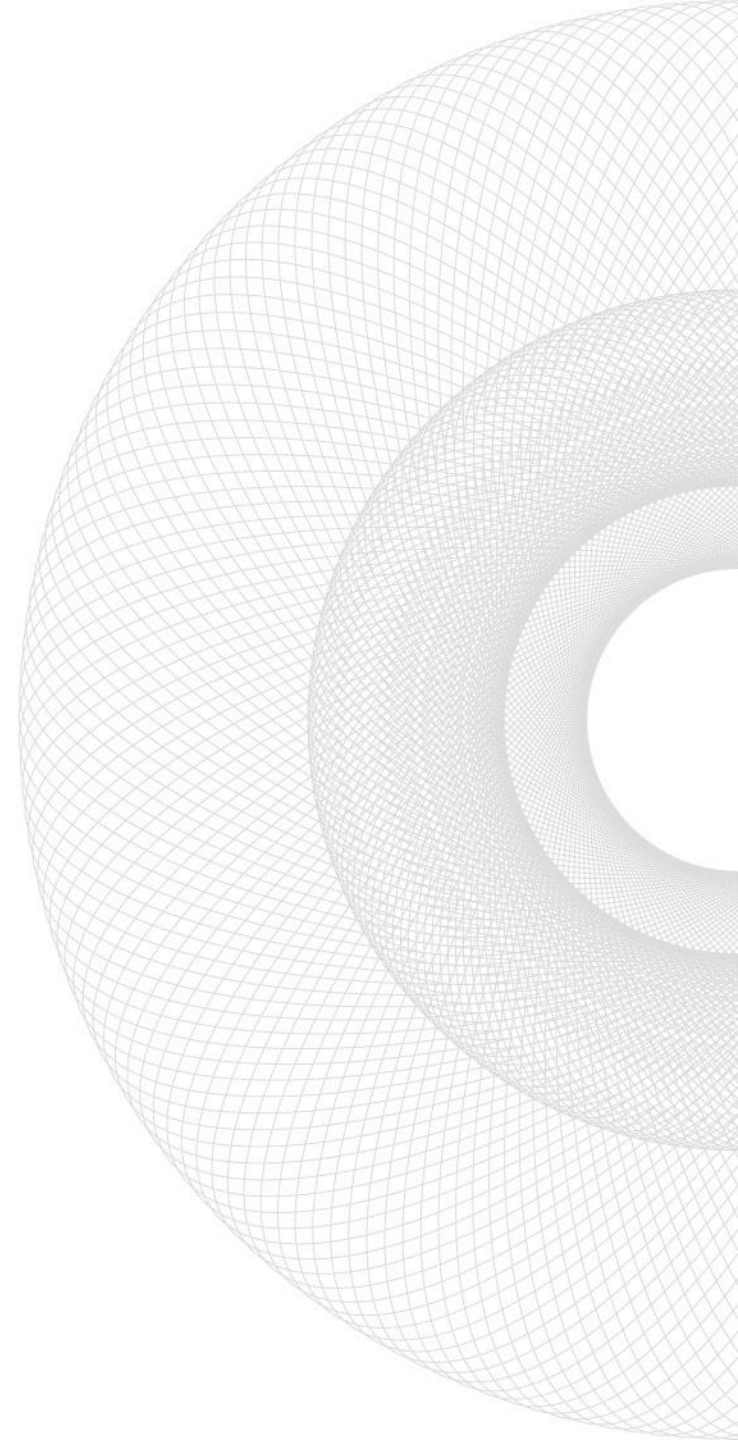


# Legal Privilege in FCPA Driven Investigations. Practical Aspects.

Iryna Nikolayevska, Counsel at Kinstellar  
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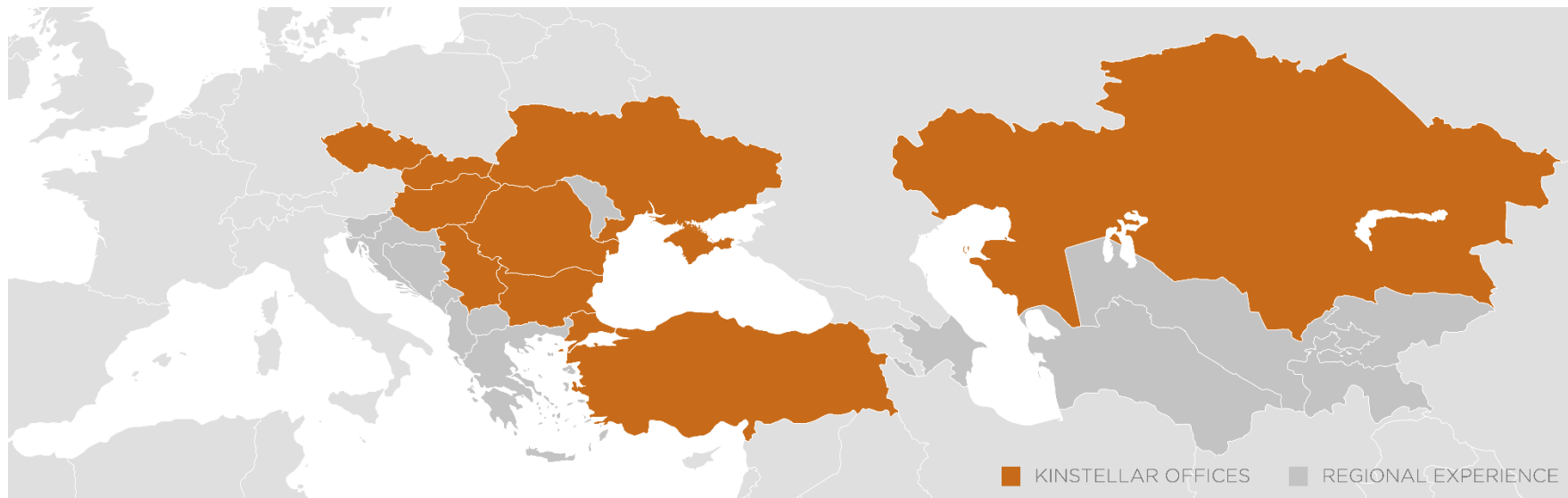
# Emerging Europe and Central Asia's Leading Independent Law Firm

Kinstellar is a leading independent law firm in Emerging Europe, Turkey and Central Asia, with offices in **Almaty** (Kazakhstan), **Belgrade** (Serbia)\*, **Bratislava** (Slovakia), **Bucharest** (Romania), **Budapest** (Hungary), **Istanbul** (Turkey), **Kyiv** (Ukraine), **Prague** (the Czech Republic) and **Sofia** (Bulgaria).

Operating as a single fully integrated firm, Kinstellar delivers consistently high quality services across all jurisdictions in an integrated and seamless style. We are particularly well suited to servicing complex transactions and advisory requirements spanning several jurisdictions.

We deliver:

- **market experience and local knowledge** across a wide range of sectors
- **an in-depth understanding** of the legal, regulatory and commercial issues surrounding any type of transaction or project in the region
- **a dedicated team** of local and internationally qualified lawyers
- **a responsive, commercial** approach and style
- **value** for money



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\* Kinstellar advises international and local clients in Serbia in cooperation with Zajednička advokatska kancelarija Marić & Mujezinović.

# Exceptional, together.

## How are we different?

- We were founded as a spin-off of the Central European practices of a London-based Magic Circle law firm and have maintained international best practices to the highest standards.
