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The International Comparative Legal Guide to:

Data Protection 2015

2nd Edition

A practical cross-border insight into data protection law

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Group Consulting Editor
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Group Publisher
Richard Firth

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Global Legal Group Ltd.
59 Tanner Street
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Tel: +44 20 7367 0720
Fax: +44 20 7407 5255
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General Chapter:

1	**Legislative Change: Assessing the European Commission's Proposal for a Data Protection Regulation** – Bridget Treacy, Hunton & Williams	1

Country Question and Answer Chapters:

2	**Australia**	Gilbert + Tobin: Peter Leonard & Michael Burnett	7
3	**Austria**	Herbst Kinsky Rechtsanwälte GmbH: Dr. Sonja Hebenstreit & Dr. Isabel Funk-Leisch	17
4	**Belgium**	Hunton & Williams: Wim Nauwelaerts & David Dumont	28
5	**Brazil**	Opice Blum, Bruno, Abrusio & Vainzof Advogados Associados: Renato Opice Blum & Renato Leite Monteiro	36
6	**Canada**	Osler, Hoskin & Harcourt LLP: Adam Kardash & Bridget McIlveen	45
7	**China**	Hunton & Williams LLP Beijing Representative Office: Manuel E. Maisog & Zhang Wei	54
8	**Cyprus**	A.G. Erotocritou LLC: Alexis Erotocritou	60
9	**Finland**	Dittmar & Indrenius: Jukka Lång & Iiris Keino	68
10	**France**	Hunton & Williams: Claire François	76
11	**Germany**	Hunton & Williams: Dr. Jörg Hladjk	84
12	**India**	Subramaniam & Associates (SNA): Hari Subramaniam & Aditi Subramaniam	93
13	**Ireland**	Matheson: John O'Connor & Anne-Marie Bohan	104
14	**Italy**	Portolano Cavallo Studio Legale: Laura Liguori & Federica De Santis	115
15	**Japan**	Mori Hamada & Matsumoto: Akira Marumo & Hiromi Hayashi	123
16	**Lithuania**	Juridicon Law Firm: Laimonas Marcinkevicius	133
17	**Luxembourg**	Jurisconsul: Erwin Sotiri	140
18	**Mexico**	Hogan Lovells BSTL, S.C.: Mario Jorge Yanez V. & Federico de Noriega O.	148
19	**Netherlands**	Brinkhof: Quinten Kroes & Tineke van de Bunt	156
20	**New Zealand**	Wigley & Company: Michael Wigley	167
21	**Norway**	Wikborg, Rein & Co. Advokatfirma DA: Dr. Rolf Riisnæs & Dr. Emily M. Weitzenboeck	173
22	**Portugal**	Cuatrecasas, Gonçalves Pereira: Leonor Chastre	183
23	**Puerto Rico**	Adsuar Muñiz Goyco Seda & Pérez-Ochoa, P.S.C.: Alejandro H. Mercado & Shylene De Jesús	193
24	**Romania**	Pachiu & Associates: Mihaela Cracea & Ioana Iovanesc	199
25	**Russia**	Gorodissky & Partners: Sergey Medvedev Ph.D., LL.M	209
26	**South Africa**	Eversheds: Tanya Waksman	219
27	**Spain**	ECIJA ABOGADOS: Carlos Pérez Sanz & Lorena Gallego-Nicasio	226
28	**Sweden**	Affärsadvokaterna i Sverige AB: Mattias Lindberg	235
29	**Switzerland**	Pestalozzi: Clara-Ann Gordon & Dr. Michael Reinle	243
30	**Taiwan**	Lee and Li, Attorneys-at-Law: Ken-Ying Tseng & Rebecca Hsiao	252
31	**Turkey**	ELIG, Attorneys-at-Law: Gönenç Gürkaynak & İlay Yılmaz	260
32	**United Kingdom**	Hunton & Williams: Bridget Treacy & Anita Bapat	269
33	**USA**	Hunton & Williams LLP: Aaron P. Simpson & Chris D. Hydak	277

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Ireland

John O'Connor

Matheson

Anne-Marie Bohan

1 Relevant Legislation and Competent Authorities

1.1 What is the principal data protection legislation?

Data Protection Acts 1988 and 2003 ("DPA").

1.2 Is there any other general legislation that impacts data protection?

Freedom of Information Act 2014

This gives a legal right for persons to access information held by a body to which FOI legislation applies; to have official information relating to himself/herself amended where it is incomplete, incorrect or misleading; and to obtain reasons for decisions affecting himself/herself.

The Protected Disclosures Act 2014 (the "Whistle-Blowers Act")

This has introduced legislation in relation to whistle-blowers in Ireland for the first time.

S.I. No. 541/2014 – Criminal Justice (Mutual Assistance) Act 2008 (Commencement) Order 2014

This enacts Part 3 of the Criminal Justice (Mutual Assistance) Act 2008 which provides for various forms of mutual legal assistance to foreign law enforcement agencies.

S.I. No. 658/2007 – Data Protection (Fees) Regulations 2007

This outlines the fee for registration and for prior checking.

S.I. No. 657/2007 – Data Protection Act 1988 (Section 16(1)) Regulations 2007

This outlines the organisations that will be required to register with the ODPC.

S.I. No. 83/1989 – Data Protection (Access Modification) (Social Work) Regulations, 1989

Outlines specific restrictions in respect of social work data.

S.I. No. 351/1988 – Data Protection (Registration) Regulations, 1988

This outlines the details that must be contained in forms for registration with the ODPC.

S.I. 350 of 1988 – Period of Registration

This outlines the period that registration lasts for (1 year).

S.I. No. 347/1988 – Data Protection (Fees) Regulations, 1988

The fee that an organisation may charge for an Access Request (€6.35) and the fee for a certified copy of a Register entry (€2.54).

1.3 Is there any sector specific legislation that impacts data protection?

S.I. No 337 of 2014 – Data Protection Act 1988 (Commencement) Order 2014 and S.I. No 338 of 2014 – Data Protection (Amendment) Act 2003 (Commencement) Order 2014

This makes it unlawful for employers to require employees or applicants for employment to make an access request seeking copies of personal data which is then made available to the employer or prospective employer. This provision also applies to any person who engages another person to provide a service.

