



*cutting through complexity*

# Cross-border investigations: Are you prepared for the challenge?

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# 01

# Introduction

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Conducting cross-border investigations is no simple endeavor. Add the complexities of legal and cultural differences, and you have arguably one of the biggest challenges facing global corporations today. There are obstacles at every step of a cross-border investigation, including initially receiving a claim or allegation; complying with foreign data privacy laws; using the appropriate staff and resources; respecting diverse employee rights; and remediating across borders. Understanding where the pitfalls are along the way and how to navigate them can help you avoid critical missteps.

The goal of this paper is to give you meaningful guidance by discussing ways to effectively meet these challenges through the experiences of KPMG investigations professionals working around the world. In addition, we asked sixty worldwide executives who are responsible for managing their organizations' cross-border investigations to tell us about the challenges and obstacles they regularly face. Ninety-five percent of these executives said that they expect their needs for cross-border investigations to increase or at least to stay the same over the next year. We are pleased to share many of their other observations with you as well.

I sincerely hope you find this paper an interesting and useful resource.



**Petrus Marais**  
Global Forensic Chair  
KPMG Forensic



**Phil Ostwalt**  
Global Investigations Network Leader  
KPMG in the US

## 02

## Triggering a cross-border investigation

Cross-border investigations can be triggered from a multitude of foreign countries, in a variety of languages, through different reporting channels, and at anytime around the clock. It is critical, therefore, when designing intake procedures to receive and process allegations to use a global mindset and consider cultural differences. “How a company initially receives and reacts to an allegation of fraud can be a defining point in a cross-border investigation,” says Alex Plavsic, KPMG in the UK. Unique challenges exist when an investigation originates in a foreign jurisdiction. “If proper translations of an allegation are not made, for example, or if certain people are not notified in a timely manner about a claim, the investigation will be fraught with problems from the beginning,” Plavsic explains. In today’s hyper-connected world it is not only possible but imperative to have well controlled and efficient processes that allow business to respond to allegations with the appropriate level of care, insight, and promptness. The reality is many companies may receive complaints, especially those from outside their home countries, and do not have a plan to deal with them. Understanding the ways in which a cross-border investigation can arise and how to respond can ensure that it starts out on the right track.

The most common trigger of a cross-border investigation is a lead or an allegation made by an employee of the company. Seventy seven percent of the respondents in KPMG’s survey indicated that internal reporting triggered their most recent cross-border investigation. Almost half of these internal leads came through whistleblower and hotline programs, a notable figure given that cultures can differ widely regarding the acceptability of reporting the conduct of others. “In some cultures, a senior person can be committing a very blatant fraud, but no one under that person would ever think of telling someone about it. One does not go against superiors in some places,” says Mark Leishman, KPMG in Australia.

In addition to cultural differences, the laws and regulations governing hotlines vary greatly from country to country. Data privacy laws in Europe, for instance, may restrict the use of whistleblower hotlines or even prohibit them from accepting anonymous calls. Some European Union countries require government approval or at least notification before establishing a hotline, while other countries compel companies to consult with employees and sometimes to get their consent before launching a hotline. Knowing the local culture and regulations about the triggers of cross-border investigations can help companies customize reporting channels to best fit the ways in which foreign employees might report allegations.

### Case Study

When a US-based consumer products company received hotline reports in foreign languages, the reports were immediately delegated to the country manager in the local jurisdiction to conduct an investigation. However, the company did not have a language-skilled person reviewing the reports before they were delegated. As a result, a report alleging potential corruption involving a customs broker in Germany was sent to be investigated by the country manager who was the actual person accused of the alleged wrongdoing. A well-designed intake process would have prevented this mistake.

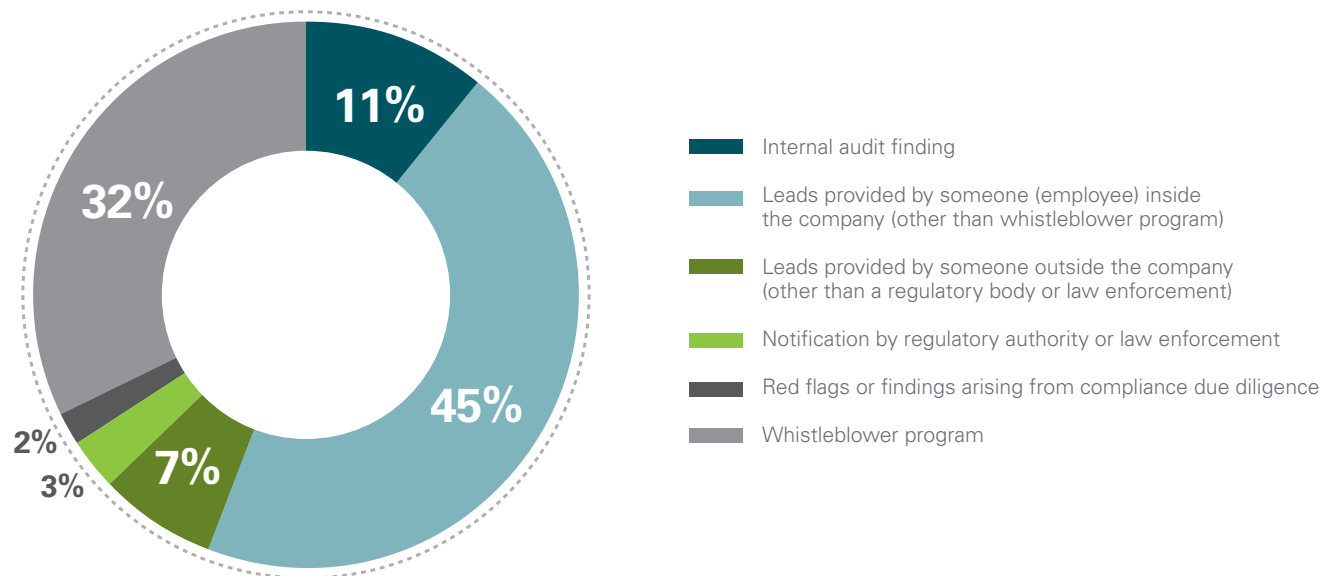
When a lead or an allegation is received in a foreign language, it is critical to get an accurate translation because even a minor misinterpretation can lead to a significant misstep. Online translation websites are no substitute for a language-skilled person who knows your business and is trained to review allegations. For instance, although Mandarin is the national language across China, the proper use of characters, sentence structure, and formation of clear thoughts varies dramatically from person to person and is heavily influenced by the upbringing of the individual, which an automated website cannot detect. It comes as no surprise that language