- We serve multi-national companies and financial institutions. We work every day with people like you. We know what you need and what you expect.
- Our quality, consistency, independence and regional coverage are unique in our markets.
- We invest significantly more in training, knowledge and professional infrastructure than other firms in these markets.
- We dedicate significant resources to compliance, risk management and risk awareness.
- The highest ethical standards have always been a cornerstone of our firm. No shortcuts. No compromises.
- We provide sensible, joined-up, commercially-minded and consistent service - a truly seamless approach across Emerging Europe, Turkey and Central Asia.

## Our top-tier practices and sectors cover:

Sectors	Practices
▪ Automotive & Industrials	▪ Banking, Finance & Capital Markets
▪ Banks & Financial Institutions	▪ Competition & State Aid
▪ Energy	▪ <b>Compliance, Risk &amp; Sensitive Investigations</b>
▪ Infrastructure & Projects	▪ Dispute Resolution
▪ Life Sciences & Healthcare	▪ Employment & Labour Law
▪ Private Equity	▪ Intellectual Property
▪ Real Estate, Construction & Planning	▪ M&A & Corporate
▪ TMT	▪ NPLs & Distressed Assets
	▪ Restructuring & Insolvency
	▪ Tax

# Compliance, Risk and Sensitive Investigations (CRSI)

We have the leading Compliance, Risk and Sensitive Investigations practice in Emerging Europe and Central Asia. Our strengths include a multi-jurisdictional approach, deep knowledge of the region's anti-corruption laws and culture, familiarity with regional enforcement trends and proficiency in dealing with local authorities.

