European Investigations Guide

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Preface

Dear Reader,

On behalf of all colleagues and experts involved, we are proud to publish the first edition of the European Investigations Guide. This guide is designed to provide you with a quick reference to some of the most pressing questions relating to internal investigations in European countries.

Although it is important to note that this guide cannot, and is not intended to, replace any kind of legal advice in individual cases, it will help the compliance expert to identify the risks arising and the right questions to ask to address those risks. To that end, a group of leading practitioners from various European countries have provided their expert input on such issues in their jurisdiction. As this guide presents the view of experts on legal issues, we can of course not exclude that courts, authorities and other third parties might hold or take different views.

We hope that you will find the European Investigations Guide helpful and would like to thank you for your interest in this publication.

Dr. Sebastian Lach

Cross-Border Investigations

INTRODUCTION

The more countries and jurisdictions are involved in a matter, the harder it becomes to run and complete an investigation quickly, efficiently and comprehensively. Various issues arise like language barriers, different cultural perceptions, local laws, data privacy provisions and blocking statutes. All of those have to be coordinated at the same time. Such investigations are, therefore, not only difficult to complete, but also bear the risk that the investigation itself may lead to cases on non-compliance. As a consequence, those in charge of such investigations have to be mindful to avoid generating such risks - also for themselves personally.

While it is no substitute for individually tailored legal advice, this Guide aims to reduce those very risks. It provides a general overview of investigations on the European continent to help orient those leading or involved with such investigations. The following article provides an overview of the most important questions and considerations that arise during the various stages of an investigation – from the beginning to the end.

START OF A CROSS BORDER INVESTIGATION

Various issues have to be considered after an initial assessment of which countries are implicated in the investigation.

The first question is often whether local support is needed. The answer will often be yes. Mostly, local in-house legal capabilities will be sufficient. However, outside counsel or other external resources will sometimes have to be consulted. In this regard, it has to be noted that it may prove difficult to find the right experts in certain countries. There is often no abundance of white collar crime or compliance experts in many locations. It is therefore advisable to build and maintain a network of experts in the most important countries, even before an investigation starts. In crisis situations (like dawn raids) there may not be time to search for local support. Even if there is time, if competitors or other companies are faced with the same problem, the best counsel may already have been taken or may already be conflicted once they are approached. Working with non-expert counsel, especially in smaller legal markets, can bear risks and create inefficiencies.

Once the team has been assembled, the next question is whether one is even allowed to investigate in the respective country. This question must be answered with the help of dedicated local counsel. In this regard, one has to differentiate between blocking statutes and data privacy considerations. A blocking statute will often mean that all or certain investigative measures may not be allowed or may only be allowed with special permission. Data privacy concerns relate to the treatment of data containing personal information, but rarely present an absolute obstacle to any investigative step. To provide a simple example, a blocking statute may prevent an interview, while data privacy laws may simply limit the use of information gathered from an interview or call for special measures for the collection and treatment of that data.

Once the question of blocking statutes has been addressed, one may have to clarify whether specific bodies like trade unions, works councils, corporate supervisory boards, financial stakeholders and shareholders have to be informed of the start of the investigation or the information that led to the investigation. Some local laws have very rigid and detailed disclosure requirements. The violation of any such requirements might hinder the investigation or even lead to civil or criminal liability of the company or the individual actors.

In addition, it must be carefully assessed whether early disclosures to local law enforcement agencies are necessary or would be helpful from a strategic standpoint. In some countries, certain situations call for such disclosure under the applicable local laws. In other countries it is culturally necessary to involve the authorities to maintain a cooperative atmosphere. In other countries, however, such disclosures are uncommon and may create more problems than they solve. In cross-border cases, where many authorities may be involved, there may be a strategic advantage to disclosing information in a certain order or having one authority take the lead. Especially at this stage, local expertise – legally and culturally – is very helpful to avoid making the wrong decisions.

THE INVESTIGATIVE PHASE

Once all obstacles that may hinder the start of an investigation have been cleared, the company can start the investigation.

An investigation often begins with so-called immediate measures. Normally, the first task is to ensure that any potentially on-going criminal or unlawful conduct is stopped. This frequently means monitoring certain payment streams or putting certain individuals at least under close monitoring to make sure that all their actions are appropriate going forward. It may also mean checking whether certain products can still be sold on the market.

Another early step is to ensure that all data potentially relevant to the investigation is preserved. This may entail a wide range of measures, from issuing a data hold to suspending auto-delete functions to immediately imaging data carriers. These measures play an important role in dissuading local prosecutors from performing dawn raids. If one can demonstrate that all relevant data has been stored securely, it may even be disproportionate for prosecutors to raid companies.

The investigation team then has to decide who will formally lead the investigation. The question often comes down to whether this is done by in-house counsel or external lawyers. In this regard, the sensitivity of the matter and privilege protection will often be decisive factors. The rule of thumb is that countries in Continental Europe often award very little privilege protection to in-house counsel. This can even mean that work product of outside counsel in the custody of in-house counsel of the company could be confiscated and reviewed by the authorities in some jurisdictions. Therefore, the decision is not only who runs the investigation, but also where to generate and store sensitive work product.

