

Data Privacy and Privilege Solutions for Cross-Border Investigations

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Discussion Points

1	Challenges in collecting, reviewing and understanding data scattered across multiple jurisdictions as well as transmitting legal advice and reporting to authorities
2	Ethical and cultural considerations in global investigations: local labor law, culture, language
3	Legal privilege in global investigations: preserving the privilege in jurisdictions where it is not recognized
4	Data privacy in global investigations: compliance with local law, including GDPR in Europe, to avoid creating liability in the course of an investigation
5	Mock case and demonstration on Dentons Direct (electronic data hosting and collaboration platform): Using tech to conduct investigations efficiently, increase quality and manage legal privilege & data privacy issues

The Challenge: collecting and reviewing global data

- **The traditional process:**

- Lawyers travel with support staff to all impacted sites, interview custodians, collect data and documents and return to the US
- Data and documents translated and reviewed in the US
- Lawyers return to interview witnesses through translators
- Internal reporting with translated documents and privileged communications transmitted on the assumption of common privilege rules
- Results in significant costs, lost nuance, misunderstandings and risk to privilege

- **Recent modifications and their challenges:**

- Pre-GDPR "consent forms" often impose US assumptions and ignore the rights of non-custodians
- Data reviewed by third-party vendors without legal training or understanding of the issues under investigation
- Translations conducted with limited understanding of local culture or law
- Advice continues to be forwarded without regard to local privilege rules

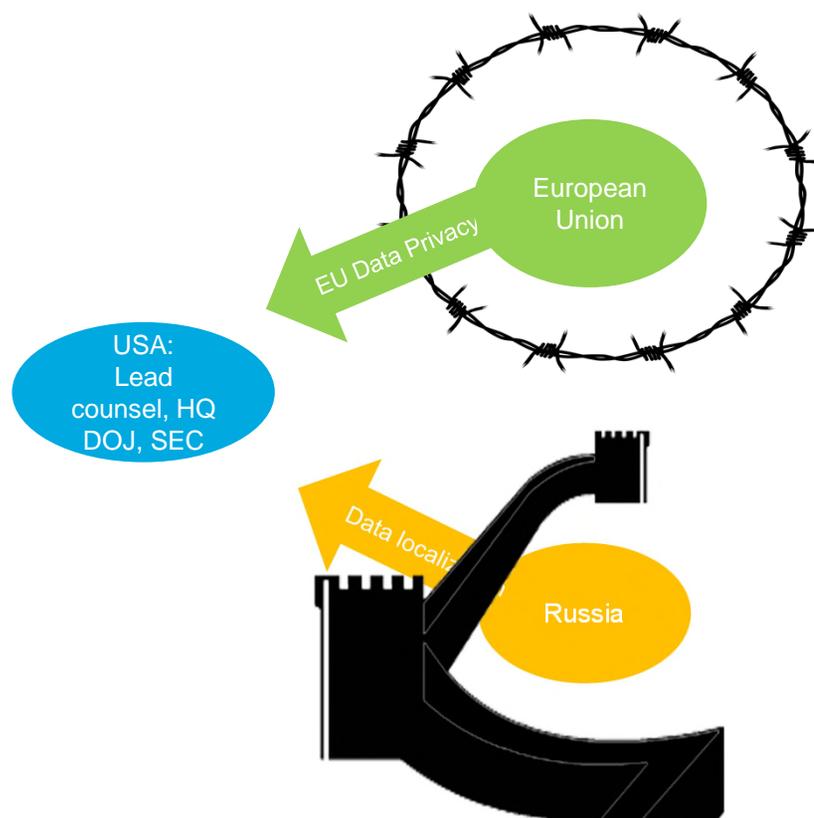
The Challenge: collecting and reviewing global data

- **Fundamentals continue:**

- collect all data from all custodians
- Review multiple languages
- Identify key documents
- Conduct interviews
- Advise key stakeholders
- Potentially transmit concussions and some data to authorities

- **Growing restrictions:**

- scope of data that may be collected
- anonymization
- Penalties grow
- Labor rights and private data
- Keep data local to manage data privacy and localization laws