differences present challenges in cross-border investigations for more than a third of the respondents to KPMG’s survey. Companies, therefore, need to have hotlines that are staffed with appropriate language-skilled operators and to ensure that translations are accurate. “Before acting on a translation of a report, consult with someone in the country who knows not only the language, but also local sayings, common euphemisms, and double meanings of certain words,” advises Shelley Hayes, KPMG in Mexico.

There are other important differences between the intake of allegations in domestic and cross-border

investigations. Some countries require notification to an employee who is the subject of an allegation as well as notification to employee representatives or work councils, especially if the employee’s data will be reviewed. Confidentiality laws also may restrict to whom a company can disclose an allegation, even internally. Because the labor laws and data privacy laws in many countries can seem counterintuitive to common practices, it is critical to understand them at the initial intake stage of an investigation.

### Which of the following has been the primary trigger of most of your company’s recent cross-border investigations?



Source: *Cross-border investigations: Are you prepared for the challenge?*, KPMG International 2013.

## 03

## Triage and protocol for cross-border investigations

Around the globe, employees have become empowered to raise concerns through a variety of reporting channels. For this reason, a company needs to be prepared to act quickly, efficiently, and effectively when responding to allegations. “Given the velocity with which compliance happens, management can never be prepared enough when it comes to its investigation protocols and procedures,” noted Timothy Hedley, KPMG in the US. Many companies, however, are underprepared to meet this challenge. More than half of those who responded to KPMG’s survey said that their companies have limited or no protocols for cross-border investigations.

A company’s intake processes and its investigation protocols can be seen as two sides of the same coin. “The imperative of encouraging employees around the world to come forward with legal, compliance, and ethics questions cannot be realized unless a company also has appropriate investigative protocols

and effective responses when issues are raised,” says Richard Girgenti, KPMG in the US. Reporting mechanisms will quickly lose credibility among international employees if their concerns are disregarded or are handled poorly. For this reason, compliance officers, in-house counsel, human resources professionals, and other members of management who work for multinational companies need to be prepared to respond to allegations in a planned and consistent manner.

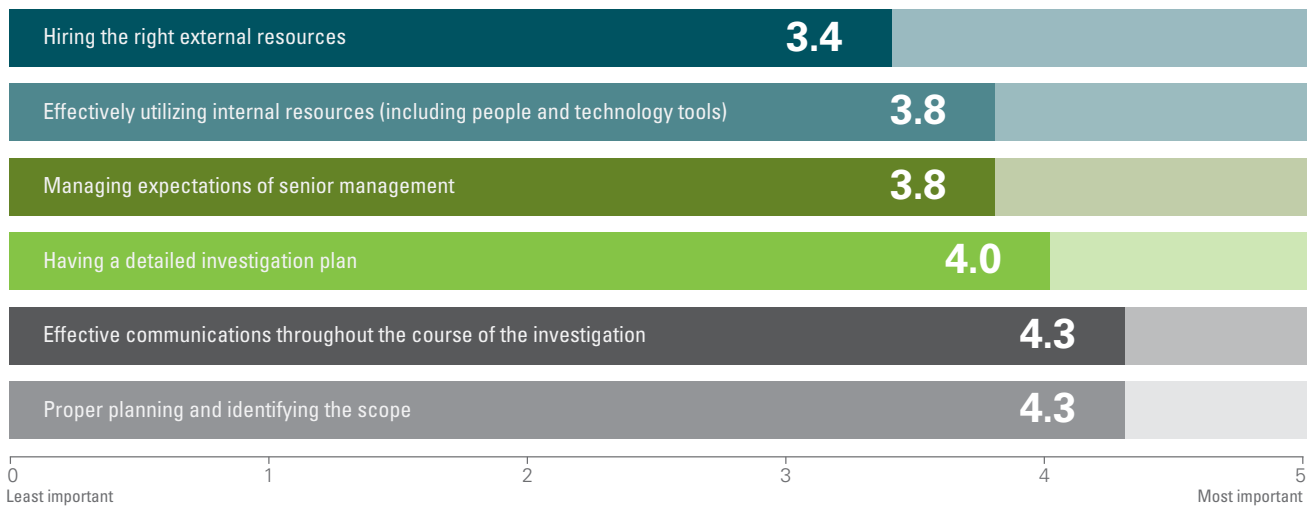
This means that a company should proactively develop case management and investigative procedures that align with the company’s values, standards, and principles and take into account region-specific or country-specific requirements, customs, and practices. Oftentimes, one size does not fit all, and procedures will need to be customized to meet the requirements of a particular jurisdiction. Creating regional case management templates that highlight key procedural distinctions provides a good starting point. “As with most compliance initiatives, the development of case management and investigative policies and procedures should be a collaborative exercise between compliance leaders at headquarters and their colleagues around the world,” says Maurice L. Crescenzi, Jr., KPMG in the US.

