THE INTERNATIONAL INVESTIGATIONS REVIEW

NINTH EDITION

Editor
Nicolas Bourtin

THE LAWREVIEWS

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CONTENTS

PREFACE

In the United States, it is a rare day when newspaper headlines do not announce criminal or regulatory investigations or prosecutions of major financial institutions and other corporations. Foreign corruption. Healthcare, consumer and environmental fraud. Tax evasion. Price fixing. Manipulation of benchmark interest rates and foreign exchange trading. Export controls and other trade sanctions. US and non-US corporations alike have faced increasing scrutiny by US authorities for several years, and their conduct, when deemed to run afoul of the law, continues to be punished severely by ever-increasing, record-breaking fines and the prosecution of corporate employees. And while in the past many corporate criminal investigations were resolved through deferred or non-prosecution agreements, the US Department of Justice has increasingly sought and obtained guilty pleas from corporate defendants. While the new presidential administration in 2017 brought uncertainty about certain enforcement priorities, and while US authorities in 2018 announced policy modifications intended to clarify or rationalise the process of resolving corporate investigations, the trend towards more enforcement and harsher penalties has continued.

This trend has by no means been limited to the United States; while the US government continues to lead the movement to globalise the prosecution of corporations, a number of non-US authorities appear determined to adopt the US model. Parallel corporate investigations in several countries increasingly compound the problems for companies, as conflicting statutes, regulations and rules of procedure and evidence make the path to compliance a treacherous one. What is more, government authorities forge their own prosecutorial alliances and share evidence, further complicating a company's defence. These trends show no sign of abating.

As a result, corporate counsel around the world are increasingly called upon to advise their clients on the implications of criminal and regulatory investigations outside their own jurisdictions. This can be a daunting task, as the practice of criminal law – particularly corporate criminal law – is notorious for following unwritten rules and practices that cannot be gleaned from a simple review of a country's criminal code. And while nothing can replace the considered advice of an expert local practitioner, a comprehensive review of the corporate investigation practices around the world will find a wide and grateful readership.

The authors who have contributed to this volume are acknowledged experts in the field of corporate investigations and leaders of the bars of their respective countries. We have attempted to distil their wisdom, experience and insight around the most common questions and concerns that corporate counsel face in guiding their clients through criminal or regulatory investigations. Under what circumstances can the corporate entity itself be charged with a crime? What are the possible penalties? Under what circumstances should a corporation voluntarily self-report potential misconduct on the part of its employees? Is it a

realistic option for a corporation to defend itself at trial against a government agency? And how does a corporation manage the delicate interactions with employees whose conduct is at issue? *The International Investigations Review* answers these questions and many more and will serve as an indispensable guide when your clients face criminal or regulatory scrutiny in a country other than your own. And while it will not qualify you to practise criminal law in a foreign country, it will highlight the major issues and critical characteristics of a given country's legal system and will serve as an invaluable aid in engaging, advising and directing local counsel in that jurisdiction. We are proud that, in its ninth edition, this publication covers 25 jurisdictions.

This volume is the product of exceptional collaboration. I wish to commend and thank our publisher and all the contributors for their extraordinary gifts of time and thought. The subject matter is broad and the issues raised are deep, and a concise synthesis of a country's legal framework and practice was challenging in each case.

Nicolas Bourtin
Sullivan & Cromwell LLP
New York
June 2019

Chapter 3

THE CHALLENGES OF MANAGING MULTI-JURISDICTIONAL CRIMINAL INVESTIGATIONS

Frederick T Davis and Thomas Jenkins[1]

I INTRODUCTION

As the various chapters in this book demonstrate, managing a criminal investigation in one country is often a challenge in itself. This becomes much more complicated if prosecutors in more than one country are, or may become, involved. The applicable procedures and important protections, such as professional privileges, vary considerably from one country to another; perhaps more urgently, a strategy that may seem to be common sense or even obvious in one country may be ineffective or even detrimental in another. This risk is not just theoretical; many crimes, such as corruption, money laundering, cybercrime and terrorism, often cross borders. Not only may evidence relating to the crime be found in more than one country, but the prosecutors in these countries may investigate and prosecute.

These situations are intrinsically complex and do not lend themselves to a one-size-fits-all approach. As this book shows, procedures differ enormously among countries and many are changing at a rapid pace, requiring frequent updates. Local knowledge and contacts are critical; weaving together a comprehensive multinational strategy will often depend on personal relationships with officials in the various countries.

That said, many traps for the unprepared could be anticipated. The goal of this chapter is not to offer a strategy for any particular case – that would be counterproductive – but rather to provide a basic checklist to address multi-jurisdictional risks. Even this checklist must be viewed as flexible. Among other things, while listed below in a logical sequence, it does not follow that one topic can be fully addressed before another is considered: they are often interactive, and urgent time exigencies may quickly disrupt a well-constructed plan.

II IDENTIFYING THE CLIENT

The identity of the client may appear obvious, but identifying the client precisely – clearly specifying the client's goals and agreeing on a protocol, which is generally a good approach in any event – is particularly important in transnational cases because differing rules in the countries involved may pose threats to the confidentiality of attorney–client communications.

