The International Comparative Legal Guide to:

Corporate Investigations 2018

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A practical cross-border insight into corporate investigations

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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?

Some entities, e.g. banks, investment funds, entities managing alternative investment companies, insurance companies, reinsurance companies, as well as entities conducting brokerage activities and fiduciary banks are obligated on the basis of special provisions to carry out inspections of compliance and internal audits, given the lack of general statutory regulations concerning an internal investigation:

A. Banks are obligated to define and start-up an effective internal inspection system on the basis of banking law. The details of the functioning of such a system are given in resolution No. 258/2011 of the Financial Supervision Authority ("FSA"), the so-called Recommendation H. At present, work is under way on substituting the said FSA resolution with a pertinent regulation by the pertinent minister. The final draft of the relevant ordinance was addressed to the Minister of Finance for signing.

B. The internal inspection system must also operate in investment funds and in entities managing alternative investment companies on the basis of the Act on investment funds and on management of alternative investment funds ("AIF").

C. The obligation to introduce and start-up the internal inspection system and internal audit also lies with insurance companies and reinsurance companies on the basis of the Act on insurance and reinsurance.

D. Moreover, all entities conducting brokerage activity and fiduciary banks are obligated to comply with the conditions being the basis for granting a permit to these entities. The permit is granted only after the entity has filed the pertinent description of the internal inspection on the basis of the Act on trade in financial instruments.

Moreover, managers of capital companies are obligated, in this regard, to observe due diligence on the basis of Art. 293 §2 of the Commercial Companies Code ("the CCC") and Art. 483 §2 of the CCC. A comprehensive inspection of the correctness of the functioning of a given organisation may constitute an indication of due and proper conduct of the company's affairs.

An internal investigation allows the persons managing a given entity to learn about material facts in the context of irregularities disclosed in the company, but, under the applicable law, the fact of carrying out an internal investigation does not constitute an independent circumstance which speaks in favour of a specific entity, e.g. in the case that criminal proceedings are initiated against that entity.

1.2 What factors, in addition to statutory or regulatory requirements, should an entity consider before deciding to initiate an internal investigation in your jurisdiction?

A circumstance which must be considered before taking a decision on initiating an internal investigation is above all that of the interests of the entity itself and the advisability of quickly obtaining as much knowledge as possible about the facts of the case. Managers of a capital company should also bear in mind that in a situation where due diligence is not shown in taking care of the interests of the company, they may be subject to the civil liability set out in the CCC, as well as criminal liability on the basis of the Criminal Code ("CC"). In situations in which the obligation to carry out inspection tasks follows from legal provisions, a failure to fulfil this obligation may result in a broad range of negative consequences for the entity – from fines to a withdrawal of permits or concessions obtained by the company.

Entities supervised by the FSA should also take account of the resolution of the FSA Rules of corporate governance for supervised institutions, especially with regard to the need to ensure an effective functioning and independence of the internal inspection system and compliance inspection. Having regard to the fact that entities supervised by the FSA, as a public trust institution, should conduct business with the highest diligence, special attention shall be paid to professionalism and the ethical conduct of the persons belonging to the bodies of the supervised entities, and they shall require their shareholders to act in a responsible and loyal manner. In sum, a supervised institution should develop and implement an efficient and independent internal audit function, aimed especially at regular examination of the adequacy and efficiency, in particular of the internal control system, the compliance function and the risk management system. With regard to companies listed on the Warsaw Stock Exchange ("WSE"), also important are the recommendations contained in Good Practices of Companies, listed on the WSE. This concerns, in particular, recommendations II.Z.10 and III.Z.4, which indicate that it is advisable to draw up annual reports on the correctness of company operation, especially an assessment of the company's standing including an assessment of the internal control, risk management and compliance systems and the internal audit function. Internal investigations may undoubtedly facilitate complying with these recommendations.

It must also be remembered that the actions taken by the preparatory proceedings authorities are usually less effective than actions taken independently by the interested entity, which may eventually result in harm to the interests of the injured party. Moreover, court proceedings and those proceedings conducted before the law enforcement authorities in Poland are often time-consuming. If, therefore, a company independently determines the facts of the case and prepares evidence, most likely this will, to some extent, remove these systemic inconveniences which are beyond its control.

1.3 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?

In Polish law, there is no general regulation concerning whistleblowing and how to proceed with information obtained in this manner. The reaction of an entity depends entirely on its internal policy. However, the whistleblower, as an employee, is subject to protection against retaliatory discrimination (consisting, e.g., in dismissing the employee from the company).

Moreover, whistleblowers – also pursuant to general rules following from internal legal frameworks – are subject to the protection following from Art. 10 of the European Human Rights Convention, pursuant to the Strasbourg standards set out in the judgment *Heinisch v. Germany*. These standards provide for the need to weigh up the interests of a given entity (such as, e.g., protection of a company's good name) with the public interest and to provide protection for a whistleblower against sanctions dependent upon his/her motives, as well as the alternative means available to him/her for achieving the assumed goal of disclosing information.