S.I. No. 336/2011 – European Communities (Electronic Communications Networks and Services) (Privacy and Electronic Communications) Regulations 2011 ("E-Privacy Regulations")

This deals with specific data protection issues relating to use of electronic communication devices, and particularly with direct marketing restrictions.

S.I. No 421 of 2009 – Data Protection Act 1988 (Section 5(1)(D)) (Specification) Regulations 2009

This outlines the exemption from the DPA of the use of personal data in the performance of certain functions of the Director of Corporate Enforcement and inspectors appointed by the High Court or Director of Corporate Enforcement.

S.I. No. 687/2007 – Data Protection (Processing of Genetic Data) Regulations 2007

This outlines restrictions in respect of processing genetic data in relation to employment.

S.I. No. 95/1993 – Data Protection Act, 1988 (Section 5 (1) (D)) (Specification) Regulations, 1993

This outlines the exemption from the DPA of the use of personal data in the performance of certain functions of the Central Bank, the National Consumer Agency, various functions performed by auditors under the Companies Acts, etc.

S.I. No. 81/1989 – Data Protection Act, 1988 (Restriction of Section 4) Regulations, 1989

This outlines the restriction on the right of access to information on adopted children and information the Public Service Ombudsman gets during an investigation.

S.I. No. 82/1989 – Data Protection (Access Modification) (Health) Regulations, 1989

This outlines certain restrictions in the right of access relating to health data.

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1.4 What is the relevant data protection regulatory authority(ies)?

The Office of the Data Protection Commissioner ("ODPC"). In 2014, Helen Dixon was appointed as the new Data Protection Commissioner, succeeding Billy Hawkes.

2 Definitions

2.1 Please provide the key definitions used in the relevant legislation:

- **"Personal Data"**

  Data relating to a living individual who is or can be identified either from the data or from the data in conjunction with other information that is in, or is likely to come into, the possession of the data controller.

- **"Sensitive Personal Data"**

  Means personal data as to:

  (a) the racial or ethnic origin, the political opinions or the religious or philosophical beliefs of the data subject;

  (b) whether the data subject is a member of a trade union;

  (c) the physical or mental health or condition or sexual life of the data subject;

  (d) the commission or alleged commission of any offence by the data subject; or

  (e) any proceedings for an offence committed or alleged to have been committed by the data subject, the disposal of such proceedings or the sentence of any court in such proceedings.

- **"Processing"**

  In relation to information or data, means performing any operation or set of operations on the information or data, whether or not by automatic means, including:

  (a) obtaining, recording or keeping the information or data;

  (b) collecting, organising, storing, altering or adapting the information or data;

  (c) retrieving, consulting or using the information or data;

  (d) disclosing the information or data by transmitting, disseminating or otherwise making it available; or

  (e) aligning, combining, blocking, erasing or destroying the information or data.

- **"Data Controller"**

  Means a person who, either alone or with others, controls the contents and use of personal data.

- **"Data Processor"**

  Means a person who processes personal data on behalf of a data controller but does not include an employee of a data controller who processes such data in the course of his employment.

- **"Data Owner"**

  No definition in Irish law.

- **"Data Subject"**

  Means an individual who is the subject of personal data.

- **"Pseudonymous Data"**

  No definition in Irish law.

- **"Direct Personal Data"**

  No definition in Irish law.

- **"Indirect Personal Data"**

  No definition in Irish law.

3 Key Principles

3.1 What are the key principles that apply to the processing of personal data?

- **Transparency**

  Data subjects must be provided with information relating to the processing of their data. This includes:

  a) the identity of the data controller or their representative and/or the data processor;

  b) the purposes for which the data are intended to be processed; and

  c) any other information that is necessary, having regard to the specific circumstances in which data are to be processed, including but not limited to details of recipients or categories of recipients of the personal data and information as to the existence of the right of access and the right to rectify data.

- **Lawful basis for processing**

  (a) consent of the data subject (specific, freely given, informed);

  (b) the processing is necessary:

  i) for the performance of a contract to which the data subject is a party;

  ii) in order to take steps at the request of the data subject prior to entering into a contract;

  iii) for compliance with a legal obligation to which the data controller is subject rather than an obligation imposed by contract;

  iv) to prevent –

  I) injury or other damage to the health of the data subject;

  II) serious loss or damage to property of the data subject, or otherwise to protect his or her vital interests where the seeking of the consent of the data subject is likely to result in those interests being damaged;

  v) for compliance with a legal obligation including:

  I) the administration of justice;

  II) for the performance of a function conferred on a person by law;

  III) for the performance of a function of the government or a minister of the government;

  IV) for the performance of any other function of a public nature which is performed in the public interest;

  vi) for the purposes of the legitimate interests pursued by the data controller (or third party to whom the personal data are disclosed).

- **Purpose limitation**

  Personal data should only be obtained for one or more specified, explicit and legitimate purposes and should not be further processed in a manner incompatible with that power or those purposes.

- **Data minimisation**

  Personal data should not be kept for longer than is necessary for the purposes for which they were obtained.

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- **Proportionality**

  Personal data collected must be adequate, relevant and not excessive in relation to the purpose or purposes for which they are collected or are further processed.
- **Retention**

  Personal data should not be kept for longer than is necessary for the purpose for which it was obtained.

  If the purpose for which the information was obtained has ceased and the personal information is no longer required, the data must be deleted or disposed of in a secure manner.
- *Other key principles*

  Data security (covered in more detail in section 13 below).

4 Individual Rights

4.1 What are the key rights that individuals have in relation to the processing of their personal data?

- **Access to data**

  Under section 3 of the DPA, data subjects have the right to, free of charge, find out if an organisation or an individual holds information about them. This includes the right to be given a description of the information and to be told the purposes for which that information is held. A request for this information must be made in writing by the data subject and the individual must receive a reply within 21 days according to the DPA.

  Section 4 of the DPA provides that data subjects have the right to obtain a copy of any information which relates to them that is held either on a computer or in a structured manual filing system, or that is intended for such a system. A fee of €6.35 is required when a request is made under section 4 and the organisation or entity is given 40 days to reply to such a request.

  Exceptions to the right of access:

  The DPA set out specific circumstances when an individual's right of access to their personal information held by an organisation may be restricted.

  Disclosure is not required if the information would be likely to:

  a) hinder the purposes of anti-fraud functions;
  b) damage international relations;
  c) impair the security or order in a prison or detention facility;
  d) hinder the assessment or collection of any taxes or duties; or if
  e) disclosure of estimates of damages or compensation regarding a claim against the data controller is likely to cause damage to the data controller.