Representing corporate entities, for example, may present unique issues. A lawyer engaged to advise or represent a corporation may also need to interface with its parent or subsidiaries; in particular, if the corporation creates subsidiaries for tax or regulatory purposes,

1 Frederick T Davis is of counsel and Thomas Jenkins is an associate at Debevoise & Plimpton LLP.

the various entities may be under different disclosure and other regulatory obligations in their countries of incorporation. Once an investigation begins, they may be subject to different restraints, such as local secrecy, privacy or 'blocking statute' obligations (see Section IV.iii).

In some instances, the client may not be a corporation but an entity such as an audit committee that may act with some degree of independence. A company's board of directors may establish a special 'litigation committee' or other group tasked with protecting shareholders' interests. In these cases, the client's goal may not be to develop a legal defence for the corporation but rather to satisfy audit, fiduciary and other obligations.

Joint ventures pose further problems. The extent of any one company's responsibility for the acts of the joint venture, as well as control of its decision-making during an investigation, may be complex and depend upon differing local laws. In other cases, the client may be a person or entity such as an outside auditor whose interests may be to some degree aligned, but not identical, with a corporate target. A company's responsibility to its officers and employees (such as an obligation to pay attorneys' fees) may be governed by by-laws and vary considerably under local laws.

Once a corporate client is identified, it is imperative to specify the individuals within the corporate structure who will be the exclusive contacts with attorneys advising and representing it, and to establish a protocol governing those communications. While US procedures for maintaining attorney–client privilege are generally broad and flexible, other countries limit protected communications to those between outside lawyers (often limited to members of a local bar) and senior officials of the company capable of receiving and acting upon legal advice. Since communications between an attorney and anyone not so identified may not be protected and become the subject of compelled, non-consensual production to a prosecutor, an early task is to identify qualified individuals who can speak for the corporation and to establish a strict protocol limiting confidential communications to that group.[2]

Advising or representing a corporation generally precludes the ability to give legal advice to individuals associated with it, even senior officers such as the chief executive officer, an issue revisited in Section IV.iii regarding the *Upjohn* principles. Since a corporation and its officers may develop inconsistent or even hostile interests – if, for example, a corporate investigation reveals evidence incriminating an individual that the corporation may be pressured to share with prosecutors – clarifying and memorialising this distinction is important.

If the client is an individual, then, of course, there will be no difficulty in identifying him or her. But especially in complex corporate and multinational investigations, the lawyer must reach a specific retention agreement. Such an agreement may address the extent of the corporation's agreement or obligation to pay the client's fees (on which local laws may differ). In some instances, the lawyer may wish to consider a common defence agreement or other arrangement with corporate counsel or counsel for other individuals, but local law and professional practice may bear on the feasibility and safety of doing this. In others, the attorney may conclude that the client's interests are unaligned with, or even hostile to, those

2 The issue of the identity of the client within a corporate organisation was explored under UK law in *Serious Fraud Office v. ENRC*. The High Court decision (see *The Director of the Serious Fraud Office v. Eurasian Natural Resources Corporation Ltd* [2017] EWHC 1017 (QB) restricting protection, particularly where the corporate client could not demonstrate that it was anticipating adversarial litigation, was largely overturned on appeal, but Justice Andrews' discussion of the need for a specified corporate contact to maintain confidentiality would appear to remain largely intact (see *Serious Fraud Office v. Eurasian Natural Resources Corporation Ltd* [2018] EWCA Civ 2006).

of a corporate entity being investigated, and may need to take steps to protect the client's interests during the investigation. The best strategy for doing so may vary country by country, depending, among other things, on local professional practice rules.

III IDENTIFYING THE INVOLVED COUNTRIES

The list of countries that may ultimately become involved in a criminal investigation will often change and must be constantly updated. But it is important to have a preliminary list of these countries before expending significant resources on fact-gathering, and certainly before developing a comprehensive long-term strategy.

Different national regimes may apply to two separate questions: which countries' laws apply (or may apply) to the potentially criminal conduct at stake and to what degree may prosecutors in those countries become involved; and what countries' laws may apply to the evidence that may be related to the investigation. In many situations, the countries so implicated may be the same, but that is not always the case, and in any event, the relevant risks and questions are quite different. Finally, countries vary considerably in their criminal procedures, including the speed and effectiveness with which they work – and the aggressiveness of their prosecutors.

i Laws applicable to conduct

Before committing resources to investigating facts, and certainly before providing a client with anything other than very short-term advice, it is imperative to determine which prosecutors are already involved, as well as those that may become so on their own initiative or that may need to be contacted. For each of them, it is important to have a preliminary but practical sense of each country's laws and procedures relevant to the conduct in question. This book provides some indications of these differences across jurisdictions, but ultimately it is critical to get high-quality, savvy legal advice from a lawyer qualified and familiar with the laws and practices of each potentially involved country (and to do so under procedures that maximise professional protection of communications with such lawyers under applicable local rules). Among national variables are the following.

Substantive criminal laws

There has been some degree of convergence among the substantive criminal laws relating to financial and other corporate crimes in the countries covered in this volume. But this is not universally true. For example, even signatories to the Organisation for Economic Co-operation and Development's Convention on Combating Bribery of Foreign Public Officials in International Business Transactions[3] differ on how to define bribery, such as whether a 'facilitating payment' is permitted, and whether anti-corruption laws apply to passive bribery (bribe-takers) as well as active bribery (bribe-givers).[4]

3 http://www.oecd.org/corruption/oecdantibriberyconvention.htm.