We have experience in crisis management and communications and expert knowledge in matters of legal privilege, data protection, employee privacy, document retention, security, and corporate and directors liability.

## **Our practice is multi-disciplinary and includes:**

### **Compliance and strategic risk management**

We advise on the scope and application of fraud, anti-bribery, AML and related legislation. We perform audits and risk assessments of operations in order to identify vulnerabilities. We assist in designing and implementing compliance programmes and provide support with monitoring and training. We assess risks of relationships with business partners and carry out risk-based due diligence to identify and resolve potential threats in M&A transactions, including in complex multi-jurisdictional projects. We assist in negotiations and in devising contractual measures to address compliance issues and protect against successor liability and tainted assets. We provide post-closing advice aimed at pre-empting subsequent violations.

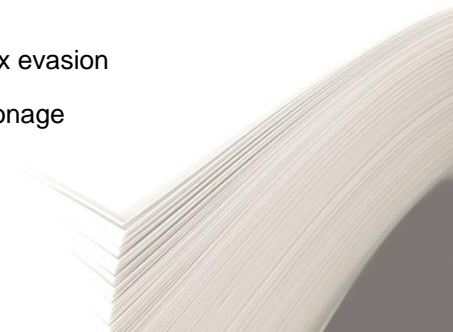
### **Investigations and enforcement proceedings**

We carry out internal investigations when violations are suspected, coordinate cross-border investigations and advise on the appropriateness of corrective actions such as voluntary disclosure. We assist in defending enforcement proceedings and cross-border actions, and in negotiating favourable settlements with enforcement agencies.

### **White-collar defence**

We defend domestic and international companies (as well as individuals) at all stages of criminal proceedings, including investigations and cross-border actions. Our white-collar defence team – which is led by a former senior public prosecutor – can assist in cases concerning:

- public and private corruption
- financial fraud, securities fraud, insider trading
- anti-trust violations
- money laundering, embezzlement
- bankruptcy fraud, insurance fraud, tax evasion
- theft of trade secrets, economic espionage
- environmental law violations



## Why focus on US/UK law?

A majority of investigations have some actual or potential nexus with the US and/or the UK:

- the ability to explain questions on privilege in our jurisdiction to US and UK counsels, esp. to highlight the similarities and differences between their notions of legal privilege and our attorney professional secrecy
- obtaining the benefit of US and UK legal privilege for a local advice and communications with clients



# Context: different legal traditions

## Common law jurisdictions

- Litigation procedures generally require full disclosure of everything potentially relevant to the particular issue
- DISCOVERY
- Privilege is an exception to discovery rights – a carve-out from the universe of information that must be disclosed
- Theory: to enable a full and open communication between attorney and client, and facilitate a fair and full defence or representation in litigation, this category of communications must be protected from discovery

## Civil law jurisdictions

- Typically no discovery
- Only obliged to present/disclose evidence in support of one's case
- Typically no obligation to disclose information that may be harmful to one's case
- Compelled disclosure less common, often requires court order
- Attorney professional secrecy therefore a concept of narrower application

# What is a legal professional privilege?

- Legal professional privilege is a right protected under law that permits a party to **refuse to testify** about a particular matter or to **refuse to disclose** a particular document to another party including the **courts, tribunals, regulatory bodies and enforcement agencies**
- It is an **absolute right** (*not subject to a court or public policy discretion*) and, once it has been established, can only be waived or lost in very limited circumstances (e.g., crime, fraud, illegal activity)
- Privilege protects only confidential documents / communication. It will be lost if communication loses its confidentiality
- Privilege generally applies to civil matters, criminal matters and antitrust enforcement (with some exceptions in criminal matters and antitrust enforcement)
- Privilege **does not** work apply when documents or communication are **part of a crime or fraud**, or seek or contain advice to assist such **illegitimate activity**

# (Roughly) equivalent concepts

## US

**Attorney-client privilege:** protects confidential communications between an attorney and client made in the course of legal representation and for the purpose of providing legal advice by the attorney to the client.