While many of the essential procedures of an effective domestic investigation and a cross-border investigation are the same, there are certain fundamental differences that case managers and investigators need to bear in mind. These differences include: the timeframe within which an investigation must occur; data privacy and the transfer of information; notifications to employees or their representatives; notifications to governmental agencies or law enforcement; and deadlines for reporting disciplinary measures taken by the company. Such fundamental differences can vary widely, depending on the jurisdiction where the investigation takes place.

“There should be a fundamental difference between the mindset of a case manager or investigator conducting an investigation on foreign soil,” says Phil Ostwalt, KPMG in the US. “In fact, there are many differences. For instance, case managers need to remember that employment law may differ significantly from country to country.” Additionally, case managers and investigators need to be adaptable to the investigative procedures and strategies that can lead to success at the local level. Given these jurisdictional and cultural differences, certain tactics considered effective in a particular country may prove counterproductive in certain foreign settings.



## How important are the following to the execution of a successful cross-border investigation?



Source: *Cross-border investigations: Are you prepared for the challenge?*, KPMG International 2013.

Just as cultural and language sensitivities matter in every other form of cross-border interactions, they also matter in investigations. While this sort of cross-border and cross-cultural sensitivity should be applied across all geographies, it is particularly relevant in certain countries with a history of governmental suppression. Accordingly, when conducting investigations in foreign jurisdictions, case managers and investigators should be mindful of the words they choose when dealing with foreign employees. For example, the word “investigation” may elicit negative emotions or connote a message that will have a chilling effect on the process. “Review,” “analysis,” or “discussion” are more impartial. Likewise, rather than saying “whistleblower,” “informant,” or “witness,” term such as “employee” or “colleague” are neutral.

In addition to cultural differences, there are significant legal differences. Many countries have restrictive data privacy and labor laws that can significantly impact the scope and depth of an investigation. In certain countries, for instance, local law may require that internal investigations be disclosed to the government, particularly if the company is owned or controlled in any

part by a government agency. Failing to modify investigatory practices when conducting cross-border investigations not only could be counterproductive from a cultural standpoint, it also could carry a consequence for an investigator – one that serves as an ironic book-end to what is often the focus of the investigation in the first place: a violation of law.

## Case Study

A software company initiated an internal investigation of its Russian subsidiary. The investigators complied with Russia’s strict limitations on removing data from the country and sent a team to Moscow to review all of the documents. As is common in the U.S., they encrypted the data not realizing that it is illegal in Russia to encrypt certain information. When the authorities learned about it, the investigation was delayed until the situation could be resolved. Knowing the local data laws could have prevented the issue.



The following steps can assist case managers and investigators in handling cross-border investigations.

### Assess the lead or allegation

When allegations involving international matters are made, the first step in the response protocol involves a preliminary assessment of the claim. “We learned as children to stop, look, and listen before crossing the street, and the same prudence should be applied before taking any action with regard to an allegation of misconduct,” notes Déan Friedman, KPMG in South Africa. “Taking the time to assess the matter is critically important for the sake of confidentiality and privacy, as well as the credibility of the compliance program, the integrity of the investigation progress, and the reputation of those involved.”

When assessing cross-border allegations, the compliance officer, lead investigator, or case manager should take the following steps:

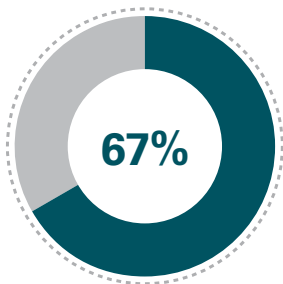
- Understand the factual nature and substantive issues involved in the allegation;
- Pinpoint, to the extent possible, the geographic source of the allegation;
- Identify the laws and policies that may be relevant;
- Determine the pervasiveness of the potential wrongdoing;
- Evaluate the credibility of the allegation;
- Identify country-specific laws and cultural norms that may affect the investigative process;
- Determine whether additional subject-matter or local professionals are needed;
- Develop a preliminary time table and budget to administer and complete the investigation;
- Determine whether and how to communicate with the claimant; and

- Assemble an investigation team involving local team members who have cultural and language expertise.

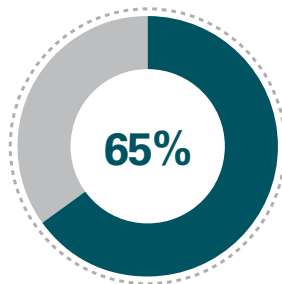
### Implement short-term action steps

Just as with domestic allegations, cross-border matters run the gamut, including employee relations concerns, corruption, data privacy breaches, theft, workplace violence, and so on. Case managers handling cross-border issues need to take certain preliminary steps to help protect the integrity of the process, employee safety, privacy and confidentiality, company property, and potential evidence. Depending on local law, such steps could involve temporarily suspending or placing on leave employees who are the subject of the concern or taking measures to preserve evidence and relevant documentation. Some countries also require notification to an employee who is the subject of an allegation, or to an employee representative or work council.

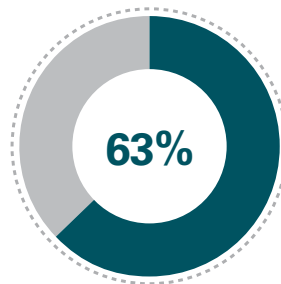
Which of the following best describes the nature of the cross-border investigations you are performing or managing?