4 For example, under the FCPA only the payment of a bribe (i.e., active bribery) is prohibited. However, under Section 2 of the UK's Bribery Act, the receiving of a bribe is also criminalised. Similarly, there is a divergence between the United States and United Kingdom on the payment of 'facilitating payments'. While the FCPA contains an express exception to permit such payments, under the Bribery Act they are not distinguished from other bribes.

Corporate criminal responsibility

National criminal laws also differ on whether and under what circumstances corporate entities can be held criminally responsible (that is, convicted of a crime): some provide for no corporate criminal responsibility at all;[5] some (such as the United States) provide for virtually automatic criminal responsibility under the principle of *respondeat superior*; some (such as the United Kingdom) provide for limited corporate criminal responsibility in some circumstances[6] and much broader exposure in others; [7] and others (e.g., France) have principles for corporate criminal responsibility that are somewhat vague and still being developed.[8] The laws on this core issue will have a major impact on determining defensive corporate strategy, generally because corporations will be more vulnerable – and in many cases have a greater motivation to negotiate – in countries that do not provide legal arguments against corporate conviction.

Time periods

Statutes of limitation vary significantly country by country. Variables include not only duration but also important factors such as fixing a 'starting date'; whether or how it can be suspended (or 'tolled'); and the circumstances under which it can be satisfied (whether by a formal investigation or the filing of a secret indictment, for example). They also vary as to whether and how they can be waived, which may become relevant during an investigation. In theory, an analysis could lead to a conclusion of diminished risk in a country with a short statute of limitation, although it should be emphasised that anticipatory analyses of statutory periods can be risky because the laws are often complex, and facts yet undiscovered can affect the analysis.

The availability of advantageous outcomes through self-reporting

The passage of time may have another, less obvious impact on country-by-country prioritisation: some countries offer complete leniency, or at least hugely advantageous outcomes, to cooperating corporations – but only to companies that genuinely 'self-report'

5 This is the case in Germany, although the expansive use of administrative regulation of corporate misbehavior may diminish its significance. See Edward B Diskant, 'Comparative Corporate Criminal Responsibility: Exploring the Uniquely American Doctrine Through Comparative Criminal Procedure', 118 *Yale L. J.* 2 (2008). See also the Korea chapter of this guide ('the Criminal Act, which governs traditional crimes such as bribery, embezzlement or fraud, does not recognise corporate criminal liability').

6 Under the 'identification principle' in the United Kingdom, corporations can be convicted of a crime only if the 'directing mind' – generally board members or very senior officers – were aware of acts committed by employees and approved them. See Pinto & Evans, *Corporate Criminal Responsibility* (2008).

7 Section 7 of the UK Bribery Act of 2010 created a new 'corporate offence' by which corporate entities can be held virtually strictly liable if its 'associated persons' commit certain kinds of bribery or other offences for the benefit of the corporation, and the corporation had not adopted procedures that could reasonably have been expected to deter such conduct. The UK Bribery Act of 2010: A Guide to the New Offences, https://www.debevoise.com/insights/publications/2010/05/the-uk-bribery-act-2010-a-guide-to-the-new-offen__.

8 Article 121-2 of the French Penal Code provides that corporate entities (other than the state) can be held liable for acts committed 'on its account' by 'organs or representatives' of the entity. The French courts have not been entirely clear how to interpret the requirement that the offending individual be a 'representative' of the corporation, an issue that has led to corporate acquittals notwithstanding felonious acts by an employee. Davis, 'Limited Corporate Criminal Liability Impedes French Enforcement of Foreign Bribery Laws', https://globalanticorruptionblog.com/2016/09/01/guest-post-unduly-limited-corporate-criminal-liability-impedes-french-enforcement-of-foreign-bribery-laws/.

by bringing matters to the attention of prosecutors before prosecutors discover the conduct on their own, or in some instances by self-reporting before a competitor does. The cost of losing such an opportunity by being 'too late' may be significant, so it is often extremely important to understand if one may be available, but is subject to being lost, in key countries under consideration.

Territorial and double jeopardy limits

The territorial limits on a prosecutor's power (including whether the laws of that country apply to the conduct in question) and the ability of authorities in one country to prosecute a person or company that has already been convicted or acquitted in another country have traditionally not been determinative issues with respect to US investigations. Unlike in many European countries, American criminal laws rarely formalise their territorial limitations, so that territorial limits are generally decided by judges case by case. Perhaps, as a result, US prosecutors often proceed on an assumption that they are authorised to investigate any potential crime that has any connection at all with the United States, such as the use of US dollars. Separately, American law systematically does not recognise a criminal outcome from a different 'sovereign' as triggering any rights under the double-jeopardy clause of the Constitution.[9] Further, American law generally permits both a prosecutor (such as the Department of Justice) and a regulator (such as the Securities and Exchange Commission) to seek and obtain penalties relating to the same defendant and the same facts, even though the 'sovereign' is the same.[10]

This latitude may not be the case in other countries, particularly in Europe, where recent trends suggest limits on multiple and extraterritorial prosecutions. Continental European and other code-based countries often specify the territorial conditions under which its criminal laws apply. Under some circumstances that may vary by jurisdiction, the domestic laws of some countries may oblige its prosecutors not to prosecute individuals or companies already convicted or acquitted elsewhere, which may come as a surprise to American lawyers. Regional treaties may apply double jeopardy (or *ne bis in idem*) principles across national boundaries. Regional bodies such as Eurojust (located in The Hague) may allocate prosecutorial responsibility to one country or another, to avoid a free-for-all of multiple prosecutions.[11] There are also indications that the principle that no person should be twice tried for the same facts or offence may come to be viewed as a human right recognised by supranational principles based on human rights.[12]

European laws may also provide advantages not available in the United States with regard to parallel criminal and regulatory investigations. While the issue is complicated and

9 *Gamble v. United States*, ____ US ___, https://www.supremecourt.gov/opinions/18pdf/17-646_new_o759.pdf (17 June 2019).