When collecting and reviewing information, data privacy laws have to be considered. The good news is that 2018 will see the entry into force of a uniform European Data Privacy Regulation. This will reduce the impact of local law specifics. On the other hand, potential penalties will substantially increase and rules will be more stringent. Given the potential legal exposure and the complexity of the issue, it is strongly recommended that expert data privacy counsel be part of any cross-border investigation team in all phases. Another specific issue in cross-border cases is the "export" of data to other countries. This can be particularly problematic if such countries do not have an equivalent level of data privacy protection compared to the European Union. This may necessitate a case-by-case analysis and may also call for additional protective measures like reducing data amounts or redacting personal information before any data transfer.

The right of participation of works councils and/or trade unions during an investigation may also need to be considered. Local laws will have different views in this regard. A mistake in this area can have serious consequences. It cannot only damage the relationship between the company and its employees, but can also lead to the end or at least to an interruption of the investigation itself. Disregarding the rights of a works council may allow this body to obtain a cease-and-desist order against the investigation.

Interviews often also raise various legal issues, such as the need for data privacy waivers and the need for special instructions on the right to not self-incriminate or the right to legal counsel. Each jurisdiction has its own rules and best practices in this regard. If an interviewee is not properly instructed or the interview is otherwise not done correctly, these issues can lead to evidence being deemed inadmissible down the road.

THE END OF THE INVESTIGATION

Questions arising at the end of an investigation may also vary from one jurisdiction to the other. However, some issues are frequently in focus in many countries.

The first question, which comes up rather frequently, is whether a detailed investigation report should be produced or not. This is, again, linked to the question of privilege. If in-house counsel produces an investigation report, this report may not be privileged in many countries on the European continent. Even if outside counsel produces the report, it may have only limited protection if it enters into the custody of the company. In some countries, authorities may view the

waiver of privilege and production of the report as necessary to demonstrate good will and cooperation. There may then be pressure to produce such a report.

Another step at the end of the life cycle of an investigation is remediation. Firstly, this may make an update of internal processes necessary. What is legally possible and state of the art with respect to internal guidelines may differ greatly, especially throughout Europe. For companies operating in multiple jurisdictions, it may be necessary to conform worldwide internal guidelines to the higher legal standard in the home jurisdiction, even though a lower standard may be permissible in local jurisdictions. In the end, it is often the home jurisdiction where the biggest risks lie. Personnel measures like warning letters, trainings and terminations will play an important role in any remediation. In this regard, it is important to note that countries may have different deadlines for implementing personnel measures. If the deadlines are missed, personnel measures may not be taken for that reason alone. Furthermore, it may again be necessary to involve works councils or trade unions in such processes. The prerequisites for termination will also differ greatly among countries. For example, it may be much easier to terminate an employee in the United Kingdom than in France or Germany.

Finally, a step that is sometimes missed at the end of an investigation is recovery. In many countries, board members are responsible for compliance in companies. If a major compliance failure arises, board members may be liable to the company if they had knowledge of the conduct or if they had responsibility for the respective compliance topic and failed to implement an appropriate compliance system. The company may then even be under a duty to assess such claims against its own board members and – if there is substance to such claims – pursue them. This may even mean that, if the company or the management of the company fail to assess and pursue such claims, those responsible for the assessment may themselves be liable for the omission. In Germany, for example, this can even lead to the criminal liability of the supervisory board for breach of fiduciary duties.

CONCLUSION

Many steps have to be kept in mind when doing a cross-border investigation in or involving Europe. Issues can arise at every stage in the life cycle of an investigation. It is not necessary to know all the answers from the beginning, but to ask the right questions. Once a potential issue has been identified, the investigative process can be set up and managed in a way that minimises risks.

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Désirée also advises clients on the establishment and enforcement of global compliance systems. Moreover, she has expertise in supporting clients in the defence against criminal law charges and providing advice on recovery issues in relation to claims arising from compliance matters.

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Data Privacy in Investigations

*The European General Data Protection Regulation, Regulation (EU) 2016/679 ("**GDPR**") is intended to provide a uniform set of rules for data processing throughout the European Union and to replace the existing patchwork of national laws governing how personal data is handled. This also applies to data processing in the course of internal investigations. The GDPR will make internal investigations much more challenging – and errors much more expensive for companies under investigation.*

The following sections shall provide companies with a general overview on the requirements and conditions for internal investigations under the GDPR. The text also highlights the relevant case-law and the potential consequences of unlawful processing.

UNDER WHICH CONDITIONS MAY COMPANIES PERFORM INTERNAL INVESTIGATIONS UNDER THE GDPR?

Companies may only perform internal investigations if they can base the respective data processing operations on a valid legal basis. Depending on the purpose of the investigation and the categories of data affected, the companies may *inter alia* rely on Article 6(1)(c), (f) or Article 9(2) GDPR. Besides, collective agreements within the meaning of Article 88 GDPR may also form a legal basis for the data processing.

