

**MAIN JUSTICE**

POLITICS, POLICY AND THE LAW

# Foreign Investigations: A Case Study

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**FULBRIGHT**  
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# Moderator

## Mary Jacoby

Mary Jacoby is an award-winning former reporter for the Wall Street Journal, Salon magazine, the St. Petersburg Times of Florida, the Chicago Tribune and Roll Call.

From 2005 – 2007 she reported from Brussels for the Wall Street Journal, where she covered European Union antitrust and regulatory issues, breaking numerous stories about investigations involving Intel, Microsoft Corp., MasterCard and other major companies.

Her investigations have ranged from the influence of Russian oligarchs in Washington to terrorist financing and white-collar crime.





# Agenda

- Introduction of Speakers
- FCPA Background
- Electronic Data Collection and Review
- Data Privacy
- Practical Considerations
  - Legal
  - Technical
- A Case Study: Two Months in Europe



# Presenter

## Kelly Thorman

Kelly Thorman is a Senior Associate in Fulbright & Jaworski L.L.P.'s Washington, D.C. office. Ms. Thorman's practice focuses on white collar criminal defense, government and internal investigations and corporate compliance matters. She represents foreign and domestic clients - both corporate entities and individuals - in matters involving the U.S. Department of Justice, U.S. Securities and Exchange Commission, and other federal and state agencies in multiple jurisdictions. Ms. Thorman has extensive experience with the Foreign Corrupt Practices Act (FCPA), European Union data privacy laws, and electronic discovery in criminal matters.

Ms. Thorman often manages large-scale multinational FCPA investigations, including a recent matter, which ended with the DOJ issuing a letter declining to prosecute the company. This investigation required coordinating a team of over 200 lawyers to conduct interviews, document review, and legal and factual analysis. In another matter, Ms. Thorman coordinated a team of 125 attorneys and legal assistants conducting an FCPA compliance review of 29 entities in 14 countries, which included writing a division-wide compliance report and leading and supervising teams of lawyers, legal assistants, and forensic accountants to conduct multiple in-country compliance audits.

Ms. Thorman earned her law degree from The George Washington University Law School.





# Presenter

## Craig Earnshaw

Craig Earnshaw is a managing director in the FTI Technology practice and is based in London. Mr. Earnshaw is responsible for the management of the activities of the Electronic Evidence Consulting, Document Analytics and Data Processing sub-segments within the UK.

Since 1997, he has worked solely in the electronic evidence field and during this time has amassed considerable experience in forensic computing, electronic disclosure, Internet investigations and electronic evidence. In 2006, he started FTI's Technology Consulting segment in Europe.

Mr. Earnshaw has provided both written and oral expert evidence in the High Court in London, and has testified at depositions in the United States, as well as submitting written expert evidence into other forums, such as employment tribunals and arbitrations.

Prior to joining FTI, Mr. Earnshaw was the head of the forensic computing practices at CRA International and Lee & Allen Consulting, which he founded in 1998. Mr. Earnshaw is a member of the British Computer Society and the Institute of Analysts and Programmers. He holds a Bachelor of Science in Computer Science from the University of Durham.



# FCPA Background

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# Foreign Corrupt Practices Act

- Creates both civil and criminal liability for individuals and companies.
- Enforced by the DOJ and SEC.
- Two components:
  - Anti-bribery provisions: prohibit offering, promising, or providing anything of value to a non-U.S. official to obtain or retain business, direct business to any person, or obtain a business advantage; and
  - Accounting provisions: require companies that file reports with the SEC to maintain accurate books and records and internal controls sufficient to detect and prevent violations.



# Ten Largest FCPA Enforcement Actions

- FCPA prosecution is a top enforcement priority for the DOJ and SEC.
- All of the 10 largest FCPA settlements have occurred since 2008.
- Eight of the top 10 settlements were with non-U.S. companies.
- Cooperation is increasing among international law enforcement agencies in bribery investigations.

Industry	Headquarters	U.S. Fine & Penalty	Year
Engineering	Germany	\$800M	2008
Energy	U.S.	\$579M	2009
Defense/ Aerospace	U.K.	\$400M	2010
Energy	Netherlands/ Italy	\$365M	2010
Engineering	France	\$338M	2010
Engineering	Japan	\$218.8M	2011
Automotive	Germany	\$185M	2010
Communications	France	\$137M	2010
Transportation	Switzerland	\$81.8M	2010
Pharmaceutical	U.S.	\$70M	2011



# Electronic Data Collection and Review

- Ubiquitous requirement for the review of ESI.
- Identification of the potential sources of ESI (computers, e-mail accounts, servers, archive systems, accounts systems, backup tapes, mobile devices, the cloud / on-line services).
- Defensible preservation technologies and methodologies.
- Collaborative document review technologies to increase efficiency.
- Forensic analysis of data sources reveals further details.
- Production of relevant documents to third party, potentially in another jurisdiction.





# Data Privacy

- Geographic and industry based privacy protections.
- Significant differences in cultural approach to data privacy on different sides of the Atlantic.
- Conflict between E.U. data privacy and requirement to disclose data in U.S. actions.
- Implications for breaches of data privacy.
- Mechanisms to facilitate transfer of data across borders.
- Impact on case timetables for appropriate compliance.
- Application of data privacy for strategic advantage.

# Practical Considerations



# Local Expertise

- Relevant laws:
  - Data privacy.
  - Blocking statutes.
  - Employment.
  - Financial security.
  - Other?
- Opinions from local counsel in each relevant jurisdiction.
  - Provide relevant custodian information.
  - Custodian and entity consent or notification requirements.
  - Local regulatory filings.