10 These distinctions are developed in Davis, 'International Double Jeopardy: US Prosecutions and the Developing Law in Europe', 31 *Am.U. Int'l L. Rev* 57 (2016).

11 http://www.eurojust.europa.eu/Pages/home.aspx.

12 Davis, op. cit., footnote 10. Some of the French decisions discussed there were subsequently vacated by the French Supreme Court, see Davis, 'Further Developments on French Law Regarding Anti-Bribery Prosecutions by Multiple States', https://globalanticorruptionblog.com/2018/04/19/guest-post-further-developments-on-french-law-regarding-anti-bribery-prosecutions-by-multiple-states/#more-11459. See also Davis, 'Paris Court Rules that a US FCPA Guilty Plea Precludes Subsequent Prosecution in France', https://globalanticorruptionblog.com/2017/07/05/guest-post-paris-court-rules-that-a-us-fcpa-guilty-plea-precludes-subsequent-prosecution-in-france/#more-9529.

subject to evolution, the European Court of Human Rights, as well as some national courts, have recognised the unfairness of permitting a double recovery by criminal prosecutors and regulators in the same country, in essence forcing the authorities of that country to choose one or the other.[13]

The law relating to territoriality may be evolving in the United States. Following the decision of the US Supreme Court in *Morrison v. National Australian Bank*,[14] that court and others have become more vigilant in assessing whether the application of US laws – and the power of a US prosecutor to enforce them – is justified in any particular case. This has led to a debate over the proper territorial reach of US prosecutions[15] and in one instance the dismissal of key charges brought under the Foreign Corrupt Practices Act for lack of a territorial connection. [16] This trend may, over time, make the United States a less potent threat to corporations incorporated and active only outside the United States. For now, the applicability of the relevant principles is very fact-intensive, and can only be developed on the basis of the mastery of the relevant facts.

ii Laws applicable to evidence

Getting access to, obtaining or copying, and often transmitting across national borders potential evidence – including information obtained by interview – often runs into local law issues that can bedevil an investigation if not planned properly. Differing laws and practices, for example, may apply depending upon:

a the physical location of documents (or physical things); and

b the physical location of a person whose information is sought by an interview (and, occasionally, the citizenship of that person).

Among the possible constraints are privacy and database issues. A company seeking to learn about its own employees' conduct, for example, must be wary of creating legal issues in gaining access to those employees' emails or records, particularly since the promulgation of the EU General Data Protection Regulation (GDPR) in 2018.[17] The issue becomes more complex when information stored as data is accessible from multiple countries, often from places different from its actual storage.[18] Some countries' regimes prohibit transferring certain kinds of personal data out of the country, which may be necessary during a transnational fact-gathering exercise.[19]

Further, many countries have bank regulations governing access to, and dissemination of, customer banking information.[20] Blocking statutes may also prohibit the transfer of any

13 See Davis, op cit. footnote 10.

14 561 US 247 (2010).

15 See *United States v. Vilar*, 729 F.3d (2 Cir. 2013); see also Herz-Roiphe, Innocent Abroad? Morrison, Vilar and the Extraterritorial Application of the Exchange Act, 124 *Yale L. J.* 1626 (2014).

16 *United States v. Hoskins*,16-1010-CR, 2018 WL 4038192, at 18 (2d Cir. 24 August 2018).

17 See, e.g., 'GDPR is Here: Now What?', https://www.debevoise.com/insights/publications/2018/06/gdpr-is-here-now-what.

18 See Davis and Gressel, 'Storm Clouds or Silver Linings: The Impact of the U.S. CLOUD Act', https://www.debevoise.com/~/media/files/pdf/storm%20clouds%20pdf%202%20article.pdf.

19 See Kirry, Davis & Bisch, 'France' in *The International Investigations Review* (2018) at page 121.

20 For example, the role of such protections in criminal investigations was explored in the pathbreaking agreement of the United States Department of Justice with Swiss banking giant UBS in 2009. See https://www.justice.gov/opa/pr/ubs-enters-deferred-prosecution-agreement.

significant information out of the country in which it is stored. Most blocking statutes apply to transnational responses to state inquiries – by prohibiting response to a foreign subpoena, for example, unless the subpoena issuer proceeds through a bilateral or multilateral treaty. Such local statutes may apply, however, if a company expatriates information with the intent to share it with a foreign prosecutor or investigator.[21]

Finally, local professional responsibility rules may restrict how interviews are done by lawyers.[22]

iii Criminal procedures, practical culture and prioritisation by risk

Most fundamentally, of course, one must develop a map of the countries that may become involved, and begin the process of prioritising them by risk and opportunities. To some degree, a review of criminal procedures (and, especially, potential criminal penalties, which may vary wildly) will provide guidance. But ultimately, every country has its own track record and culture with respect to transnational criminal matters, in which some have been notably more aggressive – and often more successful – than others. Some countries also offer much greater, or more advantageous, possibilities of reaching a negotiated outcome, and it is important to understand the state of the laws, procedures, and practices in different countries on this important issue.