- **Legal obligation to perform investigation:** Under certain conditions, companies are legally obliged to perform an internal investigation. In this case, the company may base the data processing on Article 6(1)(c) GDPR. However, such cases will likely to remain an exception in practice.
- **Data processing due to legitimate interests:** Companies may justify the data processing due to their or a third party's legitimate interests (Article 6(1)(f) GDPR), provided that the legitimate interests of the affected data subjects do not supersede. This requires a balancing of interests. When assessing the appropriateness of the investigation, companies have to take into account the extent of the investigation and the potential consequences for the data subjects. In addition, companies must consider whether the respective data processing was foreseeable for the affected data subjects (so called "reasonable expectations of privacy"). In particular, investigation measures are not admissible if there are less intrusive measures to achieve the purposes of the investigation.
- **Consent of data subject:** In the past, companies occasionally based investigation measures on the data subject's consent. However, under the GDPR, this approach is not recommendable. Pursuant to Article 7 GDPR, declarations of consent are only valid if the data subject has granted his / her consent on a voluntary basis. Internal investigations, however, are generally not advantageous for the affected data subjects. Therefore, it is likely that data protection authorities and courts will deem declarations of consent in the course of internal investigation as involuntarily.
- **Processing of sensitive data:** If the internal investigation also involves special categories of personal data within the meaning of Article 9(1) GDPR (e. g. race, political opinions, sexual orientation, health data), additional restrictions apply. Companies may only process sensitive data if they can rely on one of the legal bases stated in Article 9(2) GDPR. In particular, companies may process sensitive data for the establishment, exercise or defence of legal claims (Article 9(2)(g) GDPR). On the other hand, companies cannot justify the processing of sensitive data due to their legitimate interests.
- **Collective agreements:** Collective agreements (in particular works council agreements) may also form a legal basis for internal investigations. However, collective agreements which should legitimise data processing must comply with the specific requirements of Article 88 GDPR and potential national implementations laws (see below).

WHAT OTHER REQUIREMENTS DO COMPANIES HAVE TO CONSIDER?

Apart from the aforementioned restrictions, the GDPR (and national implementation laws, where applicable) provide for additional requirements and conditions for internal investigations.

- **General principles for data processing:** When performing internal investigations, companies have to comply with the general principles of data processing set out in Article 5 GDPR. In particular, companies have to consider the principles of data minimisation, accuracy, transparency, data security and the principle of purpose limitation. Where possible, companies should only process data which have been anonymised or pseudonymised before ("principle of data minimisation"). In addition, companies must determine and specify the purposes for which the personal data will be processed in the course of the investigation in advance ("principle of purpose limitation").
- **Considering national implementation laws:** National implementation laws to the GDPR may provide for additional requirements for internal investigations. As an example, the new version of the German Federal Data Protection Act ("**BDSG**") imposes strict requirements on companies willing to perform internal investigations in the employment context. However, most member states have not passed national implementations laws yet. We recommend companies to keep an eye on the future development in the relevant member states.
- **Documentation obligations:** The GDPR imposes strict documentation obligations on companies (Article 5(2), Article 24(1) GDPR). In particular, companies have to prove and document that they have performed the internal investigation in accordance with the GDPR. To comply with these obligations, companies should comprehensively document every step of the internal investigation. This applies particularly to the purposes of the investigation.
- **Information of data subjects:** In general, data controllers must inform affected data subjects about the data processing in advance (Articles 12 *et seq*. GDPR). In general, this principle also applies to internal investigations. However, the success of the investigation might be at risk if the suspect is informed about the envisaged data processing in advance. The GDPR, however, does not provide for explicit exceptions to the notification requirements for such cases. The national implementation laws, however, may include deviant regulations. Since the data protection authorities have not issued statements on this issue so far, there is still legal uncertainty for the companies. Whenever possible, companies should therefore inform affected employees prior to the investigation.
- **Data protection impact assessment ("DPIA"):** Generally, data controllers must perform a DPIA if the envisaged data processing is likely to result in high risks to the freedom and rights of data subjects (Article 24 GDPR). In the majority of cases, internal investigations will have such a potential impact on the rights and freedoms of the affected data subjects. To avoid legal risks, we therefore recommend companies to perform a DPIA prior to any investigation.
- **Data transfer to third parties:** It might be necessary for companies to transfer the results of an investigation to third parties outside the company. This particularly applies to law enforcement authorities like state prosecution services or courts. Such data transfers, however, must also comply with the requirements of the GDPR. If companies want to base the respective data transfer on their legitimate interests, they must also consider the data subjects' rights and freedoms (see above). The data subjects' interests may particularly be at stake if the personal data should be transferred to official authorities in the United States. Since the U.S. intelligence services have broad access to personal data, data transfers to the United States generally inherent high legal risks for the freedom and rights of data subjects. Therefore, companies should – whenever possible – only transfer data to the United States in an anonymised or pseudonymised form. In addition, companies must

also comply with the requirements of Articles 44 *et seq*. when transferring data to a third country outside the EU/EEA.

– **Co-determinations rights of works council:** In some countries, it may be necessary to involve the local works council in advance. Investigation measures which the works council did not consent to might be invalid. In addition, the works council might seek a preliminary injunction to ban the employer from performing the investigation.

WHAT MAY BE THE CONSEQUENCES OF UNLAWFUL PROCESSING?

Companies which do not consider the aforementioned requirements and conditions may face high legal risks when processing personal data in the course of internal investigations.

– **Administrative fines/criminal liability:** Companies which do not comply with the strict requirements of the GDPR may face administrative fines up to €20 million or four percent of their global revenue for the previous year, whichever is higher. Even infringements that are deemed less serious could lead to fines up to two percent of the revenue. In case of company groups, data protection authorities are expected to calculate fines on the basis of the consolidated revenue of the group. Such penalties could easily run into the hundreds of millions. Additionally, national implementation laws as well as national criminal codes may provide for criminal liability in case of unlawful processing.