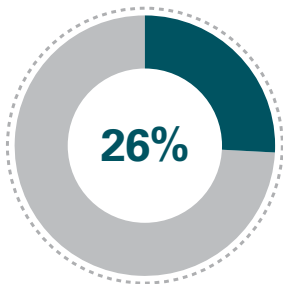
Bribery and corruption/FCPA



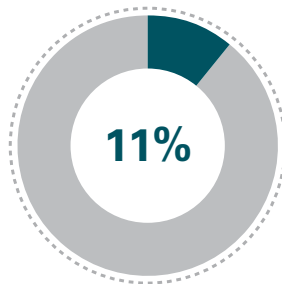
Embezzlement or misappropriation



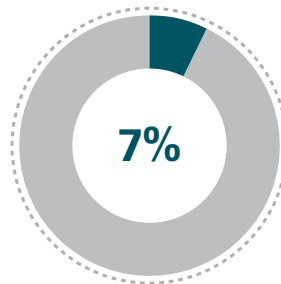
Conflict of interest



Fraudulent financial reporting



Data breach



Industry-specific regulatory issue

Source: *Cross-border investigations: Are you prepared for the challenge?*, KPMG International 2013.



## Develop a plan

All effective investigations, whether domestic or foreign, contain certain common elements. Before an investigation is launched, case managers should develop a plan that contains these steps outlined above. A thorough and well-designed plan can help investigation team members stay focused on the objectives of the investigation, measure progress along the way, and strategically incorporate supplemental steps as they become necessary. An investigation plan typically centers on a hypothesis that posits why and how the misconduct occurred. The plan should establish the scope and objectives for the investigation, the documents and data to be collected, the individuals to be interviewed, the timeline and milestones, and the reporting process.

In a cross-border context, the investigative team also needs to take into account any jurisdictional differences that may impact the investigation, the information that can be collected, and the individuals who can be interviewed. For instance, in certain European countries, due to personal data protection laws, the scope of an investigation involving an anonymous whistle-blower may be restricted. In China, many businesses are state-owned or controlled, which may trigger China's state secrets laws and greatly impact the kind of data that can be collected and reviewed. A well thought out plan should predict the kinds of issues that may arise and lay out a strategy to address them.

## Determine who should be notified

An important early step in the case-management of cross-border investigations is to alert key members of management that a potentially significant compliance allegation has been filed and that an investigation will be initiated. Depending on the nature

of the matter, it may be appropriate to notify the country manager, the functional leader, the department head, or other members of local management. It is important to keep the circle of trust small and to remind members of management about confidentiality and the integrity of the process. "We have seen instances where a member of the local country management is notified that an investigation is about to be launched, and then that person turns around and shares the news with the subject," reports Rachael Layburn, KPMG in China. Such sharing of information may be seen as violating basic investigatory practices, but in some countries it may be common practice. Knowing local customs and practices can help avoid an unintended disclosure.

## Identify who will oversee and conduct the investigation

Allegations vary in substance, severity, and priority. Therefore, a company should have a detailed procedure or protocol that outlines which department or individuals will bear responsibility for overseeing the investigation. "It is vital to have all the critical stakeholders at the table early to agree to the work plan and to set communication protocols at the very beginning," advises Pam Parizek, KPMG in the US. "When an investigation is being conducted overseas in different time zones, it creates challenges to keeping these stakeholders informed in a timely manner." The protocols, therefore, need to include not only the planned investigative procedures, but also the channels of communications with those overseeing the investigation.

While the legal department would likely oversee investigations involving potential legal matters, human resources may oversee investigations related to employee-relations issues, theft, and physical security. Moreover, potentially significant compliance situations, including those that involve

serious violations of domestic or foreign law, fraudulent financial reporting, or senior management would require direct board or audit committee oversight. These oversight groups should help establish the scope of the investigation, review the investigation plan, and ensure that adequate resources are available.

"The oversight group plays an important role with regard to the framework of a cross-border investigation," notes Maurice L. Crescenzi, Jr., KPMG in the US. "It is critically important that those who oversee and manage the investigation become intimately familiar with the local business and its operations, while at the same time, understanding the legal and cultural environment." In some instances, hiring local outside counsel to handle the investigation is appropriate. However, the outside law firm should be an independent firm and not the company's regular counsel in the jurisdiction.

Many companies struggle with the unique challenges of staffing a cross-border investigation. More than forty percent of respondents in KPMG's survey believe that their companies lack sufficient resources to handle cross-border investigations. Individuals need not only to be experienced in investigative strategy and tactics, but they also must understand local law, language, and customs. Investigation teams who do not have local language skills may miss critical aspects of key documents or interviews conducted in local language. "I can't stress enough the importance of having members of the investigations team who understand local culture and local language," says Crescenzi. "You simply cannot conduct a cross-border investigation using people who do not know the intricacies and idiosyncrasies of certain jurisdictions." These individuals may be hard to come by, and companies need to be prepared before a need arises.



## Case Study

Amid allegations of employee fraud at an international joint venture in Taiwan, a global consumer products company realized that it did not have the resources to respond immediately. The matter was exceedingly sensitive because of the stature of the subject and family-ownership of the joint venture. For assistance, the company retained a firm that had familiarity with the local business environment and culture, and had experience with Taiwanese law enforcement. The investigation was conducted in way that respected the sensitivities and resulted in a criminal prosecution.

To be well prepared, companies with global operations should proactively train employees about investigation protocols in different jurisdictions so that they can respond quickly. Trying to educate local resources after an allegation has been received may lead to delays that can sidetrack an investigation. Yet only thirty-five percent of respondents in KPMG's survey said that their companies conduct investigations training each year. Unlike domestic investigations, cross-border investigations oftentimes require specialized staffing that necessitates proactive planning. Companies can address gaps in resources by developing contingency plans for investigative personnel, such as designating experienced internal people from other regions to respond if necessary, and retaining outside local investigators to be on call when a situation arises.