1.4 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?

"The client" is nearly always the interested company, while communication is essentially conducted with its pertinent representative, the management board or the Chief Compliance Officer. What is problematic are situations in which a member of the management board (or the entire management board) is suspected of bringing about the disclosure of irregularities in the company. Then, communication with the client is most often conducted by other company bodies (e.g. the supervisory board).

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?

Polish law essentially does not contain developed leniency-type institutions (except for antimonopoly/antitrust law), though in the case of criminal liability, each time the perpetrator's attitude is taken into account. For example, Art. 15 of the CC provides that a perpetrator is not subject to a penalty if he/she voluntarily prevented the effect of an illegal act or that the penalty is reduced for a perpetrator who voluntarily made efforts to that end. Art. 16 of the Tax Criminal Code regulates so-called voluntary self-disclosure, i.e. non-imposition of a penalty for a tax crime or misdemeanour by a perpetrator who, having committed an illegal act, informed the law enforcement authority about it, disclosing material facts about the act, in particular about the persons who took part in its commission. Art. 60 §3 of the CC provides for a reduction of the penalty for a perpetrator who disclosed to the authorities information concerning a crime, in particular the identity of other perpetrators of the illegal act. In the case of bribery of a public official, disclosure by the perpetrator of all the material facts of the crime, prior to their discovery by the authorities, means that under Art. 229 §6 of the CC he/she is not subject to a penalty. An internal investigation may increase the chances of availing of the above described institutions which reduce the criminal liability of the perpetrator.

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?

Disclosure to enforcement authorities of information gathered by the company during an internal investigation is recommended to a company only after all the proceedings have been carried out and after it has been determined that the established facts of the case contain all the material information. Otherwise, it is not recommended to disclose to the enforcement authorities information gathered by the company.

An exception here are banks which, under banking law, are obligated to immediately inform the preparatory proceedings authorities about each case in which a justified suspicion arises that the activity of the bank is used to conceal a tax crime, to finance terrorism, or to launder money, or for purposes linked to these acts.

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?

In all circumstances it is recommended that a report be drawn up in writing, in a properly secured file. The results of the investigation should only be conveyed orally in situations where it is not possible to prepare a report in writing. The risk of a disclosure of data contained in the written report is minimal if the appropriate methods for securing these data are applied, i.e. above all securing the file with a password, encoding the disk, and observing the rules for handling classified documents.

It must be pointed out, however, that the recent changes in criminal procedure in Poland establish that a piece of evidence shall not be deemed inadmissible exclusively on the grounds that it has been obtained as a result of an infringement of the procedure or the forbidden act referred to in Article 1 §1 of the Criminal Code, unless the piece of evidence has been obtained in connection with the fulfilment of the official duties by a public officer, as a result of: homicide; causing deliberate damage to health; or deprivation of liberty [Art. 168a of the Code of Criminal Procedure ("CCP")]. Thus, it is impossible to entirely rule out the risk of use of information – obtained as a result of the actions of investigation authorities – in a manner which is contrary to the interests of a given entity (e.g. hacking an IT system).

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?

In Poland, there is no legal obligation for an internal investigation to be preceded by engaging in cooperation with the prosecuting authorities. If, in the course of an investigation carried out by the authorities, the object of examination is the functioning alone of a given entity and no specific charges have been made yet against it, then it is recommended that the entity disclose information obtained as a result of an investigation only when it has full knowledge about the facts of the case and after it has carefully examined all the circumstances of the case. In a situation where proceedings before the prosecuting authorities are already at the stage of verification of specific charges against the examined entity, the rules and procedure of cooperation are specified in individual summonses or notifications served on that entity, and are also determined by the actions of the persons carrying out tasks on behalf of the pertinent authorities.

3.2 Do law enforcement entities in your jurisdiction prefer to maintain oversight of internal investigations? What level of involvement in an entity's internal investigation do they prefer?

No. The law enforcement authorities are only interested in the results of possible internal investigations. In addition, investigative steps in order to bring the case to the court phase must be performed by the authorities themselves.

3.3 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?

The law enforcement authorities act independently within their powers. Through cooperation with them, the entity against which the actions of the law enforcement authorities are aimed may have an indirect influence on the scope of those powers (e.g. by filing pertinent evidence applications or by way of participation in the interviewing of witnesses).

3.4 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?

