



ICLG

The International Comparative Legal Guide to:

Corporate Investigations 2019

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A practical cross-border insight into corporate investigations

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Germany

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1 The Decision to Conduct an Internal Investigation

- 1.1 What statutory or regulatory obligations should an entity consider when deciding whether to conduct an internal investigation in your jurisdiction? Are there any consequences for failing to comply with these statutory or regulatory regulations? Are there any regulatory or legal benefits for conducting an investigation?**

Corporate investigations are governed by several rules, which include corporate law, criminal and administrative offences law, workplace safety, trade regulations, employment and data protection laws.

Corporate law requires the management of a German company to establish and maintain an adequate compliance management system (“CMS”). The extent and specific shape of the CMS falls under the discretion of the management under the business judgment rule. As part of the set of obligations, the management is required to get to the bottom of compliance deficits and violations. The extent, effort and means for an investigation have to be commensurate to the expected problem. Failure to conduct an adequate investigation can result in civil liability *vis-à-vis* the corporation or criminal liability.

- 1.2 How should an entity assess the credibility of a whistleblower's complaint and determine whether an internal investigation is necessary? Are there any legal implications for dealing with whistleblowers?**

Whistleblower allegations are to be checked and verified to the greatest extent possible. This is usually done in separate, protected proceedings which may require the whistleblower to be forthcoming with evidence without revealing its identity.

There is currently no specific law protecting whistleblowers except in banking laws: employees of institutions falling under the supervision of the Federal Financial Supervisory Authority (“BaFin”) are protected against criminal or employment law consequences, unless the allegation *vis-à-vis* BaFin was wrong intentionally or by gross negligence. The statute does not specifically provide for dealings with whistleblowers. The EU has issued a framework proposal for discussion in April 2018.

- 1.3 How does outside counsel determine who “the client” is for the purposes of conducting an internal investigation and reporting findings (e.g. the Legal Department, the Chief Compliance Officer, the Board of Directors, the Audit Committee, a special committee, etc.)? What steps must outside counsel take to ensure that the reporting relationship is free of any internal conflicts? When is it appropriate to exclude an in-house attorney, senior executive, or major shareholder who might have an interest in influencing the direction of the investigation?**

This is determined by the client, and legal counsel usually recommends that the investigation is led by a corporate organ or body that carries the necessary power under the circumstances to support and enable (and to terminate) the investigation. Another factor may be if the management is actually implicated, which may require the investigation to be hinged on a higher or more independent body, such as the supervisory board or subcommittees thereof. Caution needs to be applied before excluding any corporate function from the investigation management or the reporting of its results: the management of a German corporation can only be excused from participating if there is reliable evidence that the person is implicated and no longer expected to contribute impartially or even expected to interfere.

2 Self-Disclosure to Enforcement Authorities

- 2.1 When considering whether to impose civil or criminal penalties, do law enforcement authorities in your jurisdiction consider an entity's willingness to voluntarily disclose the results of a properly conducted internal investigation? What factors do they consider?**

Generally, there are no sentencing guidelines in criminal cases but the authorities have – within specific legal limits – discretion and may reduce criminal sentences if the subject of the investigation has shown good reasons from which it can be inferred that compliance has been ameliorated and the company is demonstrably determined to avoid compliance violations in the future. Self-reporting alone is one element but – with exceptions (see below) – generally not the decisive factor in current practice in Germany. It is more important to show that the compliance deficit has been pursued and remedied, the damage has been repaired and the compliance management has been strengthened.

BaFin guidelines on fines expressly provide for voluntary self-disclosure and cooperation in the proceedings as a mitigating factor. The Federal Cartel Office can grant cartel participants immunity from or reduction of fines if they uncover the cartel or cooperate with the Office.

2.2 When, during an internal investigation, should a disclosure be made to enforcement authorities? What are the steps that should be followed for making a disclosure?

A German company is, apart from tax evasion and the suspicion of money laundering, under no duty to disclose wrongdoing. Cooperation with enforcement authorities has proven helpful in reducing sentences, and as part of that, the strategic decision of if and when to disclose will take into account how the disclosed information will improve enforcement as well as the position of the corporation, e.g., with a view to participation in future public tenders which may be impaired if the company admitted to having committed or tolerated bribery.

2.3 How, and in what format, should the findings of an internal investigation be reported? Must the findings of an internal investigation be reported in writing? What risks, if any, arise from providing reports in writing?

There is no regulatory requirement concerning the form of reporting and an authority may also accept an oral report. Reports are in practice often made *verbatim* with slides and more detailed evidence production, but rarely by submitting detailed written reports. The more important factor is that the report is complete and produced in due time. A written report is often not really necessary since German authorities actually have to collect evidence and conduct their investigations independently. In addition, it bears the risk that it can be accessed by other authorities or may be inadvertently disclosed to media, competitors or others.