### Assess special legal or cultural considerations

Both domestic and international investigations almost always involve data collection, interviews, and other sensitive communications. For this reason, attorney-client privilege and the attorney work product doctrine are important considerations. Attorney-client privilege protects confidential information disclosed to an attorney

in the process of obtaining legal advice or assistance. In contrast, the attorney work product doctrine, which is broader, applies to tangible material or its intangible equivalent collected or prepared in anticipating of litigation or a trial, which extends to the investigative process. Before a company launches an investigation, it should consult with in-house or external counsel familiar with the law of the relevant jurisdiction as to whether the investigation can be privileged or protected.

In an international setting, local law also may limit the scope of the investigation. For instance, in Europe an investigation into an anonymous complaint cannot be as broad as an investigation in which the allegation is made by an identified employee. Wherever possible, case managers and investigators, through their secure and confidential internal case-management systems, should attempt to have an anonymous claimant identify himself or herself. In some jurisdictions, it can be illegal for companies to investigate alleged employee misconduct because the local government considers itself to be the exclusive investigator responsible for law enforcement. Here again semantics matter. If management refers to the activity as a "review" rather than an "investigation" it could make a legal difference.

Lastly, case managers and investigators should be sure that the scope of their investigative plan includes a review of whether the subject violated local law. While it is not uncommon for many companies to predicate their global standards and compliance policies on their domestic laws, cross-border investigators should also evaluate whether local law, too, has been violated. Many times, these laws are not in alignment.





# 04

## Conducting a cross-border investigation

The manner that investigative procedures are implemented and the legal framework in which they are governed can differ dramatically from country to country. Companies involved in cross-border investigations are faced with navigating a variety of foreign laws and regulations that, in many respects, change the way an investigation can be conducted. "Local legislation may significantly influence the manner in which investigations are planned and executed," notes Jimmy Helm, KPMG in the Czech Republic. For example, in certain jurisdictions the mere observation of conduct, such as the weighing process at weighbridges or truck scales, may be regarded as an infringement of privacy. "More invasive procedures such as reviewing

an individual's emails or confrontational interviews may be greatly limited," Helm says.

Cultural differences also underlie cross-border investigations and can create significant problems if investigators do not understand and respect these differences. "In cross-border investigations, it is important to understand the traditional culture that is driving how people think, act, and react, and how the person conducting the investigation is being perceived," says Shelley Hayes, KPMG in Mexico. What may be acceptable to say or do in one culture may totally offend someone from another culture. "Loyalties also differ by culture and some employees may be hesitant to speak out against

a countryman for the benefit of a foreign company," explains Mark Leishman, KPMG in Australia. It comes as no surprise that more than a third of the respondents in KPMG's survey identified cultural differences among their top challenges in cross-border investigations.

Proactively identifying and addressing legal and cultural differences is the key to conducting an effective cross-border investigation. In our experience, significant differences between cross-border investigations and domestic investigations include data privacy laws and regulations, interviewing employees, and reporting findings.

### Case Study

Certain local laws that provide a right to access public information could result in a third party's obtaining a copy of your confidential report. The operator of an Italian railway, which was partially owned by Italy's Ministry of Economy and Finance, was required to report the findings of an accounting investigation to the Ministry and its designees. The report harshly criticized the chief accountant, causing him to lose his job. Because the report had been disseminated to others, he could not find employment in the industry. He brought a lawsuit for defamation against the company. If the company had realized that the report might not remain confidential, it might have been written in a manner that would not have exposed it to a potential claim.

## Data privacy

Preserving and collecting information relevant to an investigation is one of the most important steps in the investigative process. Foreign data privacy laws and regulations pose some of the greatest challenges to conducting cross-border investigations because of restrictions on the kinds of data that can be collected and transferred out of the jurisdiction. Many countries have enacted laws that place a high priority on protecting personal data, including establishing a fundamental legal right on the privacy of personal data, even if such data are contained on an employer's system or computer. In fact, over forty six percent of the respondents in KPMG's survey reported that their greatest challenge in conducting cross-border investigations is handling data privacy issues. "Being sensitive to data privacy and regulations in individual countries is a fact of life in cross-border investigations," says Rocco deGrasse, KPMG in the US. "You cannot, for example, conduct an investigation in the European Union, or especially in China, without first understanding what legal limits are placed on collecting and exporting data."

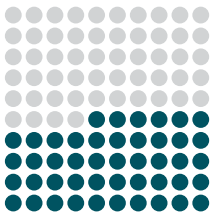
Failing to anticipate the impact of local data protection laws not only can significantly impede an investigation, but it

also can be costly in terms of added expenses, sanctions, and, in some cases, prosecution. For example, China has strict laws that prohibit the collection, review, and transfer of "state secrets" and other information that is in China's national interest. However, China's laws do not define what are state secrets or national interests. Because China is highly controlled and managed by the State, most companies operate with an abundance of caution by keeping as much information within China's borders and by hiring local experts who are intimately familiar with the risks of violating China's laws.

The data privacy laws of some countries may prohibit a company from reviewing certain data in a company's own files unless the data originally was obtained for investigatory purposes, which many times is not the case. One of the biggest hurdles is complying with limitations on collecting and reviewing data in a company's readily-accessible files, such as emails on the company's server, internet use records, documents on an employee's hard drive, and even hard copy documents in an employee's office. This is a formidable challenge. Indeed, the respondents in KPMG's study believe that the most difficult task in cross-border investigations is gathering relevant information, especially electronic data.

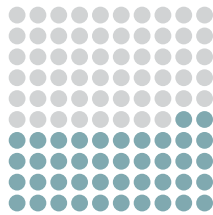
Which of the following are the top 3 challenges your company faces in the course of conducting cross-border investigations (select up to 3)?