Yes. Law enforcement authorities gladly avail of numerous regulations in this regard; both those following from Polish law (*inter alia*, relating to the European Arrest Warrant or the actions indicated in Art. 585 of the Code of Criminal Procedure, as well as those regulated in the Act on exchange of information between the law enforcement authorities of EU Member States) and following from EU law (e.g. from Art. 82 Treaty on the Functioning of the European Union; and from Art. 5 of Council Framework Decision No. 2009/948/JHA on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings, implemented into Polish law in Art. 592a CCP), as well as from agreements on mutual legal assistance (e.g. agreement between the Republic of Poland and the United States of America on mutual legal assistance in criminal cases).

If an issue being the subject of an internal investigation may have an international aspect, it is decidedly recommended to avail of the assistance of a team of specialists who are familiar with various legal systems since regulations concerning the course of an investigation, as well as of the potential obligations to disclose its results, are in many countries significantly more developed than in Poland.

4 The Investigation Process

4.1 What unique challenges do entities face when conducting an internal investigation in your jurisdiction?

A basic problem is the lack of legal regulations concerning the conduct of internal investigations. However, *inter alia*, problems linked to the need to obtain consent for the processing of personal data, especially in case of former employees of the company, are particularly difficult for the entity conducting such an investigation. The processing of data shall be permitted only where whom the data concerns has given his or her consent, save in respect to the removal of data concerning this person (Art. 23 Sec. 1 of the Personal Data Protection Act).

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

The answer depends on the character of the case, but most often an investigation is conducted according to the following layout. An initial outline is established of the irregularities which may occur in the company. Then, an inspection is carried out, *inter alia*, of the e-mails of company employees and an inspection of procedures and IT systems in which key – from the point of view of the subject of the proceedings – data may be found. In certain cases, it is also necessary to carry out research of documentation kept in paper form. If possible, it is recommended to question individual employees and persons acting within the organisation once the preliminary conclusions have been drawn by the persons conducting the internal investigation in the company.

4.3 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?

Availing of outside specialists is recommended in every situation which requires professional knowledge in a given field, in particular in the area of forensics. An important attribute is strong investigative skills. One should also take into account specialist knowledge and skills in a given sector, experience in similar cases, as well as analytical abilities.

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?

Yes. The interviewing of a person regarding circumstances which constitute a professional secret carries with it the restrictions set out in Art. 180 CCP. The interviewing of persons who practice the legal profession, e.g. an attorney or legal counsel, with regard to facts which are subject to secrecy, is only possible when it is indispensable for the sake of justice, and the fact cannot be established on the basis of other evidence. However, recent changes to the criminal procedure permit the use of evidence obtained in breach of the law. Thus, all information obtained or created in the course of an internal investigation carries the risk of being used in a manner which is contrary to the interests of the entity. Thus, it is recommended that all files be encrypted, no open correspondence should be conducted, and personnel should be instructed, as appropriate, on the subject of confidentiality.

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)?

Cooperation with third parties is carried out each time in the form of sub-contracting, on the basis of an earlier concluded, individual agreement containing a duly developed confidentiality clause, adapted to the specific nature of the commissioned activities.

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

In practice, cooperation with an outside entity is much more beneficial than with an in-house one. In that case it is possible to specify the scope of obligations of the outside entity (including those obligations which concern confidentiality) in a manner adapted to the specific nature of the tasks. An outside entity is also not involved in the internal relations of the organisational structure of the client, which may have a negative impact on the integrity of the internal investigation.

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

The scope of possible security measures is very broad and covers both purely IT-related measures and internal procedures in the company. In practice, much benefit is gained from applying the so-called Demilitarised Zone ("DMZ"), i.e. a closely monitored, separated area of the network. In this area, one can store information of a confidential nature for instance on a mobile server, but it is not used for ordinary communication with other units. All information of a confidential nature, including that concerning internal investigations, should be stored in a DMZ.

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?

Information obtained in the course of preparatory proceedings, regardless of its origin, is subject to so-called "secrecy of preparatory proceedings". Until such time as it is disclosed in court proceedings, it cannot be made public, under sanction of the penalty set out in Art. 241 §1 of the CC. Anyone who publicly spreads information from a closed court trial will be liable to the same punishment. In the current legal state in Poland, there is a possibility of closing court proceedings to the public, subject to the public prosecutor`s consent, in cases when important private interest could be infringed due to a public hearing (Art. 360 §1 and §2 CCP).

6 Data Collection and Data Privacy Issues

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

The legal norms contained in the regulations on personal data protection and protection of privacy are found, *inter alia*, in the Personal Data Protection Act, and in the Criminal Code. Poland is currently preparing for the entry into force of the Regulation of the European Parliament and of the Council (EU) 2016/679 of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, i.e. the so-called GDPR regulation (which will apply from 25 May 2018).

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?

No. Such an institution is not used at all in view of the lack of legal regulations which could make it effective. Moreover, one must remember that issuing a summons to secure documents increases the risk of a disclosure of confidential information, and may negatively impact on the prospect of securing evidence in possible future preparatory proceedings.

