2004] EWCA Civ 218.

reports and witness interview memoranda. Such production generally constitutes a waiver of privilege or work product protection as to those materials such that adversaries in civil litigation are subsequently able to obtain copies of those documents. The practice of requiring companies to waive privilege has, since 2008, been much less common.[14]

1.78 There is a difficult issue as to whether a document which is deemed privileged and immune from production in one jurisdiction will also be protected in the case of regulatory or litigation process in another jurisdiction which would not otherwise accord protection to the document. This is a sophisticated question and highly dependent on the procedural rigour of the requesting jurisdiction.

1.79 Under the Hague Convention on Taking Evidence Abroad in Civil or Commercial Matters[15] and most international criminal cooperation arrangements, where there are attempts for litigants or agencies to use the international mechanisms that have been put in place for the international gathering of evidence, the privilege of the requested state (the state of execution of the request) is recognized. It is usually the case, although not formally required by this Convention, that the requesting state will not seek material that is privileged under its own laws. This means, in effect, that only material that is protected under neither the privilege law of the requesting state nor the requested state will be transmitted. This provides a significant degree of protection.

1.80 However, that result does not address the much more frequent situation where a regulator or a litigant takes proceedings against a party and directly uses its coercive powers on that party to produce material under its control wherever it may be in the world.

1.81 In the litigation context, this is primarily an issue for the common law jurisdictions, given the general absence of discovery/disclosure under the civil law regimes. In the US, the position on disclosure of material that is privileged under US law, but not in the jurisdiction where it was created, is generally that it will not be disclosable. However, this issue is dependent on the venue in the US and is not a mandatory rule.

1.82 The more controversial issue arises where material is not privileged under US law but does have a degree of protection under local law.[16] US courts generally enforce extra-territorial subpoenas to produce information. They tend to find that the interest of the US in law enforcement outweighs the interest of the foreign state in preserving the information.[17]

[14] See below at para 3.111.

[15] 18 Mar 1970, 23 847 UNTS 231—see Art 11.

[16] In the leading US Supreme Court decision on the conflict between US and foreign countries discovery rules, *Société Internationale Pour Participations Industrielles et Commerciales, SA v Rogers* 357 US 197 (1958) the court reversed a District Court decision to dismiss a complaint due to the claimant's failure to produce documents. The claimant alleged that such disclosure would violate Art 273 of the Swiss Penal Code and Art 47 of the Swiss Banking Law, and sustained the burden of showing good faith in its efforts to comply with the production order. The Supreme Court held that the failure to comply with the order was 'due to inability fostered neither by its own conduct nor by circumstances within its control'. Consequently, the court ruled that the complaint should not be dismissed because of the claimant's inability to tender the documents. The court found it 'hardly debatable' that the fear of criminal prosecution 'constitutes a weighty excuse for non-production, and this excuse is not weakened because the laws preventing compliance are those of a foreign sovereign'. However, the court held that 'in the absence of complete disclosure by petitioner, the District Court would be justified in drawing inferences unfavorable to petition as to particular events'.

[17] See e.g. *United States v Field (In re Grand Jury Proceedings)* 532 F 2d 404, 407 (5th Cir 1976), certiorari denied, 429 US 940 (1976); *United States v The Bank of Nova Scotia (In re Grand Jury Proceedings)* 691 F 2d

As a rule of comity, section 40 of the Restatement (Second) of Foreign Relations Law of the United States (1965) instructs courts to consider:

> moderating the exercise of [their] enforcement jurisdiction, in light of such factors as: (a) the vital national interest of each of the states; (b) the extent and the nature of the hardship that inconsistent enforcement actions would impose upon the person; (c) the extent to which the required conduct is to take place in the territory of the other state; (d) the nationality of the person; and (e) the extent to which enforcement by action of either state can reasonably be expected to achieve compliance with the rule prescribed by that state.