Impact of “data privacy” and “data localization” laws on global investigations

- **Data privacy**: key aspects as they impact global investigations
 - “Personal data”: name, telephone number, email, what the person does at work; **but not the communication itself**
 - Consents often needed for data collection and review
 - Necessity principle: restricts all use of personal data, including collection, review, and later transmission
 - Export to (or “processing” from) a country without a comparable level of protection restricted to certain defined exceptions
 - these arguably do not include production in pre-trial discovery or outside of active *court* proceedings (e.g., under DPA)
 - Anonymization removes personal data
- **Data localization laws**: e.g., Russia, China
 - Require local storage of personal data

Face the realities of global investigations

- Data is **scattered across jurisdictions** (devices, storage, servers)
- Each jurisdiction has its **own rules** (EU is not alone) on privacy and labor laws, American assumptions should be recognized and rejected
 - Watch for "localization," "military secrets" and data transfer requirements
 - The simple act of sitting down with counsel can be very foreign
 - The role of a Works Council and have a unexpected and substantial impact
- **Language and culture** are at the heart of an effective investigation
 - The old adage "two nations divided by a common language" is very real and can cause great humor and deep misunderstandings
 - Just think of the impact of a Slavic language or a traditional African culture can have on communication, cooperation and understanding
 - Don't underestimate the difference in understanding that a native and non-native speaker (even a very good speaker) may have
 - Just because it is in writing doesn't mean that it reflects the author's intent

“Privilege” is not “privilege” everywhere

- **Do not assume** the legal system is just like yours...
 - Germany has no equivalent to American privilege, nor does it have discovery
 - The UK has privilege, but its not exactly the same
 - Spain has investigating judges AND prosecutors
- What does this mean for your privileged communications?
 - Duty to maintain confidentiality: Rule 1.6.101
 - Duty to safeguard confidential information Rule 1.6.220
 - Privileged communications with organizational clients Rule 1.6.470
- Jones Day and the VW raid
- Your privilege will not be respected by all jurisdictions
 - Not just a question what communications are covered (in-house v. outside)
 - WHERE the communication is stored is CRITICAL

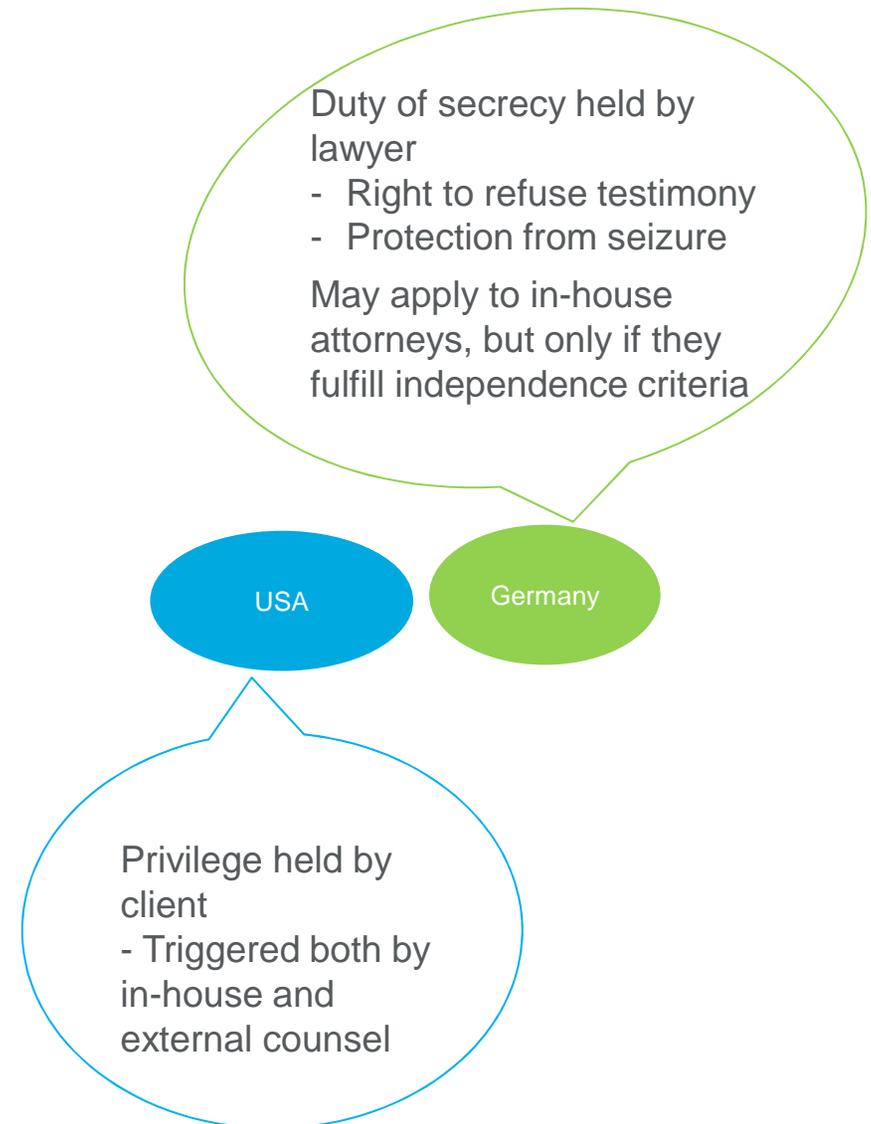
Challenge: Legal privilege in global investigations