  Certain information is also exempt from disclosure if the information is:

  a) protected by legal privilege;
  b) used for historical, statistical or research purposes, where the information is not disclosed to anyone else, and where the results of such work are not made available in a form that identifies any of the individuals involved;
  c) an opinion given in confidence; or
  d) used to prevent, detect or investigate offences, or will be used in the apprehension or prosecution of offenders.

  If a request would be either disproportionately difficult or impossible to process, the data controller or processer does not have to fulfil the request.

  Exemptions also apply in respect of access to social work data; disclosure of such may be refused if it is likely to cause serious damage to the physical, mental or emotional condition of the data subject.

  A request for health data may also be refused if disclosure of the information is likely to seriously damage the physical or mental health of that data subject.
- **Correction and deletion**

  Section 6 of the DPA provides data subjects with the right to request in writing to have their data either deleted or corrected, where the data is not obtained lawfully or is inaccurate. The data controller or processor must respond within a reasonable amount of time and no later than 40 days after the request. There is no express right of a data subject to request the deletion of their information if it is being processed lawfully.
- **Objection to processing**

  Under Section 6A of the DPA, data subjects have the right to object to processing which is likely to cause damage or distress. This right applies to processing that is necessary for the purposes of legitimate interests pursued by the data controller to whom the personal data is, or will be disclosed, or processing that is necessary for the performance of a task carried out in the public interest or in the exercise of official authority.
- **Objection to marketing**

  Under section 2.7 of the DPA, data subjects have the right to, following a request by writing, require the data controller to cease processing data for that purpose, and where it is only retained for that purpose they have the right to have it erased. The data controller must do this within 40 days.

  Under sections 13 and 14 of the E-Privacy Regulations, data subjects have the right to have their "opt-out" preference recorded in the National Directory Database, which constitutes an objection to direct marketing to them.
- **Complaint to relevant data protection authority(ies)**

  Under Section 10 of the DPA, data subjects have a right of complaint to the ODPC in relation to the treatment of their personal data. The ODPC must investigate such complaints unless it considers them to be 'frivolous or vexatious'.

5 Registration Formalities and Prior Approval

5.1 In what circumstances is registration or notification required to the relevant data protection regulatory authority(ies)? (E.g., general notification requirement, notification required for specific processing activities.)

Generally, all data controllers and processors must register unless an exemption applies, either under Section 16(1)(a) or (b) or under SI No. 657 of 2007. Under section 3 of SI No. 657 of 2007, the following are excluded from registration:

a) organisations that only carry out processing to keep, in accordance with law, a register that is intended to provide information to the public;
b) organisations that only process manual data (unless the personal data had been prescribed by the ODPC as requiring registration); and
c) organisations that are not established or conducted for profit and that are processing personal data related to their members and supporters and their activities.

There is also a wide exemption applied to normal commercial activity, which by definition requires the processing of personal data.

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If an exemption does apply, however, it is limited only to the extent to which personal data is processed within the scope of that exemption.

Additionally, the Irish Minister for Justice and Equality has specified that the following data controllers and data processors are not required to register (provided they do not fall within any of the above categories):

a) data controllers who only process employee data in the ordinary course of personnel administration and where the personal data is not processed, other than where it is necessary to carry out such processing;
b) solicitors and barristers;
c) candidates for political office and elected representatives;
d) schools, colleges, universities and similar educational institutions;
e) data controllers (other than health professionals who process data relating to the physical or mental health of a data subject for medical purposes) who process data relating to past, existing or prospective customers or suppliers for the purposes of: (i) advertising or marketing the data controller's business, activity, goods or services; (ii) keeping accounts relating to any business or other activity carried on by the data controller; (iii) deciding whether to accept any person as a customer or supplier; (iv) keeping records of purchases, sales or other transactions for the purpose of ensuring that requisite payments and deliveries are made or services provided by or to the data controller in respect of those transactions; (v) making financial or management forecasts to assist in the conduct of business or other activity carried on by the data controller; or (vi) performing a contract with the data subject, where the personal data is not processed other than where it is necessary to carry out such processing for any of the purposes set out above;
f) companies who process personal data relating to past or existing shareholders, directors or other officers of a company for the purpose of compliance with the Companies Acts;
g) data controllers who process personal data with a view to the publication of journalistic, literary or artistic material; and
h) data controllers or data processors who operate under a data protection code of practice.

Subject to the above, all data controllers and data processors are required to register, except to the extent that:

a) they carry out processing for the sole purpose of keeping in accordance with law of a register that is intended to provide information to the public and is open to consultation either by the public in general or by any person demonstrating a legitimate interest;
b) they process manual data (other than such categories, if any, of such data as may be prescribed);
c) they carry out any combination of the above; or
d) the data controller is a body that is not established or conducted for profit and is carrying out processing for the purposes of establishing or maintaining membership of, or support for, the body, or providing or administering activities for the members of the body or persons who have regular contact with the body.

The ODPC is obliged not to accept an application for registration from a data controller who keeps 'sensitive personal data' unless he or she is of the opinion that appropriate safeguards for the protection of the privacy of the data subjects concerned are being, and will continue to be, provided by him or her.

The DPA also provide that, where a data controller intends to keep personal data for two or more related purposes, they are only required to make one application in respect of those purposes. If, on the other hand, they intend to keep personal data for two or more unrelated purposes, then they will be required to make separate applications in respect of each of those purposes and entries will be made in the register in accordance with each such application.

Where the ODPC refuses an application for registration he shall notify the applicant in writing and specify the reasons for the refusal. An appeal against such decision can be made to the Circuit Court.

5.2 On what basis are registrations/notifications made? (E.g., per legal entity, per processing purpose, per data category, per system or database.)

Registrations are made per legal entity.

5.3 Who must register with/notify the relevant data protection authority(ies)? (E.g., local legal entities, foreign legal entities subject to the relevant data protection legislation, representative or branch offices of foreign legal entities subject to the relevant data protection legislation.)

Any legal entity processing personal data in Ireland not subject to the exemptions in question 5.1 above must register with the ODPC.

5.4 What information must be included in the registration/notification? (E.g., details of the notifying entity, affected categories of individuals, affected categories of personal data, processing purposes.)