1.83 Section 442(1)(c) of the Restatement (Third) of the Foreign Relations Law of the United States (1987), the current version, provides a slightly modified balancing test, under which a court or agency ordering a person subject to its jurisdiction to produce documents, objects, or other information that is located outside the US should consider:

> the importance to the investigation or litigation of the documents or other information requested; the degree of specificity of the request; whether the information originated in the United States; the availability of alternative means of securing the information; and the extent to which noncompliance with the request would undermine important interests of the United States, or compliance with the request would undermine important interests of the state where the information is located.[18]

1.84 To prevent an improper assertion of extra-territorial power by US courts or agencies, section 442(2)(a) of the Restatement (Third) of the Foreign Relations Law of the United States (1987) instructs that a court or agency may require the person to whom an order to produce information is directed 'to make a good faith effort to secure permission from the foreign authorities' in order to make the information available.[19] However, while good faith efforts ordinarily would not result in the imposition of sanctions of content or dismissal,[20] under section 442(2)(c), a court or agency may 'make findings of fact adverse to a party that has failed to comply with the order of production, even if that party has made a good faith effort to secure permission from the foreign authorities to make the information available and that effort has been unsuccessful'.

1.85 In the UK, the courts (currently) treat as protected those communications that satisfy the English law test for privilege, irrespective of how they would be treated in the court of any other jurisdiction.[21]

1.86 The position in relation to regulators is dependent on the regulators concerned. In the UK, the same approach will seemingly be applied by regulators whose statutory powers to compel the disclosure of material are limited by reference to the common law concept of privilege,[22] since the relevant test is directly imported by the legislation. In a case where

1384, 1387 (11th Cir 1982); *United States v First Nat'l City Bank* 396 F 2d 897 (2d Cir 1968); *United States v Vetco Inc* 691 F 2d 1281 (9th Cir 1981).

[18] See also, interpreting and applying the various factors, *Weiss v National Westminster Bank plc* 242 FRD 33 (DNY 2007).

[19] See e.g. *Montship Lines, Ltd v Federal Maritime Board* 295 F 2d 147 (DC Cir 1961).

[20] See Restatement (Third) of the Foreign Relations Law of the US, § 442 (1)(b): 'a court or agency should not ordinarily impose sanctions of contempt, dismissal, or default on a party that has failed to comply with the order for production, except in cases of deliberate concealment or removal of information or of failure to make a good faith effort in accordance with paragraph (a)'.

[21] *Bourns Inc v Raychem Corp* [1999] 3 All ER 154.

[22] See e.g. s 32 of the Competition Act 1998.

the protection is specifically statutorily defined (e.g. section 314 of the Financial Services and Markets Act 2000), there is no basis on which foreign privilege law could be applicable in any event. It is simply a question of whether the communications concerned fall within the protections proscribed by legislation. There is, however, no known specific UK authority or established practice on how the UK regulators would, in fact, seek to address the issue of communications not privileged under the relevant UK provisions but privileged, or otherwise protected, under another law. The practical experience has been consistent with regulators taking a relatively pragmatic position and not seeking to test the technical issue of the vulnerability of documents protected only under another legal system. The exception to this is the European Commission, or agencies applying Community antitrust law on its behalf, when the Community's own law of privilege (which is more restrictive, but supervening) will be applied and local protections ignored.

1.87 There is a particular vulnerability in relation to disclosures within the EU in the antitrust regime. Because the detailed privilege rules do vary, material could be compelled in one country with a less protective privilege regime and could be disclosed under the cooperation arrangements between national regulators such that it would be in the hands of a regulator that could not have compelled it in its own jurisdiction. Since the EU has its own specific rules in the antitrust area which apply across all member states, it has not been concerned to respect more protective regimes where the data is flowing within the inter-regulator system that the EU has established. If the antitrust issue is subject to EU antitrust rules, rather than national rules, the issue does not arise because the harmonized (limited) level of protection applies.

Waiver

1.88 A further complexity in this area is that of waiver. Here the rules and principles vary considerably.

1.89 As seen below, in some civil law jurisdictions, the lawyer generally cannot, even on instructions, waive privilege/confidentiality since he has a separate professional right and duty to maintain confidentiality. However, this is not true in Germany, where the privilege can be waived by the client putting the lawyer under an obligation to release the documents concerned to the regulator or litigant.

1.90 A client can choose not to assert a privilege, or right of confidentiality, over material in its (as opposed to the lawyer's) possession (if indeed, it is privileged—in some jurisdictions, it is not) and can release it to a regulator. Conversely, it has been the practice of regulators in continental Europe but not India to respect privilege and not to exert pressure on companies to waive it in the interests of a more harmonious and constructive relationship with the regulator concerned.