• US approach:

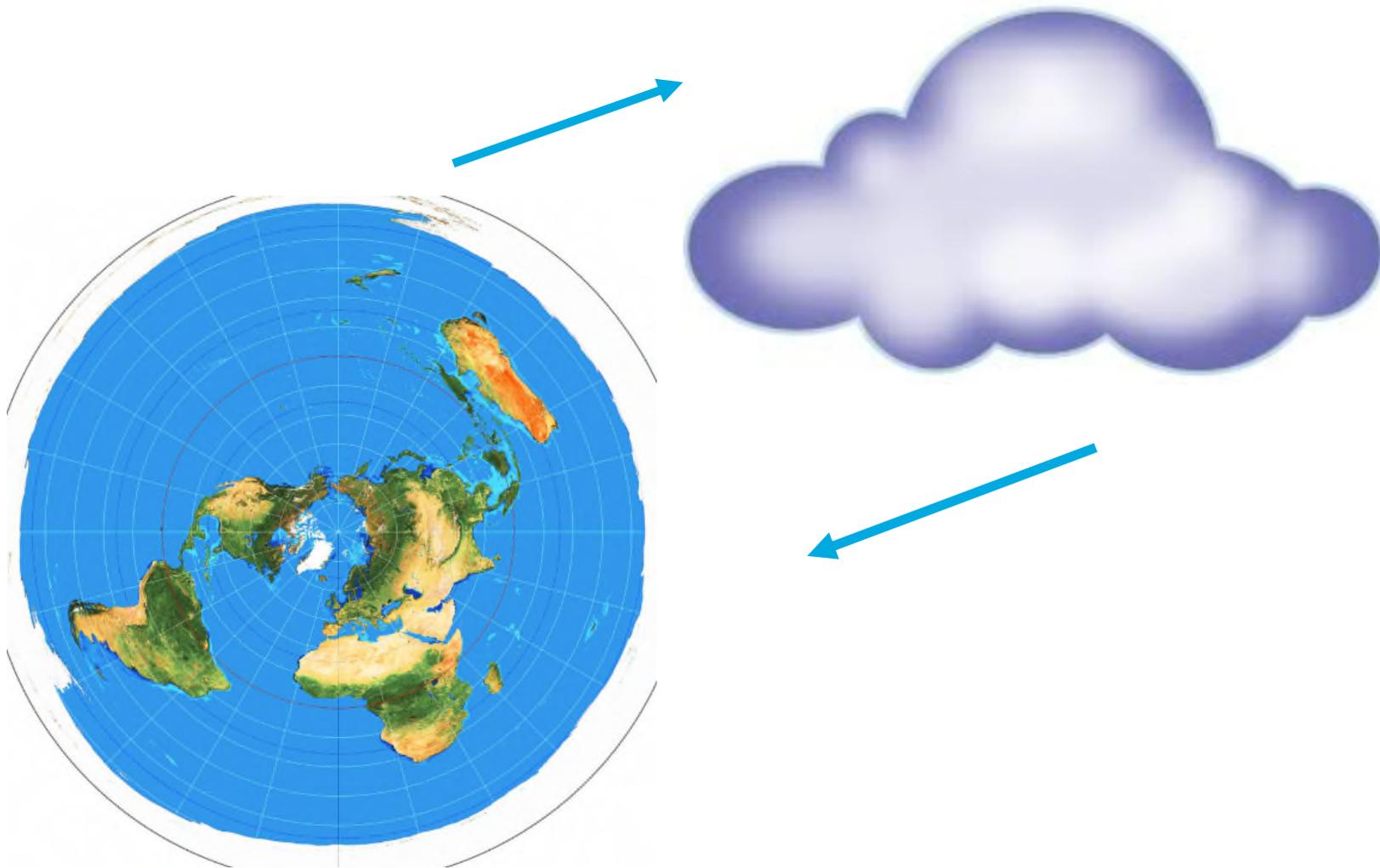
- Prosecutors respect legal privilege
- Legal privilege covers in-house counsel
- Policies against requiring waiver