Until relatively recently, a cynical but generally useful principle was a simple one: if in any given situation prosecutors in the United States were likely to become involved, that was by far the biggest threat; an ultimate strategy would focus on dealing with US prosecutors – often by negotiation. This strategy proceeded on the assumption (often correct) that US prosecutors would second-guess outcomes in other countries anyway, so that it generally made more sense to deal primarily with them in the belief that other countries' authorities would fall into line with any outcome obtained in the United States.[23] The rise of some significant outcomes in criminal investigations in Europe, however, may be changing that assumption,[24] and an evaluation of risks and opportunities remains complex.

IV ESTABLISHING THE FACTS

A lawyer cannot professionally and competently advise a client on defensive strategy in a criminal investigation without understanding the relevant facts. A skilful, thorough and timely investment of effort to master an understanding of those facts can be a major factor in the success of developing an optimal strategy. This is particularly true if that strategy involves any form of negotiation with a prosecutor: counsel armed with a superior appreciation of the facts than an adversary will inevitably be better prepared to negotiate well for a client; counsel

21 Op. cit, footnote [19] at page 121. See also Grosdidier, 'The French Blocking Statute, the Hague Evidence Convention, and the Case Law: Lessons for French Parties Responding to American Discovery', 50 *Tex. Int'l L. J* 11 (2014).

22 The several different effects that differing professional rules may have on cross-border investigations are explored in Davis, 'How national and local professional rules can mess up an international criminal investigation', https://globalinvestigationsreview.com/article/1194073/how-national-and-local-professional-rules-can-mess-up-an-international-criminal-investigation (17 June 2019).

23 See Davis, 'Where Are We Today in the International Fight Against Overseas Corruption: An Historical Perspective, and Two Problems Going Forward', https://nsuworks.nova.edu/ilsajournal/vol23/iss2/3/.

24 Davis, 'The UBS Conviction: The Dawn of a New Era in France?', 35 *International Enforcement Law Reporter*, issue 3 (March 2019).

provided with an incomplete or, worse, misleading understanding of the facts will inevitably cede control to better-informed prosecutors and risk an irredeemable loss of credibility if more complete or accurate facts emerge during the negotiation.

Establishing the facts generally involves an internal investigation, and recently the conduct of internal investigations has become a profitable cottage industry for lawyers. In many of these investigations, their work product becomes at least partially public because they lead to negotiated, and ultimately public, outcomes. But not all investigations by counsel are designed to be shared with prosecutors or become public, and it is imperative that counsel and client have a coherent and common understanding of counsel's role in conducting one, as set forth in the next section, at the outset. Succeeding sections will discuss how different national rules (especially those pertaining to lawyers) can affect the conduct of internal investigations, and different rules applicable to their use upon completion.

i What are the goals of an investigation?

What we think of as an 'internal investigation' may actually encompass several different tasks, with different goals and often different applicable rules. To avoid misunderstanding, there must be careful consideration given to an investigation's goals so that appropriate procedures and protections apply to it.[25]

At its simplest, any lawyer asked to advise or represent a client in a criminal matter will at an early stage ask the client what happened. This enquiry often begins with questioning a client (if the client is an individual) or with discussions with an appropriate officer (if the client is a corporation). Such a straightforward act of fact-finding is a form of an internal investigation, and while questioning an individual client is generally simple enough, the process becomes much more complex when the client is a corporation, especially one with far-flung activities. By conducting a factual enquiry the lawyer is, of course, fulfilling a professional obligation of diligence to learn the relevant facts to best advise the client on a defensive strategy. It may later emerge that the strategy will involve some form of negotiation, often on the basis of the factual investigation and sometimes sharing the results of that investigation with a prosecutor. However, in the majority of cases, it is impossible to make a decision to communicate or negotiate with a prosecutor, or to share information, without first learning the relevant facts sufficiently well to advise the client on that strategy, and permit the client to make an informed strategic choice. That process should take place only under procedures that guarantee confidentiality of the information learned as well as the advice give on the basis of it. Further, in a multinational investigation, it is imperative to understand the potentially different rules that may be applicable in different jurisdictions.[26]

In a relatively small subset of cases, a company may make a public declaration of the fact that it is conducting an investigation and a commitment that a report of it will be made public; this occasionally occurs when well-known companies are viewed as having been tainted by one form or another of criminal acts by one or more of its officers or employees. Such an investigation in many cases is part of a public relations campaign to protect the company's reputation. It is sometimes said that such an investigation is 'independent', meaning that its goal is to determine 'what happened' on a neutral basis, rather than to

25 Various different kinds of 'internal investigations' and their attributes are discussed in Davis, American Criminal Justice: An Introduction (2019), chapter 17.

26 See Davis, op. cit., footnote 22.

develop the best defence for a client;[27] the reports of such 'independent investigations' are often designed to, and do, become public.[28] In these unusual circumstances, protecting the confidentiality of the work product is not a core concern, since the work product may be designed for publication anyway.