– **Exclusion of evidence:** In case of unlawful processing, the company may not be able to use the findings of the internal investigation in court. This aspect is particularly important if the company has imposed sanctions (e.g. a dismissal) against an employee due to the findings of the internal investigation. If the employee challenges the lawfulness of the dismissal in court, the company has to prove that it has performed the respective data processing in accordance with the applicable data protection laws (see above). If the court deems the data processing as unlawful, the dismissal might be invalided solely due to this reason.

– **Claim for damages by affected data subjects:** Data subjects whose personal data has not been processed in accordance with the GDPR may claim damages from the company. Those claims may refer to material and non-material losses due to the infringement.

WHICH CURRENT CASE LAW IS RELEVANT FOR INTERNAL INVESTIGATIONS?

In January 2016, the European Court of Human Rights ("**ECHR**") rendered an important decision regarding the secret monitoring of employee communication (application No. 61496/08). In the so-called "Barbulescu" case, the ECHR ruled that employers violate the employees' fundamental right to respect for private life and communication (Article 8 European Convention of Human Rights) if they secretly monitor their employees' messenger communication without implementing appropriate safeguards to preserve the employees' legitimate interests.

According to the ECHR, employers are generally allowed to monitor their employees' communication to a certain degree. Such monitoring measures, however, must be accompanied by adequate and sufficient safeguards to preserve the employees right to privacy. In particular, employers must generally inform their employees about the envisaged monitoring in advance. This notification must include detailed information on the nature, the extent of the monitoring and the degree of intrusion.

In addition, employers need to provide for legitimate reasons to justify the monitoring of employee communication. In this context, the ECHR particularly refers to the principle of data minimisation. The employers must prove that there is no less intrusive measure to reach the envisaged purposes.

Although the Barbulescu decision did not directly refer to the GDPR, the decision will have broad consequences for employers throughout Europe. Since the GDPR does not supersede the European Convention, employers must also

consider this decision when preparing an internal investigation. When determining whether an internal investigation can be based on legitimate interests, employers should keep in mind the criteria mentioned by the ECHR.

CONCLUSION

The GDPR (and the national implementation laws, if applicable) set strict limits for internal investigations. Companies have to deal with a variety of requirements and conditions. To comply with these requirements, employers are well advised to take corresponding measures and install internal documentation and management systems. Otherwise, companies may face sanctions, data subject damage claims, reputational damage and exclusion of evidence due to unlawful processing.

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Legal Framework for Money Laundering in Europe

INTRODUCTION

An estimated two to five percent of the Global Gross Domestic Product ("**GDP**") is the result of money laundering. Money launderers prefer countries with solid financial markets and financial services, high GDP, high exports and imports and, of course, with a rather lax anti-money laundering regime and low fines.

According to a study from the European Parliament dated 2017, this issue poses a particular threat to large European countries. The United Kingdom tops the list with an estimated €282 billion laundered annually, followed by France, Belgium, Germany, Luxembourg, the Netherlands and Austria. Compared to their GDP, the Baltic States, Luxembourg and Cyprus have a disproportionate volume of money laundering.

In Europe, a number of steps to combat money laundering have been undertaken, such as four EU Anti-Money Laundering Directives, the latest of which was enacted in May 2015 ("**AMLD4**"). The member states were required to bring into force the laws, regulations and administrative provisions necessary to comply with AMLD4 by 26 June 2017 ("**AML laws**"). However, the above-mentioned European Parliament study came to the conclusion that in order to reach a harmonised anti-money laundering policy in Europe, a 'one size fits all'-approach is not promising as European countries differ significantly in their administrative and economic (infra)structures to reach the same level of compliance. The study further concluded that the European Union could be subdivided into at least four groups of countries to be targeted differently. The study stressed the important role of advanced member states, in training less advanced countries to create a common understanding of the need for anti-money laundering.

In recent years, the competent local authorities have published general guidelines to inform the obliged entities about the applicable due diligence and organisational requirements. As a further step, several thousand audits have been performed in the member states to evaluate the status quo and pave the way for further action against those who do not comply with the requirements of the AML laws. The most recent reports demonstrate that administrative fines have been levied against traders of goods. The most common reasons have been:

- The official identification document was not fully copied during the customer identification process.
- The obliged entity cannot prove that it has obtained appropriate confirmation whether or not the contracting party is acting on behalf of a beneficial owner.
- The obliged entity cannot prove that it has verified the obtained customer data on the basis of an appropriate official identification document.

OBLIGED ENTITIES UNDER AML LAWS

It is a widespread misconception that only financial institutions and the related industry must undertake appropriate measures in the European Union to comply with AML laws. So-called traders of goods are subject to the same legal requirements. Other affected parties are lawyers, auditors, tax advisors, real estate agents, casinos, and operators and brokers of online gambling platforms.

CRIMINAL AND ADMINISTRATIVE LIABILITY

The member states must ensure that obliged entities can be held liable for breaches of national provisions transposing AMLD4. Furthermore, the member states have the right to provide for and impose penalties under criminal law and must lay down rules on administrative measures to ensure that their competent authorities may enforce AML rules and regulations.