There are separate registration forms available on the ODPC's website for the registration of either a data processor or a data controller. A data controller must provide a general statement of the nature of their business or trade or profession and of any additional purposes for which they keep personal data. Each application of personal data relating to the purposes that the controller lists along with the types of personal data (such as name, email, date of birth, etc.) must also be listed or described. For each of these applications listed, a list of the persons or bodies to whom the personal data may be disclosed must also be given.

For data processors, a name, address and details on the nature of the data being processed must also be provided.

Information on any sensitive personal data that is kept by the controller must also be given (such as data relating to race, religion, sexual life, criminal convictions, etc.).

If any transfers are made (or intended to be made) to a country outside of the EU Member States, a list of these countries along with a description of the data to be transferred and the purpose of the transfer must be provided.

Finally, for both processors and controllers, details of a 'compliance person' who will supervise the application of the DPA within the organisation in relation to personal data which is collected must be given.

5.5 What are the sanctions for failure to register/notify where required?

a) Fines:
   i) maximum €3,000 on summary conviction; and
   ii) maximum €100,000 on indictment; and
b) order for erasure of personal data.

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5.6 What is the fee per registration (if applicable)?

	Postal Applications	Online Applications
Applicants with 26 employees or more (inclusive)	€480	€430
Applicants with 6 to 25 employees (inclusive)	€100	€90
Applicants with 0 to 5 employees (inclusive)	€40	€35

5.7 How frequently must registrations/notifications be renewed (if applicable)?

Registration must be renewed annually.

5.8 For what types of processing activities is prior approval required from the data protection regulator?

Prior approval is required for transfer abroad in certain circumstances – see question 8.3 below.

5.9 Describe the procedure for obtaining prior approval, and the applicable timeframe.

See question 8.3 below.

6 Appointment of a Data Protection Officer

6.1 Is the appointment of a Data Protection Officer mandatory or optional?

The appointment of a data protection officer is optional, though when registering with the Data Protection Commissioner both data controllers and processors must give details of a 'compliance person' who will act as a contact point for the ODPC.

6.2 What are the sanctions for failing to appoint a mandatory Data Protection Officer where required?

As there is no legal requirement, there are no sanctions.

6.3 What are the advantages of voluntarily appointing a Data Protection Officer (if applicable)?

The advantages of voluntarily appointing a data protection officer include:

a) ensures an officer with appropriate qualifications and data protection expertise exists within the organisation;

b) helps establish central professional data protection management within the organisation, particularly risk management functions, with one contact point for all data protection-related issues;

c) builds a relationship with the ODPC;

d) develops relationships with customers and a reputation generally;

e) helps handle emergencies, such as audits or data breaches; and

f) improves data protection awareness within the organisation.

6.4 Please describe any specific qualifications for the Data Protection Officer required by law.

As there is no legal requirement for a data protection officer, no specific qualifications are required.

6.5 What are the responsibilities of the Data Protection Officer, as required by law or typical in practice?

In practice, it is the duty of data protection officers to ensure that the organisation complies with the DPA and to be the contact point relating to all such matters. They provide support, assistance, advice and training to all employees of an organisation on data protection matters, and add to any risk management process.

6.6 Must the appointment of a Data Protection Officer be registered/notified to the relevant data protection authority(ies)?

As there is no legal requirement for a data protection officer, there is no need to notify this to the ODPC.

7 Marketing and Cookies

7.1 Please describe any legislative restrictions on the sending of marketing communications by post, telephone, e-mail, or SMS text message. (E.g., requirement to obtain prior opt-in consent or to provide a simple and free means of opt-out.)

When using automatic dialling machines, fax, email or SMS to send messages to an individual or making telephone calls to an individual or non-natural person's mobile telephone to make direct marketing communications, the data subject's prior opt-in consent must be obtained.

The use of automatic dialling machines, fax, email or SMS for direct marketing to a non-natural person (i.e. body corporate) is allowed as long as they have not either recorded their objection in the National Directory Database (under "objection to marketing" under question 4.1 above), or has not opted out.

Marketing messages may be sent by post to either an individual or non-natural person, unless they opt-out in writing.

The making of telephone calls for direct marketing to a subscriber or user is prohibited if the subscriber or user has recorded its objection in the National Directory Database (as under "objection to marketing" under question 4.1. above), or has opted out.

Where making direct marketing communication, the name, address and telephone number of the marketer must be included in the communication in order to give the data subject the option of opting-out.

7.2 Is the relevant data protection authority(ies) active in enforcement of breaches of marketing restrictions?

Yes. The Data Protection Commissioner has pursued a number of prosecutions in recent years for offenders.

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7.3 What are the maximum penalties for sending marketing communications in breach of applicable restrictions?

- On summary conviction a fine of €5,000, or on indictment a €250,000 fine where it is a body corporate or, in the case of a natural person, a fine of €50,000. A court may make an order for the destruction or forfeiture of any data connected with the breach.
- Where the communication is done by post, a fine of €3,000 on summary conviction, or €100,000 on indictment.

7.4 What types of cookies require explicit opt-in consent, as mandated by law or binding guidance issued by the relevant data protection authority(ies)?

Cookies are not strictly necessary for a transaction that the data subject has requested should require express and informed consent. This may be obtained as part of a prominent notification on a website, containing a link to a cookie statement.

7.5 For what types of cookies is implied consent acceptable, under relevant national legislation or binding guidance issued by the relevant data protection authority(ies)?

Where a cookie is strictly necessary to facilitate a transaction (and that transaction has been specifically requested by the data subject), implied consent is acceptable.

7.6 To date, has the relevant data protection authority(ies) taken any enforcement action in relation to cookies?

The ODPC has been active in this field. For instance, in 2012, it wrote to 80 website operators seeking information on their consent procedures. Subsequently, in 2013 the ODPC liaised with the 80 websites to ensure their compliance with the new rules as established pursuant to the E-Privacy Regulations. The ODPC published guidance to assist companies and organisations using cookies in order to achieve at least a minimum standard of compliance.

7.7 What are the maximum penalties for breaches of applicable cookie restrictions?

A fine of €5,000 and an order for the destruction or forfeiture of any data connected with the breach.