• Other jurisdictions:

- Dawn raids at law firms
 - Example: German prosecutors raided the offices of Jones Day; appeal currently pending before the German Constitutional Court
- In-house counsel may not bestow privilege
- European counsel don't always appreciate the value of privilege
- But: prosecutors may not seek legal analysis, e.g. in investigation reports



Solution: Think globally, act locally



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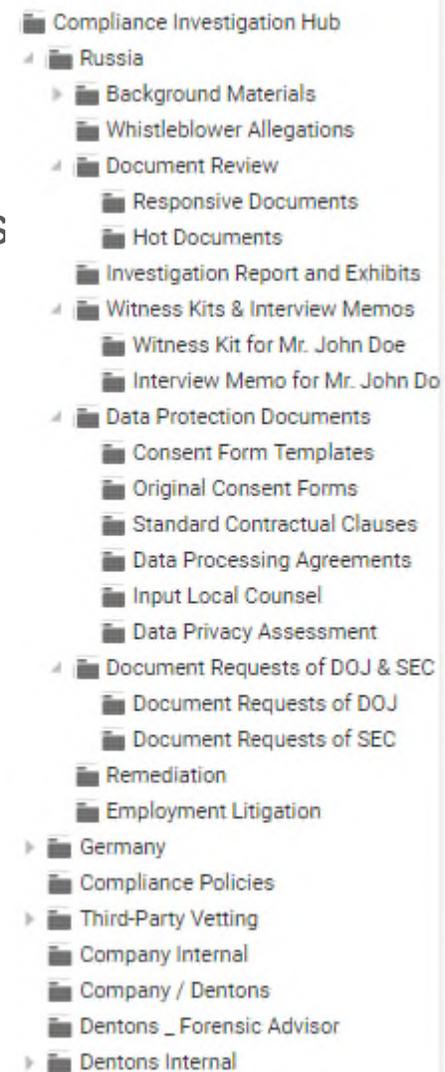
- You need a **global plan**, but the solution is where the problem is...
 - Data is governed by local law? Review it **locally**, at least initially.
 - Data is in a local language? Review it **locally** to identify the key materials.
 - Need to talk with witnesses? Do it **locally**, with a local understanding of language, culture, and local legal standards.
- But wait, the issues are actually Global...
 - Conduct crosses borders, actors engaged in different jurisdictions
 - Enforcement agencies are in Washington, Paris or Berlin
 - So think globally with a truly global team, including **local and global experts**
 - With global and local access (restricted where required by data or privilege)
- The global team can act locally and provide near instantaneous and complainant access **globally through the cloud**

Case Study

- Globally operating company with HQ in US
- Whistleblower complaints re. activities of business consultants in:
 - Russia
 - Germany
- Consents from custodians required in both cases
- German Works Council must also consent
- Relevant emails are mostly in Russian / German
 - Russian data localization laws make export illegal
 - German data protection laws restrict review (e.g., necessity principle)
- First-level review identifies 10 hot documents in each country