# Resolving Data Privacy Challenges

- Internal or government investigation.
- Client priorities: quality; speed; and cost.
- Location of document culling and review.
- Partnership with technical team.
- Confidentiality considerations.



# Logistics...Logistics...Logistics

- Review space.
- Security.
- Technical and equipment requirements:
  - Closed network access to data for review.
  - E-mail and internet access.
  - Printing and shredding.
- Staffing, lodging, and meals.
- Translation needs.
- Organizing and storing work product.
- Transfer or destruction of data post review.



# Data Protection Considerations

- Vitally important to ensure that an appropriate data protection framework is put in place:
  - Different jurisdictions involved.
  - Compliance with local regulations.
  - No “one-size-fits-all” approach that can be utilized.
- “Clarity and accountability for getting it right in terms of the right paperwork, the right technology and the right approach.”
- Don’t solely rely on custodian consent.



# In-Country Processing and Review

- Traditional methodology not always possible to be followed.
- In-country data centres are not always available.
- Deployment of mobile processing solution:
  - Identification of ESI within collected data sources.
  - Culling of ESI based on appropriate criteria.
  - Review of documents within the jurisdiction.
  - Approval for transfer of substantially reduced subset of initially collected data.
- Close working relationship between legal and technical teams.



# Document Review Considerations

- Compliance with local data preservation requirements.
- Use of encryption.
- Handling ESI in different languages and character sets.
- Formulation of search terms in different languages.
- Environmental and security considerations.
- In-country data wiping / destruction post review.



# Practical Guidance

## PROPORTIONALITY

Assess the proportionality, quality, and relevance of the data collected.

## PROCESSING

Use a qualified and trusted E.U. third party to process the data.

## ANONYMIZING

Remove any personally identifiable information such as names and e-mail addresses, and consider using aliases such as Custodian One and Custodian Two.

## FILTERING/MINIMIZATION

Tested keywords should be applied to filter the documents on-site.

## PRIVACY LOG

When an employee withholds consent for a large volume of documents, and in any instance in which redaction or production otherwise may be infeasible.

## REDACTION

Remove personal data, but beware of blocking statutes!

## PROTOCOLS

Before legally moving data out of the country, make sure protocols are in place.

# Two Months in Europe: A Case Study

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## Disclaimers

- All actions undertaken were following the advice and direction of counsel.
- Details from several matters have been combined into a practical hypothetical, modified to protect client confidentiality.
- Seek formal legal advice in advance of undertaking a multi-jurisdictional document review.
- This hypothetical relates to an internal investigation; similar solutions may be appropriate for other regulatory investigations (e.g., antitrust) or civil litigation.



# Background of the Matter

Hypothetical:

- Client was a multinational corporation headquartered outside of the U.S. (e.g., Europe).
- FCPA red flag issues identified within the corporation that required investigation.
- Client priority: speed.
- Geographic scope of the investigation included key custodians across four continents of operation.



# Legal Framework

- Local counsel were engaged.
- Two central document hubs were generated: one in the U.S. and one in Europe.
- One technology provider to perform work in all jurisdictions.
- Local counsel advised on the transfer of documents to one of the two hubs.
- U.S.-based legal team could review documents stored only on the U.S. hub; Europe-based legal team could review documents stored in either hub.
- Obtained appropriate and requisite consent from the relevant custodians and entities before collection and review.



## The U.S. Review

- Preservation of data resident in U.S. and in jurisdictions where documents could be transferred to the U.S.
- European custodians travelled to the U.S. for interviews and data was preserved whilst in U.S.
- Data from PCs, e-mail servers and mobile devices processed and loaded into review platform.
- Document review performed by a geographically dispersed U.S. team.
- U.S. reviewers did not have access to documents in the European hub.
- Transition from counsel's in-house document review environment to FTI's hosted review environment.



# The European Review

- Review facility built out in Europe hotel.
- Data collected in Europe was limited as much as possible to server-based data and data of custodians who could not travel to U.S. for interviews.
- Data collected in Europe was processed and reviewed by the Europe-based team.
- Europe-based team reviewed documents from Europe and U.S. hubs.



# The European Review

- Logistics:
  - Hotel space for review and lodging.
  - Security.
  - Catered meals.
  - In-house IT, paralegal, and secretarial assistance.
  - Protocols for administrative issues.
  - Office supplies and equipment.
- E-mail and internet access.
- Secure server for work product storage.
- Efficiencies of legal-technical partnership.



# Forensic Analysis

- Analysis of computers used by key individuals.
- Undertaking third party verification.
  - Value of obtaining second opinion without first sharing the conclusions of the original analysis.
- Close collaboration with legal team to produce a written report that was understandable and clear for the specific purposes needed.



# The Resolution of the Matter

- Requirements for ongoing access to the data in U.S. and European hubs.
- Supplemental local counsel advice for transfer of data out of the jurisdiction post-review.
- Transfer of European hub, European data, and work product containing European data within the E.U. for secure storage.
- Wiping of all computer media in Europe:
  - Attorneys' laptops.
  - Server infrastructure.
- Ultimate physical destruction or forensic wiping of all European data sources.



## Specific Challenges & Successes

- Speed of initial deployment.
- Requirement to utilise all law firm in-house staff.
- Encryption and password protection.
- Rapidly changing priorities and timelines.
- Successful completion of large-scale review in compressed time frame.

# Q&A

# Additional Resources



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e-Discovery and  
legal frameworks  
governing Privacy  
and Data  
Protection in  
European  
countries

Implications

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RAND Europe report on EU data  
privacy regulations and discovery  
available at [www.ftitechnology.com](http://www.ftitechnology.com).



# Materials

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