In most cases, however, an internal investigation at least begins as the attorneys' professional effort to ascertain the relevant facts to advise and defend a client. That advice may in fact later turn out to be to reach out to, and negotiate with, a prosecutor, and in some cases even to use some or all of the results of the attorney's investigation in those communications. National variants on the extent to which doing so is protected by a professional or other privilege, and the steps necessary to ensure such confidentiality, that bear on timing, and that affect the use of investigations are discussed below. The critical point at the opening of an engagement is that thought be given to confirming with the client that the investigation is, in fact, subject to confidentiality restraints, and to develop procedures to protect that confidentiality in the countries that may be involved.

ii What national rules may apply to lawyer-conducted investigations?

American lawyers benefit from traditions giving them ample professional authority to take steps to advise and represent their clients, and from professional protections – notably the attorney–client and work-product privileges – to shield their efforts from compelled production to a prosecutor. If properly set up and appropriately maintained, an internal investigation conducted in the United States will almost certainly be considered covered by one or both of these principles, and a demand by a prosecutor for the work product of an attorney – even if it is very likely that the ultimate purpose of the attorney's efforts will be to share information with a prosecutor – will be rebuffed.[29] Further, it is considered improper for a prosecutor to put pressure on a defendant, including a corporation, to waive its attorney–client privilege.[30] This is true even if the lawyer conducting the inquiry is an in-house counsel seeking information from fellow employees of the corporation.[31] These protections cannot be taken for granted, however, in a multinational investigation, where the following variants may appear.

Who qualifies as a 'lawyer'?

As noted, for many purposes – including the ability to conduct an internal investigation with appropriate professional protections – a duly qualified lawyer employed by a corporation to do legal work (such as a general counsel or a lawyer working in the general counsel's office) qualifies in the United States as an 'attorney' for purposes of creating an attorney–client privilege and a work-product privilege. That is not the case in most European and many other

27 See, e.g., 'CBS Board Says It Will Launch Independent Investigation', https://www.cbsnews.com/news/cbs-board-says-it-will-launch-independent-investigation-focusing-on-ceo-les-moonves/.

28 See, e.g., 'Les Moonves Obstructed Investigation into Misconduct Claims', Report Says, https://www.nytimes.com/2018/12/04/business/media/les-moonves-cbs-report.html.

29 See, e.g., *United States v. Kellogg Brown & Root, Inc*, 756 F.3d 754 (D. C. Cir 2014).

30 See Principles of Federal Prosecution of Business Organizations, Section 9-28.710, https://www.justice.gov/jm/jm-9-28000-principles-federal-prosecution-business-organizations#9-28.710.

31 See *Upjohn Co. v. United States*, 449 U.S. 383 (1981).

countries where an in-house counsel cannot be, or remain, a member of the bar, from which it follows that communications between such a person and others within the corporation may not be protected.[32]

What are the local practice-of-law requirements?

Companies conducting a worldwide investigation often use one law firm to lead that effort, and if often happens that lawyers from that firm conduct, or at least participate in, evidence gathering and interviews in countries where they are not licensed to practise law. While tolerated in many instances, this practice is increasingly dangerous because local bars are clearly focused on the professional constraints affecting internal investigations, and are not likely to look kindly on lawyers over whom they have no oversight who conduct such activities in their jurisdiction.[33]

Can a lawyer conduct an internal investigation?

In the United States, it goes without saying that attorneys can conduct internal investigations on behalf of their clients, and virtually all such investigations done in the United States are conducted, or at least supervised, by attorneys. This is not automatically true in other countries. In France, for example, it was popularly understood by many that a French lawyer should not be involved in an internal investigation, and few were. However, in 2016, almost certainly in response to a desire to regain market share from Americans and lawyers from other countries, the Paris Bar issued an opinion, later developed in several guidelines, providing that French attorneys can in fact conduct such investigations, and that they are subject to the French near-equivalent of the attorney–client privilege (*le secret professionel*), emphasising that in doing so attorneys must be respectful of the rights of those they may interview.[34]

Do conditions support the application of a professional privilege?

In the United States, virtually any communication between an attorney and a client seeking legal advice (other than advice about how to commit a future crime, which may fall within the 'crime fraud exception' to the attorney–client privilege) will be protected from compelled disclosure. The professional laws in other countries, however, may be much more exigent with respect to the conditions necessary to support the assertion of a professional privilege. The High Court decision in *ENRC v. SFO* in 2016 seemed to hold that certain aspects of an investigation conducted by an attorney (particularly witness interviews) are protected by a professional privilege only after it is clear that an adversarial relationship exists with a prosecutor – that is, after a prosecutor has made a decision to prosecute. To the great relief of the defence bar in the United Kingdom and elsewhere, this holding was significantly revised on appeal, in a judgment that provided that as long as a company has some good-faith basis to believe that it is, or may be, the subject of a criminal investigation, its communications with

32 The European Court of Justice so held with respect to competition cases before it in the often-cited decision of *Akso Nobel Chemicals v. Commission*, Judgment of 14 September 1010.

33 See Davis, op. cit., footnote 22.

34 See Kirry, Davis & Bisch, op. cit., at page 120.

attorneys – if appropriately conducted – will be protected against compelled production.[35] The laws on this specific point may well vary by jurisdiction, and must be understood in detail with respect to any investigation done in any particular country.[36]

Can the work product of an internal investigation be used in negotiation?