With regard to criminal liability, some member states previously excluded 'self-laundering' from money laundering as a criminal offence. The reason for the previous exclusion was that if, for example, a person stole money and was persecuted for both theft and money laundering, this was seen as an inadmissible double punishment. However, under strong pressure from the Financial Action Task Force on Money Laundering (FATF), all countries have meanwhile amended

their laws, declaring self-laundering a money laundering crime. Germany was the last country to amend its laws accordingly in November 2015.

Administrative sanctions and measures apply to breaches on the part of obliged entities that are serious, repeated, systematic, or a combination thereof, of the requirements for

- Customer due diligence;
- Suspicious transaction reporting;
- Record-keeping; and
- Internal control measures.

Member states must ensure that in these cases, the administrative sanctions and measures include at least:

- A public statement which identifies the natural or legal person and the nature of the breach;
- An order requiring the natural or legal person to cease the conduct and to desist from repetition of that conduct;
- Withdrawal or suspension of the authorisation where an obliged entity is subject to an authorisation;
- A temporary ban against any person discharging managerial responsibilities in an obliged entity, or any other natural person, held responsible for the breach, from exercising managerial functions in obliged entities;
- Maximum administrative fines of at least twice the amount of the benefit derived from the breach where that benefit can be determined, or at least €1 million.

SUPERVISION OF AML LAWS

Member states are required to appoint competent authorities to effectively supervise obliged entities and in particular to monitor the adherence and take the measures necessary to ensure compliance with the AML laws. In this context it is important that member states provide to the competent authorities adequate powers of enforcement, including the power to demand any information that is relevant to monitoring compliance and to perform external audits.

More specifically, the standard under European AML rules requires that the competent authorities have on-site and off-site access to all relevant information on particular domestic and international risks associated with clients, products and services of the obliged entities. Regarding the frequency and intensity of on-site and off-site supervision, competent authorities will consider the individual risk profile of obliged entities and the risks of money laundering and terrorist financing in the respective member state.

OBLIGATIONS UNDER AMLD4 AND THE AML LAWS

Compliance with the requirements of AMLD4 mainly consists of satisfying two high-level obligations:

- Organisational requirements; and
- Customer due diligence requirements.

RISK ANALYSIS

Obliged entities are required to rate individual business relationships and transactions in light of their respective money-laundering risk (risk-based approach). The results of the risk assessment must be documented. It should describe the potential risks associated with the business of the obliged entity which can be divided into the following categories:

- Company risks;
- Customer risks;
- Product risks;

- Transactional risk;
- Geographic risks.

The relevant risk factors were specified in Appendices I and II to AMLD4. As soon as the potential risks have been determined and described, it is the task of the obliged entity to determine to what extent they may actually materialise. Depending on the risk levels (i.e. risk-based approach), preventive measures and safeguards may be implemented. The risk assessment must also be updated at least once a year in order to ensure the effectiveness of the preventive measures and safeguards.

MONEY LAUNDERING REPORTING OFFICER

The essential element of compliance with AML laws lies in an appropriate internal organisation. Even if this is only required for certain entities (where appropriate with regard to the size and nature of the business), the appointment of a money laundering reporting officer ("**MLRO**") is recommendable, to bear responsibility for the development of internal policies, procedures and controls, including risk analysis and risk management measures, customer due diligence, reporting, record keeping, internal control and employee screening. The MLRO is also entitled to report suspicious events to the central office for financial transaction investigations (Financial Intelligence Unit – "**FIU**"). The position of the MLRO was generally strengthened by the latest amendments of AMLD4, as the fulfilment of his or her duties may not lead to any disadvantages in the employment relationship. The clear organisational responsibility for this task is the foundation for compliance with the AML laws.

AML MANUAL

With the confidential risk assessment in place, the next element of the compliance structure – the AML manual – can be drafted and implemented. The AML manual describes the internal processes and activities to be implemented by the company to ensure compliance with legal requirements. Amongst other matters, the manual includes regulations for client identification, the document, or software system to be used, the escalation process for on-boarding politically exposed persons, as well as record keeping and retention requirements and the internal procedure to report suspicious activities to the MLRO and other corporate governance provisions.

AML POLICY

Each obliged entity must implement appropriate processes and train employees on the types and current methods of money laundering and terrorist financing. This requirement can be met through an AML policy where each employee receives general information on money laundering and appropriate obligations. The training should be repeated at regular intervals depending on the respective AML risk of the obliged entity; market standard is every two years. It is also important to document all employees' attendance of the training sessions to ensure compliance with the AML provisions.

INTERNAL CONTROLS

With the AML manual and the AML policy in place, the company and all employees must implement the internal requirements in practice. One of the central tasks is the performance of customer due diligence. More generally, it is important to monitor the business activities and effectiveness of the implemented preventive measures and safeguards.

CENTRAL REGISTER OF BENEFICIAL OWNERS

In order to obtain and store information on beneficial owners, all member states are required to set up a central register of beneficial owners. All legal persons under private law as well as all registered partnerships must collect, hold, and provide beneficial ownership information and communicate this information to the central register.

PROPOSAL FOR A REVISION OF AMLD4

As part of the European Commission's Action Plan to strengthen the fight against terrorist financing presented in February 2016, a fifth revision of the current AML directive was proposed on 5 July 2016 ("**AMLD5**"). On 13 December 2017, after intense international negotiations, a provisional agreement was reached which resulted in the final compromise.