8 Restrictions on International Data Transfers

8.1 Please describe any restrictions on the transfer of personal data abroad.

There is no restriction on the transfer of personal data to countries within the EEA. However, personal data may not be transferred outside the EEA unless one of the following applies:

a) the transfer is authorised by law;

b) consent to the transfer is given by the data subject;

c) the transfer is necessary for the performance of a contract to which the data subject is party;

d) the transfer is necessary to conclude a contract with someone other than the data subject, where it is in their interests;

e) the transfer is necessary for reasons of substantial public interest;

f) the transfer is necessary for obtaining legal advice for legal proceedings;

g) the transfer is necessary to prevent injury or damage to the data subject;

h) the personal data to be transferred are an extract from a statutory public register established by law for public consultation; or

i) the transfer is done through one of the mechanisms described in question 8.2 below.

Even where one of the above elements exists, the Data Protection Commissioner retains the power to prohibit the transfer of personal data abroad to any country inside or outside the EEA.

8.2 Please describe the mechanisms companies typically utilise to transfer personal data abroad in compliance with applicable transfer restrictions.

In addition to the methods outlined above, the three methods by which companies typically transfer personal data abroad are as follows:

a) Use of "model clauses" between the data controller and the person/organisation to whom they intend to pass the information to abroad. These are contractual clauses approved by the EU Commission and which assure an adequate level of protection for the personal data. They do not usually require the approval of the ODPC, however it can approve transfers based on contractual clauses which do not directly conform to the European model clauses.

b) Transfer to a country that is on the EU Commission "adequate standard of protection" list, or US organisations that have agreed to be bound by the rules of the "Safe Harbour" agreement (essentially a streamlined version of EU data protection law).

c) A further method that is rarely used is the use of Binding Corporate Rules ("BCR"), whereby personal data can be transferred to other companies within a group and based abroad, as long as certain legally enforceable rules exist within the group whereby they must give the data an adequate level of protection. It is rarely used because of the expense and difficulty involved in having these rules approved by the Data Protection Commissioner.

8.3 Do transfers of personal data abroad require registration/notification or prior approval from the relevant data protection authority(ies)? Describe which mechanisms require approval or notification, what those steps involve, and how long they take.

Where data is transferred abroad under contracts that vary from the "model clauses", this must be notified to and approved by the ODPC by application to them. There is no necessity to deposit the contracts with the ODPC once the process is complete. Ordinarily, the ODPC will only consider authorising contracts that are general in nature, i.e., 'model contracts' that can be relied upon by a number of different data controllers within a sector or category rather than specific contracts. The time this process takes varies depending on the nature of the modifications to the model clauses.

The ODPC must also approve BCR mechanisms used to transfer data abroad but within a corporate group. This requires engagement with the ODPC by the company involved. At the time of writing, only one company within Ireland has implemented BCRs, as they

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are difficult to obtain. This took almost a year of engagement with the ODPC.

9 Whistle-blower Hotlines

9.1 What is the permitted scope of corporate whistle-blower hotlines under applicable law or binding guidance issued by the relevant data protection authority(ies)? (E.g., restrictions on the scope of issues that may be reported, the persons who may submit a report, the persons whom a report may concern.)

The Whistle-Blowers Act covers both the public and private sectors and has been recognised by the OECD as the highest level of protection available to whistle-blowers across the EU. Employers must now ensure that existing whistle-blower policies and more generally how they address such matters, are aligned with the requirements of the Whistle-Blowers Act.

The Whistle-Blowers Act protects workers in all sectors. In accordance with international best practice, the safeguards in the Act are extended to a wide range of "workers". The concept of "worker" is broadly defined and includes employees (public and private sector), contractors, trainees, agency staff, former employees, job seekers, and even those on work experience.

"Relevant wrongdoings", i.e. the scope of issues that may be reported, are defined in an exhaustive list as follows:

(a) that an offence has been, is being or is likely to be committed;

(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation, other than one arising under the worker's contract of employment or other contract whereby the worker undertakes to do or perform personally any work or services;

(c) that a miscarriage of justice has occurred, is occurring or is likely to occur;

(d) that the health or safety of any individual has been, is being or is likely to be endangered;

(e) that the environment has been, is being or is likely to be damaged;

(f) that an unlawful or otherwise improper use of funds or resources of a public body, or of other public money, has occurred, is occurring or is likely to occur;

(g) that an act or omission by or on behalf of a public body is oppressive, discriminatory or grossly negligent or constitutes gross mismanagement; or

(h) that information tending to show any matter falling within any of the preceding paragraphs has been, is being or is likely to be concealed or destroyed.

There are no geographical boundaries for the commission of a wrongdoing. If an offence is committed abroad, but would not be regarded in that country as an offence, it will nonetheless qualify as a protected disclosure if it would be regarded as an offence under Irish law (and *vice versa*).

9.2 Is anonymous reporting strictly prohibited, or strongly discouraged, under applicable law or binding guidance issued by the relevant data protection authority(ies)? If so, how do companies typically address this issue?

The Whistle-Blowers Act imposes an obligation on the part of the recipient of a protected disclosure (and any person to whom a protected disclosure is referred in the course of the recipient's duties) not to disclose any information that may identify the person who made the protected disclosure, unless:

(a) the recipient can show that he/she took all reasonable steps to avoid disclosing any such information;

(b) the recipient reasonably believes that the person making the disclosure does not object to the disclosure of any such information;

(c) the recipient reasonably believes that disclosing such information is necessary for the effective investigation of the relevant wrongdoing; the prevention of serious risk to the security of the State, public health, public safety or the environment; or the prevention of crime or prosecution of a criminal offence; or

(d) the disclosure is otherwise necessary in the public interest or is required by law.

The Whistle-Blowers Act provides for a tiered disclosure regime with a number of avenues open to workers. The Whistle-Blowers Act encourages the vast majority of disclosures to be made to the employer in the first instance. However, other options are available where this is inappropriate or impossible.

Tier 1:

(a) Internal disclosure to an employer or other responsible person

A worker may make a protected disclosure to his employer where he/she reasonably believes that the information shows or tends to show relevant wrongdoing, or if the worker reasonably believes that the wrongdoing relates to the conduct of some person other than his/her employer (or to something for which some other person has legal responsibility), then the disclosure can be made to that person.

(b) Minister

A worker employed in a public body may make a protected disclosure to a Minister of the Government on whom any function relating to that public body is conferred or disposed by or under any enactment.