3 Cooperation with Law Enforcement Authorities

3.1 If an entity is aware that it is the subject or target of a government investigation, is it required to liaise with local authorities before starting an internal investigation? Should it liaise with local authorities even if it is not required to do so?

Authorities have to assess a case independently from a corporation and its own internal investigation. While there is no statutory requirement to liaise with an investigating authority, coordination is recommended to avoid the allegation of obstruction of justice or suppression of evidence. Prosecutors generally appreciate the opportunity to take first accounts of key witnesses.

3.2 If regulatory or law enforcement authorities are investigating an entity's conduct, does the entity have the ability to help define or limit the scope of a government investigation? If so, how is it best achieved?

Law enforcement authorities determine the scope and the depth of an investigation *ex officio*. The corporation, as part of its cooperation, can assist the authority in the definition of the scope of

the government investigation, but the government investigation has to come to an independent result.

3.3 Do law enforcement authorities in your jurisdiction tend to coordinate with authorities in other jurisdictions? What strategies can entities adopt if they face investigations in multiple jurisdictions?

German authorities cooperate very well with law enforcement authorities in other jurisdictions and grant legal assistance on the basis of a multitude of mutual legal assistance treaties.

4 The Investigation Process

4.1 What steps should typically be included in an investigation plan?

In the investigation plan, the corporation determines the scope, the timing, the responsibilities and the type of reporting. It addresses the involvement of the data protection officer and the Works Council. The plan provides for the securing and a review of data and interview plans. It includes a strategy for communication and disclosure of the results to internal and external stakeholders.

4.2 When should companies elicit the assistance of outside counsel or outside resources such as forensic consultants? If outside counsel is used, what criteria or credentials should one seek in retaining outside counsel?

The selection decision is guided by the availability of internal resources, experience, technical equipment and budget, the requirement to conduct the investigation free of conflict of interests and the need to protect the results from government access. Another factor may be the expectation of foreign authorities that the investigation is conducted by an independent law firm experienced in investigations. The criteria for retaining outside counsel are its experience with internal and international investigations, familiarity with the industry and the business culture, personal resources, personal interaction skills, and its ease to communicate with the government and other stakeholders in an investigation. Outside lawyers can often conduct sensitive investigations better than in-house personnel.

5 Confidentiality and Attorney-Client Privileges

5.1 Does your jurisdiction recognise the attorney-client, attorney work product, or any other legal privileges in the context of internal investigations? What best practices should be followed to preserve these privileges?

German law protects communication between an attorney and its client. It follows the civil law concept of imposing secrecy obligations on the part of attorneys and safeguarding professional secrecy with procedural rules, providing for a right to refuse testimony. Professional secrecy protects any kind of documents containing attorney-client communication.

Professional secrecy attaches, in particular, to documents created by and communication with outside counsel, if the documents reside in the custody of outside counsel. Communications with and

documents created by in-house counsel are not generally privileged, unless drafted for the purpose of defence by outside counsel.

5.2 Do any privileges or rules of confidentiality apply to interactions between the client and third parties engaged by outside counsel during the investigation (e.g. an accounting firm engaged to perform transaction testing or a document collection vendor)?

Third parties engaged by outside counsel are protected by the counsel privilege, and members of a regulated profession with professional secrecy can rely on their own privilege.

5.3 Do legal privileges apply equally whether in-house counsel or outside counsel direct the internal investigation?

Criminal law privilege does not protect communications with in-house counsel. If the corporation seeks to protect the results of an investigation, outside counsel should direct the investigation.

5.4 How can entities protect privileged documents during an internal investigation conducted in your jurisdiction?

Corporations can keep privileged documents with outside counsel.

5.5 Do enforcement agencies in your jurisdictions keep the results of an internal investigation confidential if such results were voluntarily provided by the entity?

Enforcement agencies are under a duty to maintain professional secrecy and keep the results of an internal investigation confidential like every other piece of evidence gathered in a government investigation, irrespective of whether the documents were offered voluntarily. An aggrieved person showing a legitimate interest may have a right to inspect the files, unless the corporation has a prevailing interest in their confidentiality.

6 Data Collection and Data Privacy Issues

6.1 What data protection laws or regulations apply to internal investigations in your jurisdiction?

The European General Data Protection Regulation and the German Federal Data Protection Act govern the collection, use and transfer of personal data relating to individuals in internal investigations sourcing data in Germany.

6.2 Is it a common practice or a legal requirement in your jurisdiction to prepare and issue a document preservation notice to individuals who may have documents related to the issues under investigation? Who should receive such a notice? What types of documents or data should be preserved? How should the investigation be described? How should compliance with the preservation notice be recorded?