The key items of the AMLD5 target the following items:

- Designating virtual currency exchange platforms (e.g. for bitcoins) as obliged entities;
- Setting lower maximum transaction limits for certain pre-paid instruments;
- Enabling FIUs to request information on money laundering and terrorist financing from any obliged entity;
- Harmonising the EU approach towards high-risk third countries;
- Improving access to beneficial ownership information.

CONCLUSION

To meet AML compliance in practice, it is market standard that obliged entities produce three documents: a risk analysis, an AML manual and an AML policy, all tailored to their respective business model and the entailing AML risks. The risk-based approach allows an individual set of measures depending on the respective level of risk, i.e. fewer measures in case of lower risks. Most importantly, the documentation provides protection against reputational harm and external challenges by supervisory authorities.

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Cartel Investigations

CARTEL INVESTIGATIONS STILL ON THE RISE

Competition law has proven to be a high-risk area for companies in many different industries all over the world. Multi-jurisdictional cartel investigations are of increasing importance to businesses around the globe, with legal and compliance departments investing heavily in competition expertise. This is also true for the European Union where both the European Commission ("**Commission**") and National Competition Authorities ("**NCA**") are taking a clear stance on competition law violations.

In recent years, the Commission has expanded its enforcement focus to industries which had not been in the spotlight in the past, like financial services or e-commerce. Big data, algorithms and competition for innovation have become buzzwords for modern competition law enforcement and we expect to see a further rise in antitrust investigations in these industries both on an EU level as well as on a national level within the EU Member States.

When it comes to cartel investigations, being prepared is key to be able to react appropriately during a dawn raid and master the subsequent proceedings in the best possible way for the company. In the following paragraphs we will provide an overview of the legal framework, the relevant institutions and the different stages of a typical Commission cartel investigation.

LEGAL FRAMEWORK AND RELEVANT INSTITUTIONS

The Treaty on the Functioning of the European Union ("**TFEU**") provides the rules to implement a system of undistorted competition, substantially unchanged for decades. Investigations into alleged cartels or other forms of anti-competitive agreements between companies (Article 101 TFEU) as well as unilateral measures by market dominant companies (Article 102 TFEU) constitute an important pillar of European competition law enforcement. Both provisions are directly applicable in all EU Member States and can be enforced by the Commission as well as by NCAs.

Council Regulation (EC) No. 1/2003 ("Regulation 1/2003") sets out the Commission's powers during the different stages of an investigation. The Commission has published best practice guidelines as well as an internal manual of procedures which provide useful information on how the Directorate General for Competition ("**DG Competition**") runs investigations.

The Commission acts as the European competition law enforcer. Regulation 1/2003 grants considerable powers to the European Union's executive body to ensure that the Commission can effectively guard the adherence to competition law rules in the Treaty. Within the Commission there are two hearing officers, responsible for ensuring the rights of accused undertakings, especially impartiality and objectivity of competition proceedings.

The Commission also takes a central role in the European Competition Network ("**ECN**"). The ECN consists of the Commission and the NCAs in the EU Member States. The ECN provides means to ensure an effective and coherent cross-border application and enforcement of competition law within the European Union.

Upon appeal, Commission decisions in cartel cases are subject to examination by the General Court (formerly referred to as Court of First Instance). Ultimately, the European Court of Justice ("**ECJ**") is responsible for appeals on the point of law against General Court decisions.

Considering the complexity of EU level cartel investigations and the authorities involved, it comes as no surprise that cartel cases may last many years starting from the authorities' first investigative steps to a final potential decision by the ECJ.

OVERVIEW OF A TYPICAL EU COMMISSION CARTEL INVESTIGATION

Initiation of Proceedings

The Commission can start proceedings either on its own initiative, on the basis of a third-party complaint, or via a leniency applicant blowing the whistle on a cartel conspiracy. While third-party complaints usually mark the beginning of an abuse of dominance-probe, cartel cases are often triggered by leniency applications which are followed by dawn raids.

a) Leniency Applications

Leniency applications mark the typical start of a Commission investigation into an alleged cartel. In order to win the race for leniency, an undertaking can set a "marker" with DG Competition, i.e. file an abridged application for a reduction of fines and submit detailed information within a certain period of time thereafter in order to secure its rank under the Leniency Programme. Cooperating with the Commission in the investigation can result in full immunity from fines for being first-in or substantial fine reductions for subsequent applications. The different cooperation scenarios are laid out in the Commission Notice on Immunity from fines and reduction of fines in cartel cases ("**Leniency Notice**").

b) Dawn Raids

DG Competition has extensive powers to conduct unannounced inspections ("**dawn raids**") when there is an early suspicion of competition law infringements. As long as the scope of the inspection is limited to business premises, no judicial search warrant is needed. Commission inspectors – usually supported by national inspectors – make use of their extensive rights. Undertakings are liable for obstructions of these inspections with potential fines of up to one percent of the undertaking's annual turnover. On site, the Commission is empowered to examine books and business records both in digital and hard copy format, take copies, seal particular objects, and interview employees at all levels (Article 20 Regulation 1/2003).

In recent years the Commission's focus has shifted towards e-dawn raids where the Commission requests large amounts of electronic data which it then reviews on its own mobile servers at the undertaking's premises.

Dawn raids hit companies rather unexpectedly and are often disturbing for the operational business. As mistakes during the dawn raid can be very costly and may jeopardise the companies and employees' defence position, dawn raid preparation is key. It is highly advisable to have a specific process for Commission dawn raids with designated antitrust advisors established, to regularly train the in-house dawn raid team, and to have IT system administrators trained and prepared to provide the inspectors with easy access to the IT infrastructure.

