

RUNNING EFFECTIVE INTERNAL INVESTIGATIONS

SELECTED CROSS-BORDER ISSUES

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COMPLIANCE WEEK EUROPE
POWERFUL INSIGHTS, PRACTICAL IDEAS, REAL SOLUTIONS

THIS IS HOW IT COULD HAPPEN ...

The “Global Ad plc” case – a not unlikely scenario:

The British advertising company “Global Ad plc” with headquarters in London is listed in New York. Global Ad has, among others, sales operations in China. On Friday last week, the Chinese police appeared at the local offices of Global Ad in Pudong (Shanghai), referred to serious corruption allegations, and confiscated documents and took with it the head of Sales.

Alarmed by the news, the Board of Global Ad plc London requests its general counsel for a briefing on the possible exposure with recommendations of how to proceed.

Questions:

- What are the key risk areas that your briefing should address?
- What do you suggest as initial steps to deal with this incident?

WHAT IS DIFFERENT IN A CROSS-BORDER INVESTIGATION?

Level of Complexity

- The 'easy' part:
 - Different culture: Denunciation; investigation; whistleblower; etc.
 - Different language: Who has the language capability: only the local unit?
 - Different laws: What local laws apply in an investigation? Privacy and data protection rules; employee rights and interviews; legal privilege issues
 - Cross-border corporate issues: Subsidiaries have their own corporate regimes with own governance structures
 - Sufficient and qualified resources

What to do?

- Intake processes and investigation protocols need to foresee possibility of cross-border issues

KEY QUESTIONS TO ASK

- Will any alleged misconduct have consequences in another jurisdiction?
- Should disclosure be made to foreign authorities?
- If information is provided to the enforcement agencies in one country, should it also be provided to another?
- Do witnesses need separate counsel in other jurisdictions?

DATA COLLECTION & PRIVACY (1)

❑ EU Privacy Rules

- Transfer of data
- Review of emails

❑ Switzerland

- **Prohibition to aid foreign governments (Art. 271 Criminal Code):**
 - **For instance: conducting internal investigation with subsequent disclosure of results to U.S. or other foreign authorities would fall under Art. 271**
 - **Consider to use Multilateral Assistance Agreements procedures**

DATA COLLECTION & PRIVACY (2)

□ China

○ Data Privacy

- **Data collection in China is not a smooth process:**
 - **Chinese law protects an individual's privacy of communications against disclosure by other entities (except the state). This includes also email communications**
 - **Employment agreements may at best demonstrate good faith but are untested**

○ State Secrets Law

- **They protect secrets belonging to the state, provincial or local governments including State-owned-enterprises (SOEs)**
- **State secret definition wide and unpredictable: e.g., confidential documents from Chinese joint venture partner may be caught**
- **Offshore hosting and reviewing of data or sharing with other enforcement agencies can trigger criminal and other liabilities**

NEW EMPHASIS ON COOPERATION IN U.S. IMPACT ON DOCUMENT COLLECTION

- ❑ Securing evidence of individual culpability should be the focus of the investigative efforts



- *'Corporations are often too quick to claim that they cannot retrieve overseas documents, emails or other evidence regarding individuals due to foreign data privacy laws.'*
- Voluntary disclosure does not constitute true cooperation, if the company avoids identifying the individuals who are criminally responsible and fails to provide the relevant facts that implicate those individuals

DOUBLE JEOPARDY

Charging an individual or company with a crime for which it has already been tried in another jurisdiction

- ❑ **There is no general international double jeopardy prohibition**
 - **A company can be charged and fined for the same facts in different countries. For instance:**
 - **‘Global Ad plc’ in our opening hypothetical may be charged by China, the U.K. and the U.S.**

- ❑ **In Europe within the Schengen area, the predominant view is that double jeopardy is prohibited but there is no confirming jurisprudence**

- ❑ **The U.K. has a double jeopardy prohibition which applies also to non-EU countries such as the U.S.**
 - **The critical point for Schengen and U.K. is if the ‘same facts’ and the ‘same company’ are involved**

PLANNING FOR AN INTERNATIONAL INVESTIGATION

- ❑ **Staffing/Resources**
- ❑ **Local Experts Network**
- ❑ **Intake and Reporting Procedures**
- ❑ **Short Term Action Plan Framework**
 - **Who to notify**
 - **Stop wrong doing**
 - **IT action plan**
 - **Document preservation**

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