46%



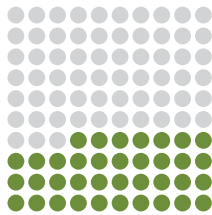
Privacy or information issues

42%



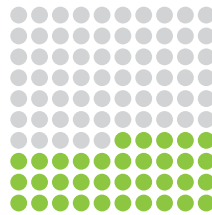
Lack of internal investigation resources

37%



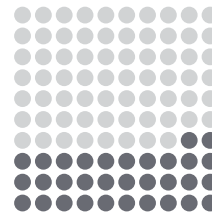
Cultural differences

35%



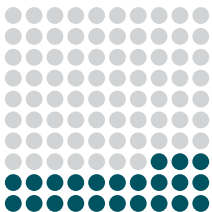
The legal or regulatory environment

32%



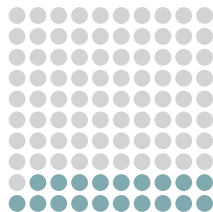
Language differences

23%



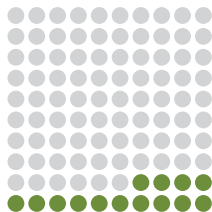
Lack of robust publicly available information to supplement investigative findings

19%



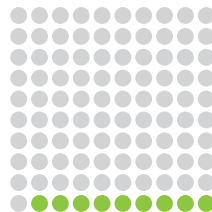
Lack of cooperation from others in your organization

14%



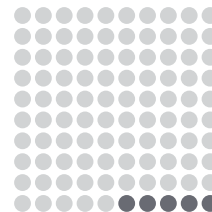
Identification and retention of competent external resources

9%



Personal security of persons involved in investigations

5%



Lack of cooperation from government agencies

Note: Chart shows the number of participants who chose the specified challenge as a percentage of total participants who responded.

Source: *Cross-border investigations: Are you prepared for the challenge?*, KPMG International 2013.

Unlike a common presumption in some countries that a company has the right to search data on company-owned systems and computers, the prevailing view in many foreign countries is that personal data is protected regardless of where it is stored. "Most jurisdictions in Central and Eastern Europe require the approval of the person before their email accounts may be extracted and interrogated as part of an investigation," says Jimmy Helm, KPMG in the Czech Republic.

The model for many foreign data protection laws is European Union Directive 95/46/EC, the primary legislation to date on data protection

in Europe. The EU Directive broadly defines personal data as "any information relating to an identified or identifiable natural person." It restricts the collection and processing of personal data to limited circumstances such as when the individual has consented, when it is necessary to comply with a legal obligation, or when a legitimate corporate interest is not overridden by the fundamental rights and freedoms of the individual. These situations are not always clear, and foreign regulators may have varying opinions as to their applicability.

## Case Study

A US company initiated an investigation of certain of its overseas operations in Europe. The company had a global policy that it could review emails that were contained on company-owned computers and systems. In accordance with its policy, the company copied the emails of a number of foreign employees. However, when investigators tried to leave the country with the copies of the emails, the data was confiscated by a customs official until the company could provide consents from each employee. This led to significant delays because some of the employees initially refused to consent, while others could not be located. Creating export channels beforehand, such as getting consents, could have prevented the situation.





Obtaining relevant data, however, is only the first step. “One has to understand whether there are restrictions on taking data out of the local country,” explains Roy Waligora, KPMG in South Africa. Many foreign data privacy laws, including those in Europe and parts of Latin America and Asia, prohibit transferring data out of the local jurisdiction without first establishing data export channels. Data export channels are methods of ensuring that country-specific data protection procedures will be followed, such as adopting corporate policies that adhere to foreign data protection laws; incorporating model contract clauses that provide a “safe harbor” under laws like the EU Directive; and, in some cases, obtaining consents by employees. It is vitally important to establish these data export channels *before* an investigation arises to prevent delays or roadblocks in a cross-border investigation.

Another important difference between domestic and foreign data privacy laws relates to the confidentiality of investigation materials. Many countries require that investigators disclose personal data included in investigation materials to the individuals who are targets of the investigation if they request the data. Additionally, labor laws in some countries may require companies to disclose investigatory procedures involving data processing systems to labor unions or employee rights work councils if personal data could be impacted. “Balancing the integrity of the investigative process with the legal rights that overseas subjects enjoy under local law is both an art and a science,” says Tim Hedley, KPMG’s Global Leader for Fraud Risk Management. “One way to strike this balance is to wait for an appropriate time in the investigative process to share this information once the investigation is mature and the findings have begun to take shape.”

Important differences in data privacy laws can have an impact after the conclusion of a cross-border investigation. Some countries prohibit outdated personal information from being retained, even if it is contained in investigatory materials. This runs counter to certain laws and regulations that may require a US company to maintain investigatory materials and work product for a period of time. “Having a solid understanding of the data privacy laws in the jurisdiction is critical from the beginning through the end of a cross-border investigation. In most cases, this means relying on experts who have in-country experience with handling data,” says Ken Koch, KPMG in the US.

## Case Study

During an internal investigation in a European Union member state, the company's employee rights council intervened on behalf of an employee, in part because the company had not notified the council that it was going to collect the employee's data. The council claimed that the data included personal data and it threatened to get a court order to halt the investigation. The resulting publicity could have threatened the confidentiality of the investigation. The company ultimately agreed to segregate any personal information and disclose it to the employee and to the council before including it in any investigation materials. This increased the costs of the investigation and caused delays. Working with the council proactively could have avoided the delays.