Public bodies are very broadly defined to include institutions of higher education and any entity on which any functions are conferred by or under any enactment (other than the Companies Act).

(c) Legal advisor

A disclosure made in the course of obtaining legal advice (including advice relating to the operation of the Act) from a barrister, solicitor, trade union, or an official of an excepted body, is protected. However, if this disclosure is covered by legal professional privilege, a subsequent disclosure by the relevant advisor is not protected.

Tier 2: Disclosure to a prescribed person

The Minister for Public Expenditure and Reform may prescribe a list of "prescribed persons" (e.g. a regulatory body) whose roles and responsibilities are defined by law and are, in his opinion, appropriate to receive and investigate matters arising from disclosures relating to any of the wrongdoings in relation to which a disclosure may be made.

The Whistle-Blowers Act 2014 contains a list of 72 prescribed persons, which largely consists of the heads of statutory bodies.

Where a worker chooses to disclose in this manner, in addition to having a reasonable belief that the disclosure tends to show one or more relevant wrongdoings, he/she must also have a reasonable belief that:

(a) the relevant wrongdoing falls within the purview of the relevant prescribed person; and

(b) the information disclosed, and any allegations contained in it, are true.

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Tier 3: Other disclosures

There is also provision for disclosure in other circumstances (i.e. disclosure potentially into the public domain) where the standard for reporting is significantly higher. For this type of disclosure to be protected:

(a) the worker must reasonably believe that the information disclosed is substantially true;

(b) the disclosure cannot be made for personal gain (which does not include any reward payable under or by virtue of any enactment); and

(c) the making of the disclosure must be reasonable "in all the circumstances".

In addition, one or more of the following conditions must be met:

(a) at the time of making the disclosure the worker reasonably believes that he/she will be subject to penalisation by his/her employer if the disclosure is made to the employer;

(b) in a case where there is no prescribed person in relation to the relevant wrongdoing, the worker reasonably believes that evidence will be destroyed/concealed if a disclosure is made to the employer;

(c) the worker has previously made a Tier 1 disclosure of substantially the same nature, and no action was taken; and/or

(d) the relevant wrongdoing is of an exceptionally serious nature.

9.3 Do corporate whistle-blower hotlines require separate registration/notification or prior approval from the relevant data protection authority(ies)? Please explain the process, how long it typically takes, and any available exemptions.

No, they do not.

10 CCTV and Employee Monitoring

10.1 Does the use of CCTV require separate registration/notification or prior approval from the relevant data protection authority(ies)?

There is no requirement to register separately for the use of CCTV.

10.2 What types of employee monitoring are permitted (if any), and in what circumstances?

There is no hard restriction on the type of monitoring that employees may be put under, including monitoring of their electronic communications or surveillance by CCTV. However, as this involves the collection of personal data, the principles outlined in question 3.1 above must be followed, in particular the principle of proportionality, whereby employers must only collect relevant, adequate and non-excessive personal data, having regard to their legitimate aims.

Any employee monitoring must strike an appropriate balance between the legitimate aims of the employer and the privacy rights of the employees in question. For instance, the constant monitoring of employees by CCTV would be difficult to justify, unless there was a specific security need for it.

Employees have a legitimate right to privacy in relation to communications made from the workplace unless informed otherwise, so there is an additional requirement that they give their consent to monitoring, as outlined in question 10.3 below.

10.3 Is consent or notice required? Describe how employers typically obtain consent or provide notice.

Employees must be notified of the existence of the surveillance and the purposes for which the data are processed. Surveillance of electronic communications and otherwise is often notified by making the employee aware of an acceptable usage policy.

10.4 To what extent do works councils/trade unions/employee representatives need to be notified or consulted?

The extent to which a works council/trade union/employee representative needs to be notified of such surveillance will depend on: (i) the scope of the agreement with the relevant body; (ii) whether this topic has already been covered in the contract of employment; and (iii) the likelihood that the employer will need to rely on the monitoring in the future (in order to provide evidence in defending a claim from an employee, for example).

10.5 Does employee monitoring require separate registration/notification or prior approval from the relevant data protection authority(ies)?

There is no requirement to make a separate registration, notification or prior approval with the ODPC in respect of employee monitoring.

11 Processing Data in the Cloud

11.1 Is it permitted to process personal data in the cloud? If so, what specific due diligence must be performed, under applicable law or binding guidance issued by the relevant data protection authority(ies)?

Personal data may be processed in the cloud, subject to the DPA.

Under non-binding guidance from the ODPC, the data controller must ensure that the processor (the cloud provider) has sufficient security precautions in place for the personal data, which is a requirement placed on the data controller as outlined in question 13.1 below. The cloud should be able to give assurances on:

a) continued access to data by the data controller (backup and recovery measures);

b) prevention of authorised access to data (covers both protection against external "hacking" attacks and access by the cloud provider's personnel or by other users of the datacentre);

c) adequate oversight including by means of contract of any sub-processors used;

d) procedures in the event of a data breach (so that the data controller can take necessary measures); and

e) right to remove or transfer data (if the data controller wishes either to move the data back under its own direct control or move it to another cloud provider).

11.2 What specific contractual obligations must be imposed on a processor providing cloud-based services, under applicable law or binding guidance issued by the relevant data protection authority(ies)?

There must be a written contract with the cloud provider and any sub-processors. The obligations imposed by it should include:

a) the cloud providers and sub-processors will only process data as instructed by the data controller;

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b) the security requirements as outlined in question 11.1 above; and

c) model contract clauses where the data is processed outside the EEA.

12 Big Data and Analytics

12.1 Is the utilisation of big data and analytics permitted? If so, what due diligence is required, under applicable law or binding guidance issued by the relevant data protection authority(ies)?

There is nothing in Irish law that specifically prevents the use of big data and analytics, and no specific laws or binding guidance covering the precise due diligence required.

However, as data protection issues are likely to arise in many projects, it is strongly recommended to undertake thorough due diligence.

13 Data Security and Data Breach

13.1 What data security standards (e.g., encryption) are required, under applicable law or binding guidance issued by the relevant data protection authority(ies)?

Under section 2 of the DPA, data controllers must have "appropriate security measures" in place, taking into account:

a) the state of technological development;

b) the cost of implementing the measures;

c) the harm that might result; and

d) the nature of the data concerned.