It is common practice, but not a legal requirement, to issue document preservation notices to individuals holding physical or electronic documents relevant to the investigation in their custody. In an employment context, the employer directive to preserve documents does not require an extensive description of the investigation. The

notice and the acknowledgment of its receipt should be documented in a manner that permits its use as evidence in case of the custodian's non-compliance.

6.3 What factors must an entity consider when documents are located in multiple jurisdictions (e.g. bank secrecy laws, data privacy, procedural requirements, etc.)?

To preserve the evidentiary value of documents collected in an internal investigation and to avoid interference with the investigation process, the mode of collection and use of information has to be made in accordance with various laws, including criminal procedure laws, employment laws and data protection laws. Business secrets may be protected by bank secrecy laws or confidentiality agreements; other documents may contain classified information subject to military secrecy duties. An analysis for every jurisdiction where the documents reside and are supposed to be used is key.

6.4 What types of documents are generally deemed important to collect for an internal investigation by your jurisdiction's enforcement agencies?

In Germany, government investigations and internal investigations are separate proceedings in principle, and the corporation does not necessarily collect documents for the enforcement agency. It is the government investigation that determines the relevance of documents. If the government investigation seeks to demonstrate management involvement in corporate wrongdoings it may also seek to seize minutes of board meetings.

6.5 What resources are typically used to collect documents during an internal investigation, and which resources are considered the most efficient?

In case of voluminous data collections, experienced vendors are an important resource for the collection of emails and other electronic documents and, if required, the conversion of physical documents into electronic machine-readable formats.

6.6 When reviewing documents, do judicial or enforcement authorities in your jurisdiction permit the use of predictive coding techniques? What are best practices for reviewing a voluminous document collection in internal investigations?

It is the corporation, not the judicial or enforcement authority, that decides on the use of predictive coding techniques.

7 Witness Interviews

7.1 What local laws or regulations apply to interviews of employees, former employees, or third parties? What authorities, if any, do entities need to consult before initiating witness interviews?

Labour laws govern interviews of employees. Former employees have a duty to comply with an interview request only if strong investigation interests prevail. There are no specific rules governing the interviewing of third parties. No authority needs to be consulted before interviewing witnesses. Prior to conducting interviews with employees, coordination with the Works Council about the methods used in the interviews is recommended.

7.2 Are employees required to cooperate with their employer's internal investigation? When and under what circumstances may they decline to participate in a witness interview?

Employees are required to cooperate with interviews as part of their employer's investigation if the investigated facts are work-related.

7.3 Is an entity required to provide legal representation to witnesses prior to interviews? If so, under what circumstances must an entity provide legal representation for witnesses?

The corporation is not required to provide legal representation to witnesses prior to interviews, but it has become a recommended practice to make interviews more efficient.

7.4 What are best practices for conducting witness interviews in your jurisdiction?

Best practices include thorough preparation with an outline and relevant evidence being readily available during the interview. Interviews should be scheduled well in advance and provide for a convenient setting. The interview should start with an explanation of the purpose and a clarification that the interviewing counsel's privilege is with the corporation which may waive the privilege. The introduction should also include a reminder of the labour law duty to answer questions truthfully and comprehensively and to keep the interview and its content confidential.

7.5 What cultural factors should interviewers be aware of when conducting interviews in your jurisdiction?

There are no specific cultural factors of which an interviewer should be aware.

7.6 When interviewing a whistleblower, how can an entity protect the interests of the company while upholding the rights of the whistleblower?

The whistleblower does not enjoy specific rights that have to be respected in an interview.

7.7 Can employees in your jurisdiction request to review or revise statements they have made or are the statements closed?

The employee can request to review or revise statements if the corporation chooses to include the interview notes in the personal files of the employee. Best practice suggests avoiding sharing notes with anybody, and to rather invite the employee to prepare his/her own notes.

7.8 Does your jurisdiction require that enforcement authorities or a witness' legal representative be present during witness interviews for internal investigations?

Internal investigations are separate from government investigations and there is no statutory requirement that enforcement authorities be present during the witness interview. Legal assistance for a witness is not required, but may support the process.

8 Investigation Report

8.1 How should the investigation report be structured and what topics should it address?

It is common practice to prepare a short investigation summary report at the end of an internal investigation, setting out the findings, remediation and future compliance measures to avoid recurrence. Detailed reports are usually given only in special meetings with the relevant departments, including all relevant evidence used for further internal measures. The structure and content of the investigation report should also reflect the mandate and the purpose of the investigation. The characteristic elements of a report should be: a definition of the scope of the investigation; a description of the investigative process; an assessment of the evidence; and a summary of the findings. A legal assessment and recommendations for remedial measures are optional.

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