Solution: Bundle documents

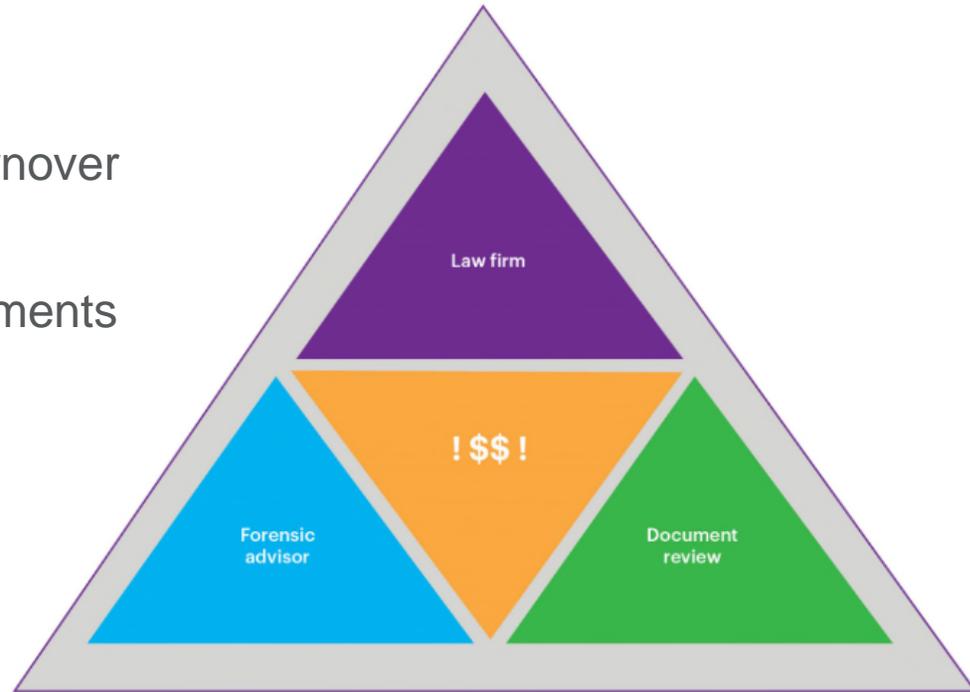
- Collect all documents in one virtual place
- Assign access rights on folder or document basis
- Restrict access of teams / firms on a “need to know” basis
- Full audit history of access
- Avoid sending sensitive documents by email
- Avoid hard copies
- Cloud storage minimizes risk of seizure by prosecutors in jurisdictions that do not respect legal privilege



Challenges: Efficiency, cost, quality

Traditional model:

- “Know-how” loss due to team turnover
- Lack of control over data
- Time wasted searching for documents
- Lack of visibility over costs



Collaboration portal model:

- Increase efficiency by tracking KPIs and saving time
- Collect all key information in a single database
- Manage interfaces among the company and its advisors
- Improve data security
- Reduce data protection and privilege risks

Solutions: Closer collaboration minimizes interfaces

大成 DENTONS

Home Activity Docs Links & KPI's News Tasks Calendar Trackers Doc Review Q&A Team Admin

Welcome to Dentons Direct: This is your confidential team site for Internal Investigations

Manage interfaces with tech
Save time & cost-increase quality

Site Team:

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Latest FCPA Compliance news

- US v. Panasonic Avionics Corp.—FCPA Enforcement Action Highlights Best Practices in Mitigating Third-Party Risk
04 Jun 2018
- Legg Mason accrues \$67M charge to earnings for FCPA matter
31 May 2018
- Société Générale Agrees to \$860M Penalty in FCPA, LIBOR Cases
04 Jun 2018
- FCPA: An act of punitive moralism
08 May 2018
- FCPA Compliance Report-Episode 382, Susan Divers on LRN's 2018 Program Effectiveness Report
09 May 2018
- Lessons to be learned from first declination under new FCPA policy

Solutions: Bundle information

Bundle information in smart ways

- Ensure consistency, avoid duplication
- Quick access to relevant parties cuts costs



Trackers

We can create a number of indices that can give you the oversight you need. Some examples include:

- Matter list
- Search term list
- Knowledgeable persons list
- Data protection approach overview

Data Protection - Final -

<input type="checkbox"/>	Investigation -	Data Privacy Assessment -	DPA's needed -	Original DPAs -	SCCs needed -	Original SCCs -	Consents needed -	Original Consents -	Local Co
<input type="checkbox"/>	Germany	/Data Protection Documents/Data Privacy Assessment	Yes	/Data Protection Documents/Data Privacy Assessment	Yes	/Data Protection Documents/Standard Contractual Clauses	Yes	/Data Protection Documents/Original Consent Forms	Law Firm Mrs. Jar

List of Custodians - Final -

<input type="checkbox"/>	Custodian -	Release Date -	Investigation -	Entity -	Position -	Language -	Involvement -	Consent needed -	Original Consent -
<input type="checkbox"/>	Mr. John Doe	31 May 2018	Germany, Russia	Company A	Managing Director	English	Person Involved	Yes	/Data Protection Documents/Original Consent Forms

Search Terms - Final -

<input type="checkbox"/>	Search No. -	Release Date -	Investigation -	English -	Local Language -	Created by -	Modified by -	Modified date -	Responsive/Hot Documents -
<input type="checkbox"/>	1	15 May 2018	Russia	money, bribe, fraud, illegal, "cover up"	деньги, взятка, мошенничество, незаконное, сокрытие	Amy Klaesener	Amy Klaesener	04 Jun 2018 16:47	/Russia/Document Review/Hot Documents