It is often the case in the United States that an investigation that commenced as an entirely confidential matter shielded by the attorney–client (and possibly work-product) privilege then leads to negotiation discussions with a prosecutor. In such discussions, if the properly informed client specifically consents, the attorney may share with a prosecutor factual information learned during the investigation, even though it had previously been zealously protected from compelled production. The attorney may even physically transmit a written internal investigation report to be used as a basis for discussion, and in some circumstances that report may end up providing the 'factual basis' for a negotiated outcome such as a deferred prosecution agreement, a non-prosecution agreement or a guilty plea.

Conceptually, there is no professional impediment to doing so: in the United States, the attorney–client and work-product privileges are viewed as 'belonging to' the client, from which it follows that the client can, and expressly must before any communications with a prosecutor takes place, waive the applicable privilege, and thereby authorise the attorney to share otherwise privileged material. Professional obligations applicable to lawyers in other countries, however, may not work in the same way. In France, for example, it is said that even a client cannot 'waive' *le secret professionel* that prohibits an attorney from sharing information learned as a result of a professional engagement. Care must therefore be taken to make sure that the fruits of an internal investigation are used under procedures that respect the professional obligations of the lawyers who conducted it.

iii What are best practices for investigations in different countries?

Conducting a large corporate investigation in one country is daunting enough: each one must be carefully thought through to establish a practical plan that is effective, efficient, compliant with local norms and rules, and designed to provide useful and usable work product. The operational logistics can be difficult. Developing a work plan when the investigation spans more than one country adds significantly to this challenge. Among the issues that must be anticipated and addressed are the following.

Developing a compliant data and document access and copying programme

As already noted, the arrival of the GDPR in Europe and similar laws protecting privacy elsewhere creates a thicket of potential regulatory limits on information gathering. Such rules are generally local to the place where the data or other information are found, and the laws applicable to them must be understood and addressed.

35 See 'Litigation Privilege in UK Internal Investigations Revived?', https://www.debevoise.com/insights/publications/2018/02/litigation-privilege-internal-investigations.

36 See Davis, 'By Refusing To Respect Attorney Client Confidentiality European Courts Threaten to Undermine Anti-Bribery Enforcement' https://globalanticorruptionblog.com/2018/08/02/guest-post-by-refusing-to-respect-attorney-client-confidentiality-european-courts-threaten-to-undermine-anti-bribery-enforcement/.

Logistics of database management and transfer

A large investigation will inevitably result in compilation of large amounts of information that will be reduced to a form of digitised data. Local laws may impact the ability to maintain such databases, and also on rights to transfer data in them outside of the country.

Possible coordination with prosecutors

In many situations, counsel will conduct or supervise an investigation, and – once informed by that investigation and with the consent of the client – then make a determination whether to reach out to a prosecutor. But in some cases it may be necessary to coordinate the conduct of an investigation with a prosecutor, even to the point of obtaining approval for its implementation and providing regular reports. This may be driven by time pressure: a logical decision may be reached to self-report before an investigation is completed because otherwise the advantage of a self-report may be lost (if there is a risk that a prosecutor will begin an investigation, or another company will offer to cooperate first). In others, counsel may reach out to a prosecutor before an investigation even begins.

In the context of mergers, for example, the Department of Justice has issued guidelines offering to hold an acquiring company harmless for the pre-acquisition criminal acts committed by an acquired company if the acquiring company conducts a comprehensive post-acquisition investigation and shares its results with the prosecutor.[37] In those situations, the prosecutor may want to exercise supervision and control of the investigation, even if conducted by corporate counsel. In particularly sensitive situations, the prosecutor may engage in what the Department calls 'deconfliction', whereby the Department may direct a corporate investigator not to interview certain witnesses until after the prosecutor has had an opportunity to do so.[38]

Blocking statutes and other laws related to sovereignty. Some countries impose limits on access to data found in them in order to protect sovereignty. Such 'blocking statutes' generally by their terms apply to efforts by authorities in one country to obtain evidence in another, by way of subpoena for example, but under certain circumstances – especially if a lawyer-led investigation is being coordinated with prosecutors – these rules may apply to internal investigations.

Upjohn warnings in interviews

The Supreme Court's decision in *Upjohn Co v. United States*[39] confirmed that an investigation conducted by an attorney, including an in-house attorney, is covered by the attorney–client privilege and the work-product privilege. It emphasised that, in the case of a corporate investigation, the 'client' is the corporation and not a person being interviewed during the investigation. From this, there developed the salutary practice of giving *Upjohn* warnings to employees of a corporate client who are formally interviewed, in which it is emphasised that the attorney interviewing them is not advising or representing them, but the corporation. Other countries may have rules addressing the conduct of an investigation. An interchange

37 See DOJ Foreign Corrupt Practices Act Review Opinion Procedure Release 08-02: https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2010/04/11/0802.pdf.

38 See FCPA Update December 2017 https://www.debevoise.com/insights/publications/2017/12/fcpa-update-dec-2017-vol-9-no-5.

39 449 US 383 (1981).

with an interviewee can lead to difficult questions if, for example, the interviewee asks whether he or she should have an independent attorney during the interview. There is no simple answer to such questions; doing so depends on sensitivity to the context, but also on local laws and practices.

Other local variants

Local customs, as well as laws, may affect the conduct of interviews. Workers' councils in many countries will take an interest in any systematic programme of interviewing employees, and will want to be consulted. In some countries, individuals interviewed by the police are accustomed to being shown the agents' notes of the interview, are often asked to sign a statement and will expect similar procedures to be followed in a corporate investigation.