### Interviewing employees

Interviewing employees who are located in a foreign country raises unique legal and cultural issues that oftentimes are fraught with pitfalls. In many countries, employees have the right to refuse to cooperate with an employer-led investigation, even if they are not its target. For example, in some jurisdictions, including Europe, rules prohibit employers from requiring their employees to report incriminatory information about co-workers. Labor laws in many countries mandate that an employee representative or union committee be consulted before an employer may interview its

own employees in an investigation. One of the starkest differences between domestic and cross-border investigations is the requirement that companies in some countries have to inform their employees of procedural rights during the investigation and give them at least some degree of access to investigation materials that identify them. Employees also may have the right to have a lawyer or employee representative present at the interview.

Understanding local culture plays a pivotal role with interviewing employees in cross-border investigations. "In some cultures, talking about fraud, theft, and manipulation of financial statements is

accepted; in others, the same words will put people on edge," observes Shelley Hayes, KPMG in Mexico. Even body language may differ. "Looking someone in the eye is considered rude in some countries, so it should not be taken as a clue that a person is lying if he or she does not maintain eye contact with an investigator," notes Mark Leishman, KPMG in Australia. Conducting an interview in a confrontational manner may be effective, but in many countries, the interviewing style needs to be softened. These kinds of insights are relevant to cross-border investigations and investigators should be mindful of what it will take to put a witness at ease during an interview.

Language differences can pose problems at every stage in cross-border investigations, and they may be most acute when interviewing witnesses. Unlike documents that are written in a foreign language, witnesses oftentimes speak with different dialects, or use slang or local jargon. Some spoken words and terms also do not translate in exactly the same way between languages. It is no wonder that language differences were ranked as a top challenge in cross-border investigations by nearly a third of the respondents in KPMG's survey. Using investigators with local language skills, particularly those having the appropriate regional dialects, can be essential when interviewing witnesses. When different languages are involved, another area that poses a high risk is obtaining an accurate translation of an interview into English. Even slight variations in translations could create significant misinterpretations of the reported facts.

## Reporting findings

Careful attention should be paid to the form and content of a report in a cross-border investigation. There may

be advantages to providing only an oral report, but the labor laws in a particular jurisdiction may require a written report, especially if disciplinary action is taken. Many countries have data privacy laws that allow a target or a witness to have access to certain investigatory material, including a written investigation report. Being compelled to disclose data in this way could affect the applicability of domestic and foreign legal privileges and could expose the company to data privacy and defamation claims.

A company needs to keep in mind that an investigation report may contain data that is restricted from being transferred out of a jurisdiction, such as names of individuals, financial information, or personal data. Therefore, the proper data export channels need to be established before providing a report (even a report in draft form) to management or directors outside of the country. These considerations apply likewise to reports and materials prepared by experts and consultants. "A company conducting a cross-border investigation needs to make sure that all of its outside experts and vendors

who receive data comply with local data privacy laws," advises Jack DeRaad, KPMG in the Netherlands. "This can be challenging when there are many experts involved, such as lawyers, forensic accountants, ediscovery vendors, and computer forensic specialists, especially if they are located in various jurisdictions with different data privacy regimes."

An understanding of local law is critical in reporting the findings of a cross-border investigation. The data privacy laws of some countries restrict an employer from reporting to enforcement authorities the personal information found during an investigation. In contrast, other countries, such as Australia, require an employer with evidence of certain criminal offenses to report them to police. It is easy to see how conflicts might arise between the reporting restrictions and requirements of different jurisdictions. Knowing beforehand if reporting restrictions exist can help to avoid difficult situations at the conclusion of a cross-border investigation.

## Case Study

An employee in India who was being interviewed by a company's U.S. investigator claimed that she was intimidated and harassed because the investigator emphasized that he formerly was a federal prosecutor and that the company would take criminal action against anyone found guilty of wrongdoing. The harassment claim interrupted the investigation and caused the employee to refuse to cooperate. Understanding local culture and practices might have changed the way in which the investigator approached the employee.

# 05

## Remediation across borders

Once the fact finding stage of a cross-border investigation is complete, a company may need to remediate any issues identified, which could include correcting books and records, fixing control weaknesses, and disciplining employees. Taking remedial action can be an important determinant by regulators, both domestic and foreign, in deciding to charge a company with a violation of a law or to reduce the size of a criminal fine or penalty that might be assessed. Remediation across borders, however, can create unsuspecting challenges.

One of the first considerations is how to handle employees found to have engaged in wrongdoing. These employees may have different levels of culpability and may be located in jurisdictions with different legal or labor protections against adverse action. While it is critical that companies punish employees proportionately to their role in the misconduct, it also is important to follow local regulations when doing so. For instance, certain countries require employers to first notify an employee if he or she is going to be terminated for cause. And in some places, such as Austria and Belgium, this notification may need to be made within days of obtaining evidence of wrongdoing.

While the kinds of punishment can run the gamut, terminating an employee could trigger different requirements in different jurisdictions. "Even if an employee is being terminated for

cause, you have to be careful to follow local dismissal procedures," advises Mike Schwartz, KPMG in the US. "The first reaction may be to fire a guilty employee as soon as possible, but that could violate local laws or employee rights." Even if the evidence appears to implicate a person, the labor laws in some countries contain high standards that must be met in order to justify a termination for cause. Domestic and foreign regulators also may complicate matters by requesting that a company not terminate a culpable employee so that the regulator continues to have access to the employee. Even in this situation, a company should change the responsibilities of the affected employee to make sure he or she cannot repeat past misdeeds or be put in a position with a comparable level of authority, which could be interpreted as insufficient punishment.

Another key area of remediation is to adequately address the deficient, insufficient, or ineffective controls or procedures that allowed the misconduct to occur or to avoid being detected. In a multi-national company, these controls and procedures need to be examined not only in the affected location, but also wherever they exist globally, and they need to be remediated if necessary. While regulators may be impressed with the overall level of effort, they, along with management and directors, may insist on an interim fix to the controls that provides assurance that some remedial

action is occurring while a longer term solution is being implemented. Keep in mind, however, that in some countries there may be limitations on the ability of an employer to make substantive changes to the work environment without consulting labor unions or workers' councils.