Solutions: Bundle legal tech

- Links databases in a central place
- Add buttons to additional internal or external resources



[Link to Forensic Advisor Site](#)



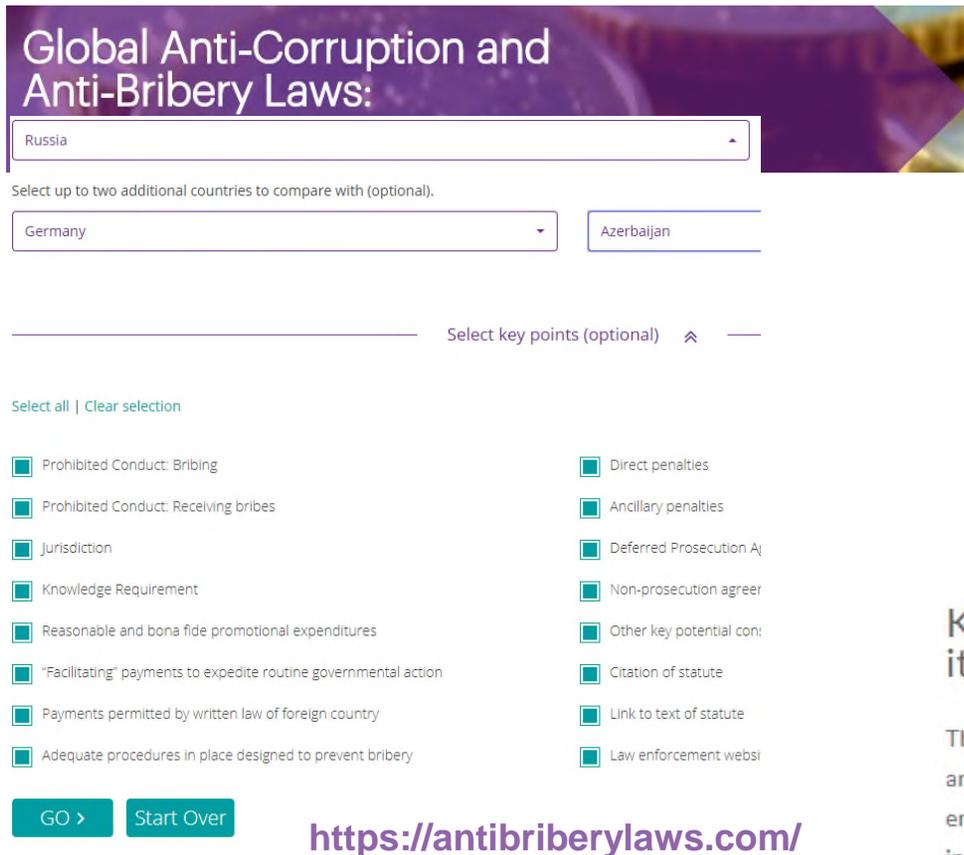
FileFacets

The all-in-one platform equipped with machine learning enables organizations to perform sophisticated data discovery and advanced content search of networks, servers, desktops and laptops, identifying investigation relevant information and Personally Identifiable Information (PII), removing Redundant, Obsolete and Trivial data (ROT) and facilitating the secure transfer of data between repositories.

Dentons' Global Anti-Corruption and Anti-Bribery Laws

Comparison of key points in select jurisdictions

Solutions: Bundle legal tech, for example...



Global Anti-Corruption and Anti-Bribery Laws:

Russia

Select up to two additional countries to compare with (optional).

Germany Azerbaijan

Select key points (optional) ⤴

Select all | Clear selection

- Prohibited Conduct: Bribing
- Prohibited Conduct: Receiving bribes
- Jurisdiction
- Knowledge Requirement
- Reasonable and bona fide promotional expenditures
- "Facilitating" payments to expedite routine governmental action
- Payments permitted by written law of foreign country
- Adequate procedures in place designed to prevent bribery
- Direct penalties
- Ancillary penalties
- Deferred Prosecution Ag
- Non-prosecution agreer
- Other key potential con:
- Citation of statute
- Link to text of statute
- Law enforcement websi

GO > Start Over

<https://antibriberylaws.com/>

Allows quick comparison of the laws of 27 countries.