V DEVISING A COMPREHENSIVE STRATEGY

The most important step is also the most complicated and the least amenable to a checklist: developing a coherent and effective defence in the face of multiple investigations. A few principles may guide the process.

There must first be a short-term strategy. Following the steps outlined here may well take time, during which events may progress. External events generally cannot be controlled, but at least some events internal to the client may be subject to review and modification. Chief among them is the risk that relevant evidence will become unavailable or even destroyed, which can have devastating results in an investigation, especially if prosecutors conclude that the destruction was wilful or should have been avoided. In most circumstances, it is therefore imperative to issue 'hold notices' to relevant employees directing them not to destroy documents or other evidence, even in the course of a routine cleanup. Local laws and practices may inform how this is done to conform with workplace and other norms.

A strategy must be flexible, and constantly reviewed and updated. The steps outlined here may well suggest a strategy that turns out to be suboptimal when new facts emerge, or perhaps when new actors (such as prosecutors in new countries) become involved.

Consequential decisions must be based on a maximum of available inputs. While time pressures may put pressure on prompt decision-making, it nonetheless is imperative to accomplish as much as possible of the checklist found here before important decisions are made. Reaching out to a prosecutor, for example, is a weighty step because, once done, it will inevitably set in motion reactions that can be anticipated but not controlled. A coherent strategy will evaluate the range of possible outcomes from any proposed step. If not performed with the facts known and a sophisticated understanding of the various actors who may become involved, this strategy is unlikely to achieve its goals.

The decision to self-report must be at least considered in most cases. Performing an internal investigation does not always lead to negotiations with a prosecutor or a decision to reach out to one. However, especially in the United States, relatively few corporations actually proceed to a criminal trial; in most cases, a negotiated process can predictably reach an outcome preferable to a predicted trial outcome, largely because it is relatively easy in the United States to convict corporate entities, for reasons summarised under Section III.i above. The Department of Justice is increasingly clear that it not only expects corporations to self-report, but that if good faith promptness, and cooperation are demonstrated, the corporation will be well rewarded, often by avoiding a criminal conviction that could have otherwise have disastrous consequences. As a result, other countries are increasingly exploring

negotiated outcomes often similar to those long available in the United States.[40] The procedures and practices relating to whether, how and when to reach out to a prosecutor, and most importantly the degree to which one can negotiate with a prosecutor, vary tremendously by country, as this book demonstrates. Hiring experienced local counsel is critical; relying on instincts from one's own country may often lead to suboptimal outcomes, even a disaster.

The consequences of a negotiated outcome must be explored with the client. Guilty pleas may result in being barred from public or other contracts under local, national or regional rules. Even a successful negotiation – one that leads to a 'declination' or a non-criminal outcome, such as a deferred prosecution agreement – may have consequences that need to be analysed through the perspective of the different countries that may be affected. The appointment of a monitor, for example, may create local legal issues, including whether a local blocking statute permits the monitor to report to officials in another country. More generally, an obligation of 'cooperation' whereby a corporation delivers evidence incriminating its officers or its employees may raise local issues, including under workplace rules.

Coordination among prosecutors must be anticipated and explored. Perhaps the most difficult issue may be deciding which prosecutor to approach (if, of course, any contact is made at all), and whether to also inform prosecutors in other countries at the same time, possibly on a coordinated basis. The problem is that in the general absence of a double-jeopardy (or *ne bis in idem*) protection across state borders, an outcome in one country may not preclude a new investigation in other – and the risk of a 'me too' prosecution. In very limited circumstances, *ne bis in idem* rules in fact may offer some protection, but in most instances, the best approach is to evaluate which country's authorities are most likely to reach a result that will be both optimal to the corporate client and acceptable to prosecutors in other countries that could become involved. As noted above at Section III.iii, traditionally this has led to a practical conclusion that it is safest to deal with American prosecutors if there is a real possibility of their involvement, as a US outcome stands a good chance of being accepted elsewhere (often because the penalties are so very high), while the opposite is often not true. This may be changing. In many instances, a company should evaluate the range of possibilities that could predictably follow a self-report in its 'home' country and determine whether an outcome there would be respected by other countries, including the United States. While couched in very vague terms (and specifically identified as 'non-binding' in a legal sense), the Department of Justice regularly issues guidelines emphasising that it does not wish to relitigate outcomes in other countries and will respect them – as long as they are 'adequate'.[41] A sophisticated understanding of the laws, procedures and especially the practices in the various countries that are or may be involved should lead to a reasoned judgement as to how to prioritise outreach to and communications among them.

40 In March 2019, Swiss banking giant UBS and its French subsidiary were convicted in French court of money laundering and other crimes related to alleged tax evasion by their clients, and were hit with fines and other payments totaling almost €4 billion, having rejected a negotiated outcome that would have resulted in a far smaller result. While the judgment is being reviewed on appeal, its size and the apparent availability to obtain a much better outcome through negotiation may suggest a shift in strategy relating to companies subject to prosecution in France. See 'French Criminal Court Imposes Blockbuster Fine for Tax Fraud Related Offences' https://www.debevoise.com/insights/publications/2019/02/french-criminal-court-imposes.

41 See US Department of Justice, 'Policy on Coordination of Corporate Resolution Penalties' (9 May 2018), https://www.justice.gov/opa/speech/file/1061186/download.

Appendix 1

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