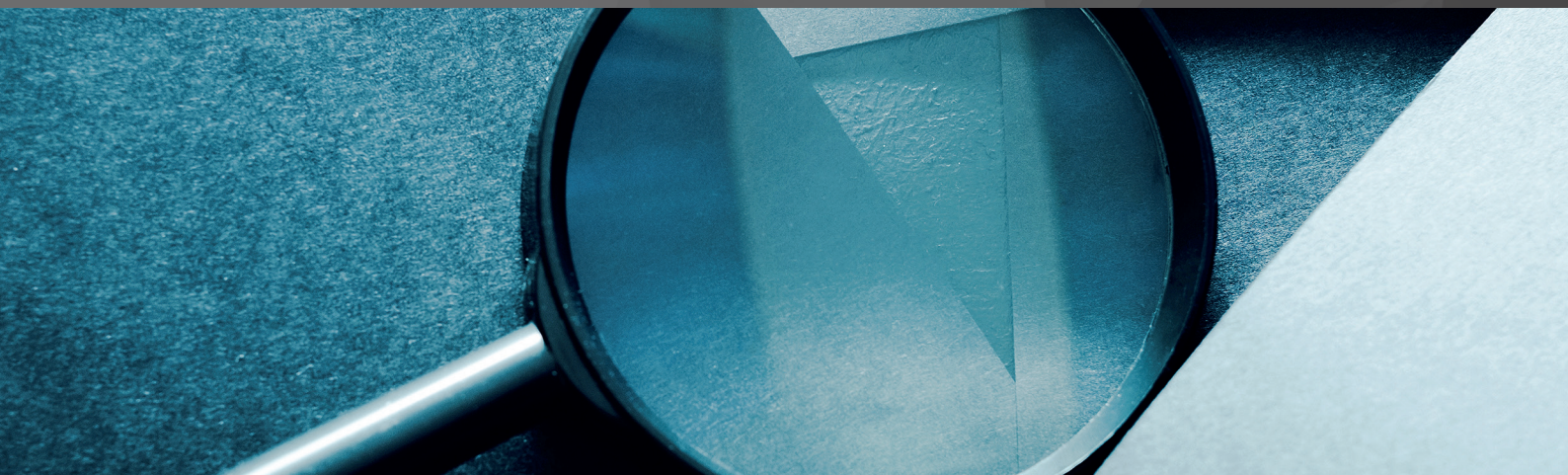


International **Comparative** Legal Guides



Corporate Investigations **2021**

A practical cross-border insight into corporate investigations

Fifth Edition

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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. A draft Corporate Sanctions Act also regulating corporate investigations and entering into force not earlier than two years after promulgation has made its way to the German Parliament.

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 company management under the business judgment rule. As part of the set of obligations, the company management is required to get to the bottom of compliance deficits and violations. The extent of, effort to conduct and means for an investigation have to be commensurate with the anticipated issue. 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.

Germany offers protection to whistleblowers only in special instances, such as in cases of reporting the misconduct of companies under the supervision of the German financial regulator, *Bundesamt für Finanzdienstleistungsaufsicht* (“BaFin”), in accordance with the Act Establishing the Federal Financial Supervisory Authority or of violations of the Money Laundering Act. German law further protects, in certain instances, whistleblowers disclosing trade secrets in accordance with the Act on Trade Secrets. The statutes do not specifically provide for dealings with whistleblowers. An EU Directive requires Germany

to provide by the end of 2021 for secure reporting channels and effective protection from retaliation for whistleblowers reporting on or disclosing breaches of certain Union laws.

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 company 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 exercised 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 discretion, within specific legal limits; they may reduce criminal sentences if the subject of the investigation has shown good reasons to demonstrate 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, this is 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 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, *Bundeskartellamt*, 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 under no duty to disclose wrongdoing, apart from tax evasion or the suspicion of money laundering. 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 that 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, a written report bears the risk of being accessed by other authorities or being 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 allegations 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 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 generally cooperate with law enforcement authorities in other jurisdictions, and they grant legal assistance on the basis 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, timing, responsibilities and 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 conflicts of interest, 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 of communicating with the government and other stakeholders in an investigation. Outside lawyers are often better placed to conduct sensitive investigations 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 the 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 communication format containing attorney-client communication. There is no attorney-work-product doctrine available. Thus, professional privilege extends only to documents created by and communication with outside counsel, if the documents reside in the custody of the outside counsel, and are safe from seizure in criminal cases only if they were created by outside counsel in the course or the expectation of actual or imminent defence cases against the client. Communications with and documents created by in-house counsel are not privileged, which should in particular be taken into account in communications between U.S. counsel and an EU in-house counsel. Documents that are privileged under

foreign laws may not be under German laws, and can possibly be seized by the prosecuting authorities at the client's offices; in which case, the seizing should be opposed with the aim of preserving foreign privilege to the largest extent possible.

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)?

To the extent the privilege exists, it may also extend to third parties engaged by outside counsel; members of a regulated profession with professional secrecy enjoy 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 conduct the investigation and the generation of notes on their own.

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, employment laws and data protection laws. Business secrets may be protected by trade and 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 wrongdoing, 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 in its internal investigation.

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, the body representing employee interests *vis-à-vis* the management, on 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 company chooses to include the interview notes in the personal files of the employee. Best practice suggests avoiding sharing notes with anybody, and to rather leave it to the employees to prepare their own notes if they wish.

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 currently 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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