Know what you have & where – no matter where it is

Through a sophisticated, yet simple interface, the FileFacets platform searches for, and identifies files across networked and cloud-based shared drives, servers, enterprise content management systems. It even scans for and identifies sensitive information sitting in email, desktops, and laptops.

It learns as it goes, dynamically clustering files or content into groups based on the content type or document type – allowing you to routinely action on that specific kind of data. When new content is added, FileFacets will find it, identify it, classify it, and then action it based on your defined business processes.

Solutions: Task tracker

- Assign each task to a cost center
- Move tasks through work steps
- Core team retains oversight over all work
- Sensitive documents need not be circulated by email

Inv. 8: Expand investigation to new issue

Details

Status **Not started**

Due date 16 Jun 2018

Assignee(s) Amy Klaesener

Priority High

List 1. Document Review

Created by Amy Klaesener, 04 Jun 2018 09:20

Updated by Amy Klaesener, 04 Jun 2018 09:23

Description

A new issue arose in the interview of Mr. Doe (potential oral agreement): draft search terms and launch review of emails of Custodians A, B and C.

Attachments (0)

Tags (0)

Reminders (1)

🔔 1 Day(s) before ❌

Comments (0)

Not started

Inv. 8: Expand investigation to new issue
Due on 16 Jun 2018
Amy Klaesener
In 1. Document Review

Inv. 8: Additional Custodian
No due date
In None

Add task

Dentons

Germany: Prepare consent forms
Due on 22 Jun 2018
In 2. Data Protection

Russia: Prepare witness kit for John Doe interview
Due on 26 Jun 2018
Amy Klaesener
In 3. Prepare and Conduct Interviews

Add task

Forensic Advisor

Russia: Collect data from custodians in Moscow
No due date
In 1. Document Review

Russia: First-level document review in Investigation 8
Due on 29 Jun 2018
In 1. Document Review

Add task

Company Legal / Compliance

Russia: Circulate litigation hold letter
Due on 17 Jun 2018
In 1. Document Review

Germany: Obtain consent of Ms. Doe
No due date
In 2. Data Protection

Add task

Business Team Investigation 1

Investigation 1: Collect contract documents
Due on 21 Jun 2018
In None

Add task

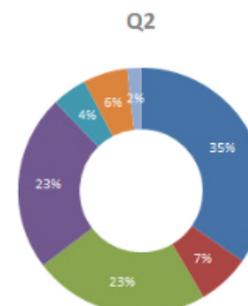
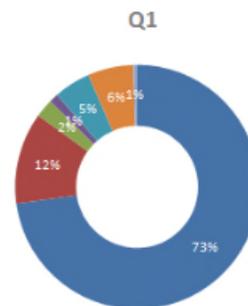
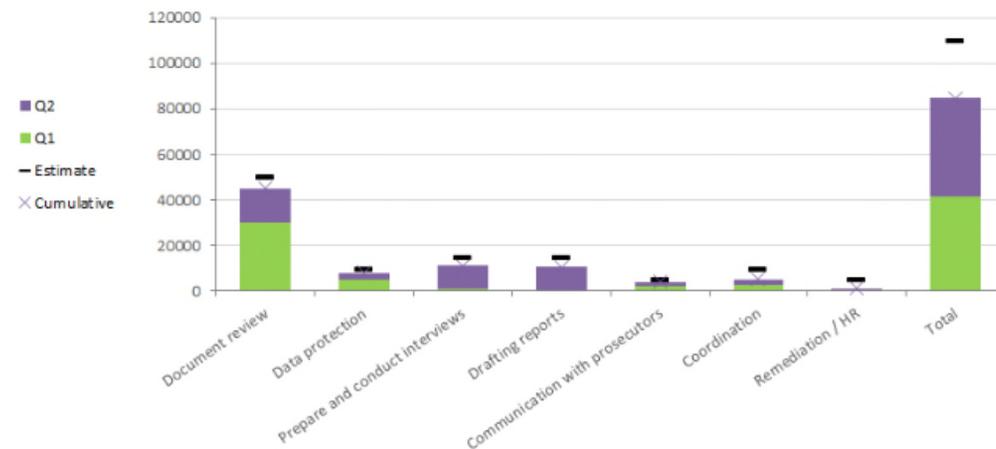
Solutions: Track costs