**Work product doctrine:** is more inclusive than the attorney client privilege, which covers only communications between an attorney and the client; work-product includes materials prepared by persons other than the attorney. It can shield materials prepared by anybody as long as they were prepared with an eye towards the realistic possibility litigation, and it can cover materials collected for the attorney such as interrogatories, signed statements, other information acquired for the prosecution or defence of a case.

**Opinion work product** includes an attorney's mental impressions, legal theories, conclusions, or opinions, attorney notes and documents reflecting strategies; and has greater protection.

**Ordinary work product** includes factual information separate and apart from legal analysis, such as transcript of witness interviews, reports of non-testifying experts and financial records from the client; may be accessible when substantial need is proven.

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## UK

**Legal advice privilege:** protects confidential communications, and evidence of those communications, between a lawyer and a client provided that the communications are for the purpose of seeking and receiving legal advice in a relevant legal context. It does not protect communications with third parties.

**Litigation privilege** – this protects confidential communications, and evidence of those communications, between a lawyer and his client and/or a third party, or between a client and a third party. It will apply to communications that have been created for the dominant purpose of obtaining legal advice, evidence or information in preparation for actual legal proceedings, or legal proceedings that are reasonably imminent.



# Whose communications covered?

## Who is the lawyer?

- qualified lawyers – broadly defined to include solicitors, barristers, attorneys
- retired or disbarred lawyers? Sorry.... but former/current clients are safe
- domestic lawyers' staff, trainees, *etc.* (if duly supervised)
- in-house lawyers – generally yes (except for UK in competition matters...)
- foreign lawyers – generally yes (but have to be members of the Bar Association)
- third parties – can be subject to the Work Product Doctrine/ Litigation Privilege, but not Attorney Client Privilege/Legal Advice Privilege

## Who is the client?

### UK

- employee who actually charged with obtaining legal advice and directly communicate with the lawyer (external or in-house)

### US

- **“control group test”** an employee should have a right to participate in legal affairs of the company
- **“subject matter test”** communication for specific purpose of securing legal advice for the corporation (*Upjohn v United States*)

## Which communications?

- Documents/communications created for the purposes of giving or receiving legal advice or in connection with litigation
- Communications from client to lawyer and from lawyer to client (not lawyer to lawyer or employee to employee)
- Advice given about the commercial aspects of a transaction can attract privilege (*i.e.*, advising on optimal approach when responding to a public inquiry or regulatory investigation), but the **“relevant legal context”** should be in place (*Property Alliance Group Ltd v The Royal Bank of Scotland Plc [2015] EWHC 3187 (Ch) (5 November 2015)*)
- Pure investment advice, non-legal business advice may be excluded
- Communications that were part of a fraud, even where the lawyer was not aware of the fraud, may be excluded

# Cousins, not twins



## Legal professional privilege

A substantive legal right that operates to prevent:

- compelled disclosure of information that is protected by the privilege
- admission into evidence of information that is protected by the privilege
- applies in civil, administrative and criminal contexts
- not purely a procedural rule – applies in a wide range of situations

## Whose right is it?

- a right belongs to the client, not the lawyer; and creates duties for the attorney
- can only be waived by the client

## Attorney Professional Secrecy

Typically (details vary in different jurisdictions):

- stipulated in Advocacy Act or code of professional conduct of attorneys
- obligation of the attorney
- does not prevent admission into evidence of information obtained from a source other than the attorney
- covers information / data, in any form:
  - provided by the client in confidence for the purpose of obtaining legal assistance
  - any documents produced/created by the lawyer based on such received data/information

# Privilege vs Confidentiality

- confidentiality is not an obstacle to discovery, only privilege is
- however, the confidential nature of a communication is a necessary precondition to privilege
- loss of confidentiality often = loss of privilege
- intentional waiver of privilege over one document can lead to the unintentional waiver of privilege over other documents (if selective waiver leads to unfairness or misunderstanding)
- confidentiality agreement and express or implied limited waiver may retain privilege (even if disclosed incidentally)