These measures must be appropriate to the nature of the data concerned and must provide a level of security that is appropriate to the potential level of harm that could result from any unauthorised or unlawful processing, or from any loss or destruction of personal data. Data controllers and processors must also ensure that their employees comply with any and all security measures in place.

Non-binding guidance from the ODPC provides guidance on access control, access authorisation, encryption, anti-virus software, firewalls, software patching, remote access, etc.

13.2 Is there a legal requirement to report data breaches to the relevant data protection authority(ies)? If so, describe what details must be reported, to whom, and within what timeframe. If no legal requirement exists, describe under what circumstances the relevant data protection authority(ies) expects voluntary breach reporting.

Providers of publicly available electronic communications services or public communications networks in Ireland are subject to a mandatory reporting obligation under the E-Privacy Regulations. For entities that are not providers of such networks or services, there is no strict legal requirement under the DPA to report data breaches. However, the ODPC expects voluntary breach reporting as outlined in the 'Personal Data Security Breach Code of Practice' ("the Code"), which contains specific data security breach guidelines.

The Code is non-binding in nature, although certain industries have developed codes of practice (for example, the insurance industry) which make the Code binding on industry stakeholders on a voluntary basis.

Under the Code, any incident which has put personal data at risk should be reported to the ODPC as soon as the data controller becomes aware of it. There are some limited exceptions to this provided for in the Code, i.e., this is not required where:

a) it affects fewer than 100 data subjects;

b) the full facts of the incident have been reported without delay to those affected;

c) the breach does not involve sensitive personal data or personal data of a financial nature; or

d) if the personal data was protected by technological measures (such as encryption) to such an extent that it would be unintelligible to any person who is not authorised to access it, then the data controller may decide that there is no risk to the personal data (and so no notification to the data subject is necessary).

If the data controller is unclear about whether to report the incident or not, the Code advises that the incident should be reported to the ODPC. The Code advises that the controller should make contact with the ODPC within two working days of the incident occurring.

13.3 Is there a legal requirement to report data breaches to individuals? If so, describe what details must be reported, to whom, and within what timeframe. If no legal requirement exists, describe under what circumstances the relevant data protection authority(ies) expects voluntary breach reporting.

There is no legal requirement, however the Code requires that data controllers must give immediate consideration to notifying the affected data subjects, unless there is no risk to the personal data because of a level of encryption as outlined in question 13.2 above.

The notification should include information on the nature of the personal data breach and a contact point where more information can be obtained, and should also recommend measures to mitigate the possible adverse effects of the breach.

14 Enforcement and Sanctions

14.1 Describe the enforcement powers of the data protection authority(ies):

Investigatory Power	Civil/Administrative Sanction	Criminal Sanction
Investigation of complaint under s.10 DPA, or of its own accord	Damages under negligence	Summary €3,000 Indictment €100,000
Privacy audit	This is not applicable	Summary €3,000 Indictment €100,000
Power to obtain information	This is not applicable	Summary €3,000 Indictment €100,000
Power to enforce compliance with DPA with enforcement notice	Damages under negligence	Summary €3,000 Indictment €100,000
Power of authorised officers to enter and examine premises	This is not applicable	Summary €3,000 Indictment €100,000

14.2 Describe the data protection authority's approach to exercising those powers, with examples of recent cases.

The ODPC exercises all of these powers on a regular basis. The ODPC has conducted investigations recently, obtained information and conducted inspections of many organisations. A recent example of all three is the investigation, inspection and subsequent obtaining

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of information from Loyalty Build, a customer data database provider which had an extensive data breach.

During the course of 2013, 44 audits and inspections were carried out by the ODPC.

The ODPC has also used its power to enforce compliance with an enforcement notice on many occasions, including recently with the enforcement notice on a large telecoms provider, Eircom, to cease releasing personal data of subscribers.

15 E-discovery / Disclosure to Foreign Law Enforcement Agencies

15.1 How do companies within Ireland respond to foreign e-discovery requests, or requests for disclosure from foreign law enforcement agencies?

The DPA seek to regulate the collection, processing, use and disclosure of data relating to individuals that is processed or controlled in Ireland. The DPA prohibit the transfer of personal data from Ireland outside the European Economic Area unless the receiving country ensures an 'adequate level of protection' for the privacy and fundamental rights and freedoms of data subjects in relation to the processing of personal data, having regard to all the circumstances surrounding the transfer.

Where data are sought for use in civil proceedings in a foreign country, Irish companies may be compelled under a subpoena from an Irish court to provide them. This happens frequently between EU countries, but it is also possible for a request from outside the EU to succeed.

In relation to requests from foreign law enforcement agencies, there is a legal framework in place that allows for the law enforcement agencies of foreign signatories of certain Hague Conventions to seek the disclosure of data held by Irish companies by the Irish police, who then issue a warrant for it. Where the request is made by the law enforcement agencies of countries who are not signatories, this is determined by the Department of Justice and Equality on a case-by-case basis. Generally where proper undertakings are given by the agency making the request, it will be granted, and Irish companies will be compelled to disclose the data.

A Ministerial Order (S.I. 541/2014) was passed, in November 2014, to enact Part 3 of the Criminal Justice (Mutual Assistance) Act 2008 (the "Criminal Justice Act"), effective from 1 December 2014. The Criminal Justice Act provides for various forms of mutual legal assistance to foreign law enforcement authorities. Part 3 relates to requests for mutual assistance between Ireland and other EU Member States for co-operation in the policing of telecommunications messages for the purposes of criminal investigations. The Minister for Justice can also now request that tapping of communications be undertaken in an EU Member State for an Irish-based criminal investigation, and Part 3 also outlines how requests from other EU countries to Ireland for such interceptions should be processed.

Prior to the Criminal Justice Act, a foreign State was restricted in what communications it could intercept legally in an Irish context. This is due to the wording of the Postal and Telecommunications Services Act 1983, and the Interception of Postal Packets and Telecommunications Messages (Regulation) Act 1993 (the "Interception Acts") which provide only for the interception of communications in respect of offences under Irish law. As the interception of communications involves the processing of personal data, the DPA also applied to all such interceptions. Exemptions under the DPA (section 8(b) – where compliance with the DPA would prejudice the investigation – and section 8(e) – where the processing is required by law or pursuant to a court order – applied only to Irish law, Irish ministerial orders and orders by the Irish courts. The mutual assistance regime established by the Criminal Justice Act will allow Ireland to share intercepted information with other EU Member States with the authorisation of the Minister for Justice, Equality and Law Reform, thereby satisfying the exemption criteria of the DPA.