1.91 In the US, the position has evolved considerably over the past 10 years. Beginning in 2008, the US regulators no longer routinely require a waiver of the privilege in order to demonstrate cooperation.[23]

1.92 When a waiver is made, however, it has profound consequences. In general, waiver of privilege to one regulator by the submission of privileged material constitutes a waiver of the

[23] See below at para 3.110.

protection not only against all regulators but also against all private litigants. This is despite the best efforts of some agencies and practitioners to persuade the courts otherwise in the hope of making it easier for companies to deal openly with them without prejudicing their position in civil claims.

1.93 While the US position has moved closer to that of the UK, the UK's position remains perhaps the most attractive. As a general rule, UK regulators have not sought to persuade companies to waive their rights of privilege generally. Moreover, there is considerable authority that it is possible to give only a partial, or expressly limited, waiver of privilege. This has the attraction that it is possible to disclose to, and discuss with, a regulator a privileged document, such as the report of an investigation, such that the document is likely to remain privileged as regards not only other regulators but also private sector litigants.

1.94 It is open to debate (and not yet tested) whether the US courts (say) would recognize that, under English law, a waiver of privilege of a document created in, and privileged under the law of, England was limited and the client had maintained its rights as against other parties. As a matter of conflicts of law theory, one would have expected the sanctity of the privilege to be maintained since the detraction from it was specifically limited and did not have the impact of undermining it generally under the law governing both that privilege and that waiver. However, the likely practical position in the US is less clear. For example, if documents with an inherently US connection which would otherwise be privileged under US law (say an investigation report by a US law firm, written in the US to the board of a US company) were disclosed to an English regulator, even though the waiver, under English law, was limited, it is suspected that the US courts might well show considerably less sympathy in such circumstances.

1.95 Equally, there must be a considerable risk that in private litigation in the UK, a US connected document would be disclosable if its privilege had been waived under US principles of privilege by disclosure to a US regulator, even if it would have been possible to have constructed a limited waiver under English law.

1.96 A conservative position is consistently taken, in practice, in the case of disclosures to the European Commission or national agencies, in antitrust leniency applications. The perception is that the risk of the documents' consequent vulnerability to US civil claims is such that, whether the documents be originally US related documents or documents that had no particular relationship with the US, it will not willingly be accepted. This also means that strict steps are taken to avoid creating potentially disclosable documents in the context of the relationships with the regulators, including on leniency applications. There is, however, no escaping the impact of an agency in Europe applying EU rules on privilege (which, for example, do not protect communications with in-house counsel) requiring the disclosure of documents privileged under US law, but not within the EU, with the result that a US litigant would then argue that privilege had been waived by virtue of that disclosure.

1.97 Applying this inconsistent set of approaches to an international investigation, perhaps in the teeth of multiple regulatory attacks, presents considerable problems. However, whatever the technical issues, the practical question usually resolves to the civil litigation exposure. It is, again, not generally credible that a company would seek to waive privilege by releasing to one regulator but seek to assert it against others. Such a position would look highly defensive and technical and would be very difficult to justify in any credible regulatory strategy.

It would also be likely to be self-defeating. Given the degree of coordination between regulators, it is likely that either the material disclosed or the gist of it will, in any event, be disclosed between different regulators.

1.98 However, it is a very credible concern that there is a sensitive internal report which a client would like to give to a regulator as part of its cooperation with that regulator but which it is inhibited from doing so by the prospect of rendering it vulnerable to litigation, particularly in the US. The process that is usually adopted to resolve such an issue tracks the procedure that is usually adopted in the US in such circumstances where the questions are purely national.

1.99 In such a case, the report is delivered orally to the regulator concerned in a meeting in which the relevant case officers are taken through the contemporaneous (and hence usually non-privileged) documentary evidence so that the necessary connections can be made and the context understood. In such a case, the case officers will usually take their own notes. However, it is generally considered that those reports, in the hands of foreign government or EC agencies are protected from US disclosure. There is, by definition, no document in the possession of the company over which privilege has been waived by the process of disclosing it to a regulator. The investigation report and related material remain privileged (assuming that they have attracted privilege) as between the lawyers and the client. This approach is almost uniform practice within antitrust regulators in the EC and is becoming more frequently seen elsewhere when there is a risk of US litigation.