# Internal and regulatory investigations



- Unless an internal investigation is properly designed/managed there is a risk that privileged (potentially privileged) documents and communication might lose or never attain that status
- This risk is very important in case of regulatory actions or legal proceedings in a common law jurisdictions, since the right of privilege may be waived or lost
- Due to the requirement that communication take place between the lawyer and the client **only**, UK legal advice privilege and its US equivalent, attorney-client privilege, will be more difficult to establish over documents and communication generated in the course of an internal investigation than UK litigation privilege or US work product doctrine. To have the latter types of privilege, legal proceedings must be in contemplation or existence at the time of the investigation
- Note that US work product doctrine is not absolute. An additional cure could be “**self critical analysis**”
- Under UK law requirements of regulatory authorities, requests for staff to give witness statements, other investigative processes **≠** adversarial procedures (unless “**dominant purpose**” test is satisfied)
- Often regulators and government authorities request the disclosure of internal investigation reports, whilst they cannot compel disclosure. This usually leads to waiver of attorney-client privilege over all related communication. However, cooperation may reduce or avoid enforcement actions. A possible remedy could be confidentiality agreements and /or limited waivers (UK /US) + Federal Rule of Evidence 502(a) (US). However, a risk still exists because the prosecutor may be required or ordered to disclosed privileged materials to a third party if it commences criminal proceedings against such third party (UK)
- A possible remedy in regulatory investigations also could be Property Alliance Group case (broad role of an external legal advisor allows to protect wide range of documents) (UK)
- No selective waiver doctrine – disclosure to government agency waives attorney-client privilege as regards third party litigations (US). A possible remedy could be work product doctrine if the government and disclosing party have same interests

# Establishing/Preserving Privilege

There are no guaranteed measures – privilege will generally be assessed by the courts on a case by case basis and the assessment will be very fact specific, but the following considerations should be kept in mind:

- When working with UK or US counsel, seek instructions on communications, distribution lists, form and presentation of information for which privilege is desired

**Remember: in UK and US contexts the scope and preservation of privilege accorded to local work product will be assessed according to their rules of legal privilege, not our rules of professional secrecy!**

- Where Work Product Doctrine / Litigation Privilege coverage is sought, the threat of litigation should be documented
- Documents generated before litigation is in sight – less likely to be covered. Distinguish between investigations undertaken in anticipation of litigation and those undertaken for purposes of regular compliance.
- Interviews:
  - ✓ interviewees should be formally warned that their interview is for the purpose of providing legal advice to the client, and in contemplation of litigation, and the content of the interview record will be subject to legal professional privilege (Upjohn case)
  - ✓ *verbatim* interview notes should (if possible) be avoided

# Establishing/Preserving Privilege (Cont.)

- Involvement of attorneys from the outset of the investigation more strongly supports the contention that the work was carried out in contemplation of litigation
- Substantive involvement of attorneys is important:
  - ✓ conduct of witness interviews
  - ✓ review investigation work product
  - ✓ provide legal advice throughout the process
  - ✓ appropriate warnings to witnesses (Upjohn case)
  - ✓ written legends on documents (Privileged/Attorney Work Product)
  - ✓ ensure documents marked as privileged are drafted consistently with that characterisation
  - ✓ reports to client should be addressed to the company **via its general counsel**, and should indicate they contain legal advice
- Third party involvement:
  - ✓ non-lawyers working on a matter should be instructed in writing on their work by **legal counsel** – instructions should make clear that they are working for legal counsel and that their work is conducted for the purpose of gathering facts necessary to provide legal advice / in anticipation of litigation
  - ✓ lawyers must oversee the work of non lawyers, and must document this oversight
  - ✓ reports, summaries of third party input should be addressed to the **lawyers only**, and should be marked as privileged and prepared for the purposes of enabling the provision of legal advice / or in anticipation of litigation

## Establishing/Preserving Privilege (Cont.)

- Mark documents appropriately: “**Strictly confidential - subject to legal professional privilege**”
- Confidentiality must be maintained: disclosure beyond a narrow circle may constitute a waiver of the privilege
- Limit the circulation, number of copies
- Consider carefully which information is recorded in writing rather than delivered orally
- Prohibit copying and circulation of privileged documents
- Quotation of privileged information in another report which is not privileged may lose the privilege.
- Inadvertent disclosure by recording of privileged information in board minutes, materials or other management reports



# THANK YOU FOR ATTENTION!

## Contact us

**Iryna Nikolayevska**  
**Kinstellar Kyiv**  
Gulliver Business Centre  
16th floor, 1-A, Sportyvna sq.  
Kyiv 01601, Ukraine  
T: 380 44 394 9040  
E: [iryna.nikolayevska@kinstellar.com](mailto:iryna.nikolayevska@kinstellar.com)

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