- Track costs by investigation, entity, phase, etc.
- Develop reference points for fixed pricing models
- Increase accountability and efficiency

KPIs

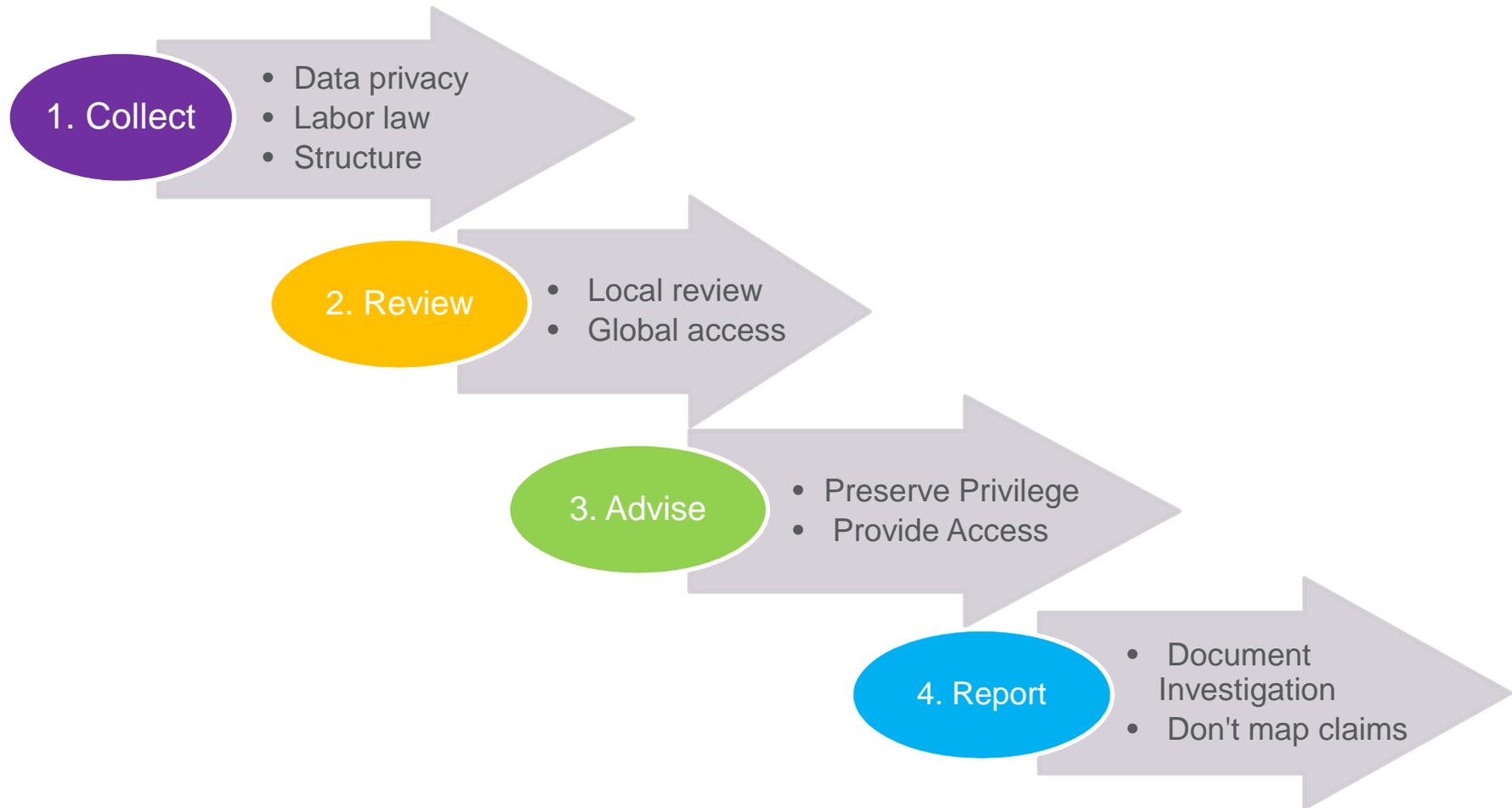
By Daniel Tusting, 07 Dec 2017 09:35 | Updated by Daniel Tusting, 11 Dec 2017 15:45 | Compare

Spend by work type



- Document review
- Data protection
- Prepare and conduct interviews
- Drafting reports
- Communication with prosecutors
- Coordination
- Remediation / HR

Summary: Think globally, act locally



Thank you!



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