A very sensitive and important topic throughout the entire investigation and specifically during a dawn raid is the protection of legally privileged documents. Generally speaking, only communications with or prepared for external lawyers can be legally privileged under EU law and can therefore be withheld from inspection. Other documents and data need to be provided upon request as long as they fall within the scope of the investigation.

The duration of such inspections depends – amongst other factors – on the scope of the investigation, the undertaking's size, and the amount of data requested by the Commission. Inspections at the companies' premises can last several days and may be continued at DG Competition's offices in Brussels if the data volume to be reviewed by the officials is very large.

Additional Investigative Powers

Before the Commission initiates formal proceedings it gathers information relevant to the specific sectors in order to uncover competition law infringements and to collect evidence of such alleged violations. Commission investigations are driven by the *ex officio* principle. The authority is under a duty to investigate all facts relevant to the case diligently and impartially. In addition to the powerful investigative tool of dawn raids, Regulation 1/2003 equips the Commission with a range of additional powers typically applied by DG Competition in cartel investigations:

– **Requests for information:** In order to carry out its duties under Regulation 1/2003, the Commission may issue a Request for Information (Article 18 Regulation 1/2003). The submission of incorrect or misleading information can be fined with up to one percent of the undertaking's total annual turnover (Article 23(1)(a) Regulation 1/2003).

– **Power to take statements:** Further, the Commission has the power to take statements and may interview any natural or legal person for the purpose of collecting information relating to the subject-matter of the investigation (Article 19 Regulation 1/2003).

Initiation of Formal Proceedings and Statement of Objections

The opening of proceedings is a formal act by the Commission which is notified to the parties and usually also to the public. Typically, DG Competition opens formal proceedings by submitting a so-called Statement of Objections ("**SO**") to the companies under investigation. The SO lays out the Commission's position and must contain all facts and evidence necessary for the final decision.

Its main purpose is to inform the undertakings about the concrete competition law charges against them and to enable them to exercise their rights of defence. State of play meetings should be held before the SO is issued, helping the undertakings to understand the Commission's views on the status of the case. Relevant issues and facts can be clarified in bi- or multilateral hearings. The cover letter usually explains the rights of the addressees and sets a deadline for the reply.

Decision and Settlement

During the Commission's proceedings companies have the right to inspect the files and to be heard. The formal proceedings are usually characterised by an active exchange between the Commission and the accused parties. The procedure generally comes to a close with the Commission adopting its final decision in which it can impose substantial fines.

Only when the Commission is convinced of a competition law infringement based on meaningful and consistent evidence can it adopt a decision and impose fines. Fines for infringements of Articles 101 and 102 TFEU can go up to 10 percent of the undertaking's total annual turnover. In setting the fine, the Commission weighs different factors such as gravity and duration of the infringement as well as the role of the undertaking in the infringement. The details on the fining method are laid out in the Commission's Guidelines on the method of setting fines. The Commission imposed accumulated fines of €3.7 billion in 2016 and €1.9 billion in 2017.

In recent years, many cartel cases have been settled between the Commission and the companies under investigation. Such settlements usually take place before the submission of SOs. It is the essence of settlements that settling undertakings acknowledge their misconduct and their liability and in return may receive an (additional) reduction of the fine of up to 10 percent based on the Commission Notice on the conduct of settlement procedures in cartel cases ("**Settlement Notice**"). On the part of the participating undertakings, this has the advantage that further money and resources can be saved as the procedure is expedited.

TYPICAL FOLLOW-ON: CARTEL DAMAGES CLAIMS

Since the Commission has no power to award damages to victims of a cartel, civil cartel damages litigation has increased significantly in recent years. Both the European Courts and the Commission have pushed this development and called for effective means to recover cartel damages before national civil courts.

Such "follow-on" litigation can prolong the lifetime of cartel cases significantly. The risks of such claims by companies who may have suffered damages, for instance through the payment of cartel overcharges, must already be carefully considered by the companies under investigation during the Commission proceedings, e.g. when determining leniency or settlement strategies.

CONCLUSION

Cartel investigations are still on the rise and constitute a high-risk area for companies around the globe, bringing along everything companies need to avoid: Cartel cases have a very long lifecycle from dawn raids to follow-on litigation, are costly, bind a lot of resources and can damage the reputation of the companies involved.

The experience shows that preparation is key for companies to master the dawn raid situation as well as the subsequent cartel proceedings in the best possible way.

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National and international clients entrust Christian Ritz with their complex German and European competition law issues. Christian can assist you with his extensive experience in cartel authority investigations, cartel damages litigation as well as compliance issues and merger control procedures. You may also seek Christian's advice on state aid law as well as regulatory issues. With a background in policy-making and government relations, Christian can assist you to get your voice heard at national as well as at EU level.

Prior to joining our firm, Christian practiced antitrust and competition law at the Berlin office of Freshfields Bruckhaus Deringer. He also gained valuable experience in the EU public policy arena while working for Alber & Geiger in Berlin and Brussels.