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.)?

There are a large number of issues which must be taken into account in the case of placing information in various jurisdictions. These include the subject matter scope of banking secrecy, or the scope of the denunciation obligation, especially with regard to foreign branches of credit institutions. Many recommendations also follow from EU law; *inter alia*, Directive No. 2006/24/EC of the European Parliament and of the Council on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks, of which the key provisions were implemented in Poland in the Telecommunications Act. European Union law is implemented into the Polish legal system or it is directly applied.

In the international context, one should also take into account the possible differences in the manner of implementation of EU acts, as well as in the manner and practice of their application in various Member States.

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

In principle, what is deemed important are all documents (both in electronic versions and in writing) which are relevant to a given case, which the entity has in its possession. There are no significant differences between the practice of internal investigations and the practice of preparatory proceedings conducted by law enforcement authorities.

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

Most often, cooperation is engaged in with authorised employees of the client who are instructed about what tasks they should perform and what information and documents they should obtain. Documentation is then collected in electronic form, after which it is reviewed and analysed. However, seizure of electronic evidence should be performed by forensic specialists using dedicated hardware and software.

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?

Various technologies and software are used. In particular, in the case of a large number of documents, it is worth using review platforms such as Relativity or Nuix.

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?

There are no legal regulations in this regard; however, one should always bear in mind the personal rights of the interviewed person. The provisions of CCP on interviewing witnesses or parties to proceedings do not apply. With regard to current employees, depending on the situation, the provisions of the Labour Code may apply, in particular Art. 94 point 2 LC which regulates the obligation to organise work in a manner best suited to make effective use of working time and achievement of high efficiency and appropriate quality of work by employees through the exercise of their abilities and qualifications. In addition, one has to bear in mind that an employee, if a member of a Trade Union, may be represented by a Trade Union. There is no obligation for earlier consultation with any authorities regardless of the intention to interview.

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?

The obligation to cooperate with the employer follows essentially from Art. 100 §2 point 4 LC, i.e. to care for the interests of the employing establishment, protect its property and to maintain the confidentiality of information, the disclosure of which could cause damage to the employer. In the absence of application of the provisions of CCP to internal investigations, an employee does not have the right to refuse to make a statement. At the same time, however, the interviewed person does not face any consequences, apart from professional ones, in the case of making a false statement or refusing to make a statement.

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?

This obligation does not exist because of the informal character of the internal investigation.

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

There are not strict rules/best practices for conducting witness interviews, but it is important to take care of rights and freedoms of a witness. Interviews are essentially conducted by members of the investigation team – lawyers and forensic specialists. Sometimes, HR and/or compliance officers of the client also participate.

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

Poland is a country which is quite ethnically and culturally uniform. In this respect, there are no particular factors which should be taken into account when planning and conducting internal investigations.

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

In light of the absence of detailed whistleblowing regulations in Poland, it is difficult to answer this question. However, it is inadmissible to apply any means or methods towards the whistleblower which could infringe his/her dignity or which could restrict his/her freedom; *inter alia*, freedom of speech.

7.7 Is it ever appropriate to grant "immunity" or "amnesty" to employees during an internal investigation? If so, when?

A release from professional liability of a specific employee is essentially an internal matter of a given entity. However, it should be borne in mind that application of "amnesty" or "immunity" towards specific persons cannot have a discriminatory character with respect to the remaining employees. Art. 18^{3a} LC prohibits unequal treatment of employees in all aspects related to employment, including in the application or non-application towards them of all types of sanctions.

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

Internal investigations have an informal character, thus these issues take different forms depending on the internal policy of a given entity – in certain companies there may, for example, exist an internal inspection regulation which guarantees the interviewed person specific rights.

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

There is no such requirement in Polish law.

8 Investigation Report

8.1 Is it common practice in your jurisdiction to prepare a written investigation report at the end of an internal investigation? What are the pros and cons of producing the report in writing versus orally?

Reports on internal investigations are almost always drawn up in writing as this facilitates both their later use by a given entity and the management of the information collected in the course of the investigation. Of course recording the results of the investigation on a permanent carrier gives rise to certain risks, as mentioned above in the answer to question 2.3. Situations also occur (though rarely) in which the preparation of a written report is required directly by legal provisions. An example of such a regulation is point 4.29 of attachment No. 2 to the regulation of the Minister for Health on the conditions of Good Manufacturing Practice.

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

There are no strict, formal requirements of a legal nature which specify how the investigation report should be structured. It is recommended, however, that such report indicates the reasons for initiating the internal investigation, as well as that it contains a list of the tasks carried out, list of witnesses, list of custodians and the key findings, together with a list of the evidences on which they were based. The minutes from the interviews and other documents indicated in the report should constitute attachments to it.

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