15.2 What guidance has the data protection authority(ies) issued?

The recent legal dispute between Microsoft Corporation and the US Government in relation to a US-issued warrant requiring disclosure of information including personal data held in the email account of a Microsoft customer held on a Microsoft server in Ireland has brought the issue into the international media spotlight.

In recognition of the growing importance of effective data protection standards and oversight in Ireland, in July 2014 the Irish Government created a Minister of State position, whereby Dara Murphy TD has been assigned to the Department of Justice and Equality with special responsibility for Data Protection (the "*Minister of State*").

The ODPC has not, as yet issued official guidance in relation to foreign e-discovery requests, or requests for disclosure from foreign law enforcement agencies, however the Minister of State has expressed the view that the Irish Government has 'serious concerns' about the implications for Ireland and the EU arising from the US court decision in Microsoft case. The Minister of State suggested that compliance with the warrant may result in Microsoft, and any other US companies with operations in the EU which are served with such warrants in the future, being in breach of the DPA and the EU Data Protection Directive, stating that '*[t]his would create significant legal uncertainty for Irish and EU consumers and companies regarding the protection of their data which, in this digital age, is everyone's most valuable asset*'. The Irish Government has instead advocated the use of the existing mutual legal assistance treaty, which provides for assistance in legal cases or law enforcement investigations.

16 Trends and Developments

16.1 What enforcement trends have emerged during the previous 12 months? Describe any relevant case law.

The ODPC has particularly targeted the area of private investigators and tracing agents during the previous 12 months. Following an investigation by the ODPC, M.C.K. Rentals Limited (trading as M.C.K. Investigations) ("**MCK**"), was charged with 23 counts of breaches of Section 22 of the DPA for obtaining access to personal data without the prior authority of the data controller by whom the data is kept and disclosing the data to another person. This is the first time that the ODPC has prosecuted company directors. Section 29 of the DPA expressly permits actions against company directors or officers who consent to or negligently allow a violation.

The two company directors were charged with 23 counts of breaches of Section 29; they pleaded guilty to one charge each and were fined €1,500 each. MCK pleaded guilty to 5 of 22 counts and was fined €7,500. Following the decision against MCK and the company directors, a second investigation – against MJG Investigations – also led to a private investigator being found guilty of 70 breaches of the DPA.

The ODPC has issued non-binding guidance stating that the following issues have arisen from its investigations in 2014:

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(a) security of personal data which is in the hands of large data controllers and the vigilance which is required by front-line staff at all times to prevent unlawful soliciting of personal data, in particular by means of telephone contact by unscrupulous agents;

(b) all companies and businesses who hire private investigators or tracing agents are reminded that they have onerous responsibilities under the DPA to ensure that all tracing or other work carried out on their behalf by private investigators or tracing agents is done lawfully; and

(c) directors and other officers of bodies corporate may be proceeded against and punished in a court of law for offences committed by the body corporate.

16.2 What "hot topics" are currently a focus for the data protection regulator?

In December 2014, the ODPC joined 22 privacy enforcement authorities from countries around the world in demanding that mobile application marketplaces, e.g. Google Play and Apple App Store, make it mandatory for mobile application developers to make links to privacy policies available to the consumer, prior to downloading, if the app will collect their personal data. The recommendation follows a mobile application privacy sweep, as recommended in the 2013 ODPC Annual Report.

John O'Connor
Matheson
70 Sir John Rogerson's Quay
Dublin 2
Ireland

Tel: +353 1 232 2150
Fax: +353 1 232 3333
Email: john.oconnor@matheson.com
URL: www.matheson.com

John is a partner and head of the Technology and Commercial Contracts Group at Matheson. He has extensive experience in advising both suppliers and customers in relation to their commercial arrangements including their technology and outsourcing transactions.

On the technology side of John's practice, he advises his clients in relation to systems implementations, IT outsourcing and services arrangements, cloud computing, licensing and re-seller arrangements, data protection, intellectual property and e-business. On the commercial contracts side of John's practice he typically advises in relation to agency, distribution, franchising, manufacturing, business process outsourcing, facilities management and partnering agreements.

Prior to joining Matheson John worked at a leading London City firm where he gained significant experience of large scale technology and commercial transactions.

John is a frequent public speaker and regularly presents at seminars in relation to public procurement and in relation to outsourcing and managed services.

John has been published in legal and business journals in the UK and Ireland. John is a member of the Law Society of England and Wales (non-practicing) and an active member of the Society for Computers and Law (and currently chairs its Irish division), ITechLaw, the International Association of Privacy Professionals and the UK National Outsourcing Association.

John co-authored the Irish chapter for PLC Outsourcing Handbook 2013/14.

Anne-Marie Bohan
Matheson
70 Sir John Rogerson's Quay
Dublin 2
Ireland

Tel: +353 1 232 2212
Fax: +353 1 232 3333
Email: anne-marie.bohan@matheson.com
URL: www.matheson.com

Anne-Marie is a partner in both the Information Technology Law Group and the Asset Management and Investment Funds Group at Matheson, and is head of our Outsourcing Group. She advises on all aspects of outsourcing, information technology law and e-commerce law, with specific focus on the requirements of financial institutions and financial services providers in these areas.

Anne-Marie has extensive experience in drafting and negotiating contracts for the development, sale, purchase and licensing of hardware, software and IT systems for both suppliers and users of IT within the financial services industry and across a broad range of other industries. She has also acted in some of the largest-value and most complex IT and telecommunications systems and services outsourcing contracts, including advising on the largest and highest-value financial services outsourcing to date, in Ireland. Anne-Marie's practice also includes advising a broad range of clients on data protection and privacy issues, including employee data protection issues.

Anne-Marie has lectured on IT and financial services in the Law Society of Ireland and more broadly. She is author of the Irish chapter in *Outsourcing Contracts* – a Practical Guide (Lewis, Third Ed, 2009) and in the forthcoming new edition, and is co-author of the Irish chapter in PLC's Outsourcing Guide.

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59 Tanner Street, London SE1 3PL, United Kingdom
Tel: +44 20 7367 0720 / Fax: +44 20 7407 5255
Email: sales@glgroup.co.uk

www.iclg.co.uk