The timing of remedial action also is a consideration. Oftentimes, remediation can and should begin as soon as inadequate or compromised financial controls have been identified, even during the investigative fact finding. "Both the board of directors and the regulators will expect, or at least welcome, prompt attention to fixing known gaps, workarounds, or weaknesses in compliance protocols or financial controls without waiting for the investigation to be completed," advises Rocco deGrasse, KPMG in the U.S. In a complex matter, remediation of multiple controls across multiple countries may take a long time, even years. "Law enforcement and regulatory authorities may be reluctant to finally resolve regulatory and other proceedings until they know the company has fixed the gaps in all affected countries and has taken some sort of action against responsible employees," says Charlie Patrick, KPMG in the UK. "The bottom line with conducting remediation across borders is to start promptly and to proceed prudently."





# 06

## Concluding remarks

Given the challenges created by cross-border investigations, ninety-five percent of the respondents in KPMG's survey expected that their needs for cross-border investigations will increase or at least to stay the same over the next year. Add to this, the increase in global regulations, laws, and enforcement actions, companies with well designed cross-border investigation protocols will be positioned for more positive outcomes than those that are not prepared. At each stage of a cross-border investigation, there are unique challenges that require

forethought and planning to manage the risks and to respond swiftly and appropriately. No longer can companies rely on procedures and resources used for domestic investigations. Instead, they must be customized to comply with different local laws and to respect diverse cultures and customs. When allegations can arise from almost anywhere around the world, at any time around the clock, and in virtually any language, every company should answer the question: Are you prepared for the challenge?



## We would like to acknowledge the following individuals for their assistance:

**Laura Alderson**  
**Nina D'Arcangelo**  
**William Hanley, III**

**Jilane Khakhar**  
**Victoria Malloy**  
**Lissa Mitchell**

Special acknowledgement to Scott Hilsen for his significant contributions in helping with the successful completion of this project.

## Contributors

**Maurice L. Crescenzi Jr.**  
**KPMG in the US**  
**T:** 973 912 4861  
**E:** mcrescenzi@kpmg.com

**Rocco de Grasse**  
**KPMG in the US**  
**T:** 312 665 1296  
**E:** rdegrasse@kpmg.com

**Shelley Hayes**  
**KPMG in Mexico**  
**T:** +52 5552468634  
**E:** hayes.shelley@kpmg.com.mx

**Jimmy Helm**  
**KPMG in the Czech Republic**  
**T:** +42 0222123430  
**E:** jhelm@kpmg.cz

**Timothy Hedley**  
**KPMG in the US**  
**T:** 212 872 3496  
**E:** thedley@kpmg.com

**David Hicks**  
**KPMG in the UK**  
**T:** +44 20 76942915  
**E:** david.hicks@kpmg.co.uk

**Scott Hilsen**  
**KPMG in the US**  
**T:** 404 222 3015  
**E:** shilsen@kpmg.com

**Ken Koch**  
**KPMG in the US**  
**T:** 404 614 8658  
**E:** kckoch@kpmg.com

**Rachel Layburn**  
**KPMG in China**  
**T:** +86 108 5087075  
**E:** rachel.layburn@kpmg.com

**Marc Miller**  
**KPMG in the US**  
**T:** 212 872 6916  
**E:** marcmler@kpmg.com

**Charlie Patrick**  
**KPMG in the UK**  
**T:** +44 20 76945470  
**E:** charlie.patrick@kpmg.co.uk

**Pamela Parizek**  
**KPMG in the US**  
**T:** 202 533 5362  
**E:** pparizek@kpmg.com

**Alex Plavsic**  
**KPMG in the UK**  
**T:** +44 20 73113862  
**E:** alex.plavsic@kpmg.co.uk

**Mike Schwartz**  
**KPMG in the US**  
**T:** 713 319 2258  
**E:** mschwartz@kpmg.com

**Roy Waligora**  
**KPMG in South Africa**  
**T:** +27 736222319  
**E:** roy.waligora@kpmg.co.za

## Contact us

### KPMG's Global Forensic Investigations Network

#### Phillip Ostwalt

##### Global & Americas Leader

T: 404 222 3327

E: [postwalt@kpmg.com](mailto:postwalt@kpmg.com)

#### Dean Friedman

##### EMA Leader

T: +27 116478033

E: [dean.friedman@kpmg.co.za](mailto:dean.friedman@kpmg.co.za)

#### Mark Leishman

##### AsPAC Leader

T: +61 7 3233 9683

E: [mleishman@kpmg.com.au](mailto:mleishman@kpmg.com.au)

### KPMG's Global Forensic Regional Leadership

#### Petrus Marais

##### Global Forensic Leader

T: +27 795159469

E: [petrus.marais@kpmg.co.za](mailto:petrus.marais@kpmg.co.za)

#### Richard H. Girgenti

##### Americas Region

##### Forensic Leader

T: 212 872 6953

E: [rgirgenti@kpmg.com](mailto:rgirgenti@kpmg.com)

#### Jack DeRaad

##### EMA Region Forensic Leader

T: +31206 567774

E: [deraad.jack@kpmg.nl](mailto:deraad.jack@kpmg.nl)

#### Grant Jamieson

##### AsPAC Region Forensic Leader

T: +85 221402804

E: [grant.jamieson@kpmg.com](mailto:grant.jamieson@kpmg.com)

[kpmg.com/socialmedia](http://kpmg.com/socialmedia)



[kpmg.com/app](http://kpmg.com/app)



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Designed by Evalueserve.

Publication name: Cross-border investigations report

Publication number: 121643

Publication date: November 2013