Export / Sanctions

Sanctions and export control issues continue to pose a challenge for companies. While sanctions against Iran were partially lifted in January 2016, thus creating new opportunities for companies, on-going United States ("**U.S.**") restrictions and the possibility of "snapback" of European Union ("**EU**") sanctions mean that involvement with Iran continues to carry risks. Recent political events also have the potential to impact export control and sanctions regimes. The Trump Administration has caused uncertainty for non-U.S. companies over the existing sanctions regimes against Iran by withdrawing from the Joint Comprehensive Plan of Action ("**JCPOA**") in May 2018. Thus, the U.S. sanctions have become increasingly politically high profile. In Europe, the United Kingdom ("**UK**") will not leave the EU until at least 2019 and a transitional period will most likely apply from 29 March 2019 until at least 31 December 2020; however, with Britain as one of the main drivers of EU sanctions such as those against Russia, Brexit has the potential to influence the direction of future EU sanctions policy. 2017 also saw the reintroduction of U.S. sanctions on Cuba, while discussions about imposing sanctions on Myanmar have been increasing in both sides of the Atlantic. Moreover, sanctions relating to North Korea, Syria, Russia, Ukraine and Crimea, to name only a few, continue to directly impact companies' business behaviour. As the EU and the U.S. play the most important role when it comes to shaping new sanctions policies, this area affects many businesses worldwide.

The broad scope of many sanctions regimes and the deep impact on business relations with customers in targeted countries makes compliance with all applicable laws a permanent challenge for businesses engaging in international trade and investment. Infringements may result in heavy fines, reputational damage or even criminal prosecution. Thus, investigations of infringements – whether those occurred wilfully or negligently – are a crucial instrument to protect the integrity of a company and to ensure that it keeps control of the situation. On the positive side, national authorities in EU Member States are alive to the challenges faced in this area by companies. The possibility for voluntary disclosure covering certain infringements, and the publication of detailed guidelines on designing internal compliance policies specific to trade compliance are useful contributions in an on-going dialogue between companies and authorities.

Typically, internal investigations of a potential export control or sanctions infringement are triggered by one of the following situations:

- **Internal suspicions of export control infringements.** Very often, companies themselves realise that they have erred in applying export control provisions, e.g. by relying on an incorrect general licence or by not consulting the latest list of designated entities or individuals. Sometimes an initial high-level audit produces evidence that employees have engaged in restricted trade with sanctioned countries. Another example may be the incorrect "deduction" of shipped items from the total number of products for which an export licence has been obtained, which might result in goods being shipped without authorisation, despite such authorisation being required under EU rules. This is a particularly difficult issue to track and may be easily caused by human mistake (e.g. due to inadequate training) or by the lack of software tools that facilitate tracking exported goods (e.g. appropriate IT systems).

  In such cases, an internal investigation is required to fully assess the gravity of the infringement, potential liability of the company and the steps required to remedy the concerns, e.g. a voluntary disclosure of the infringement to the authorities or training of the persons in charge of exports. Voluntary disclosure to avoid fines is encouraged in many jurisdictions. However, due to the different scope among EU Member States of the breadth of voluntary disclosure provisions, companies should seek legal advice before proactively making use of this procedure as they may find themselves in a risky situation, including a criminal investigation, if the conduct is not covered by the scope of the applicable voluntary disclosure scheme, or if such a scheme is not provided for under applicable national legislation.

- **Official investigations by authorities**. Internal investigations may also be triggered by an external review such as an audit of the company's books without any concrete suspicion of export control issues. In such a case, a company should mirror the authority's "fishing expedition" to ensure that it has clean records. Where an

authority is already investigating an alleged breach of export control or sanctions laws, the affected company may want to investigate whether any further infringements have occurred and require immediate action.

– **M&A and financing.** Finally, investigations of potential past export control and sanctions issues and more generally of the compliance system in this field may be caused by M&A or financing projects. In the course of preparing documents for a due diligence or for corporate finance projects (issuing bonds, entering into new credit facility agreements etc.) third parties may request a statement on potential legal areas of concern and a risk assessment. In this case, companies need to investigate their compliance internally with the export control and sanctions rules applicable to them.

While an investigation regarding export control and sanctions law issues has many parallels with investigations in other legal areas, some specifics need to be considered.

First, the applicable legal regime and the competent authorities need to be identified. It follows from the nature of trade business that a number of jurisdictions may need to be considered in determining which law applies to a specific export. Some jurisdictions such as the U.S. have a far-reaching extra-territorial scope. In particular, with regard to investigations in defence sector companies, U.S. International Traffic in Arms Regulations ("**ITAR**") controls the movement of controlled data between the EU and the U.S. This means that investigations should be structured to ensure that potentially ITAR-sensitive material is reviewed in an ITAR-compliant manner. This may limit the ability of non-U.S. citizens to be involved in the review of such data. In an internal investigation, the steering team needs to ensure that such data is identified and kept separate from other information to be reviewed. Appropriate documentation is required to demonstrate compliance with these export control rules. Other jurisdictions such as EU or Member States' law may even prohibit complying with certain sanctions other States imposed (anti-boycott laws). In the EU, export control and sanctions provisions are generally set at the EU level while the enforcement falls into the competence of Member States' authorities. Very often companies need to deal with parallel investigations by several authorities at the same time, whether that is authorities in different EU Member States, or even multiple authorities within the same Member State. It is worth noting that in the U.S. a reporting obligation for boycott requests exists regardless of whether the company complied with the request. Again, this may impact the way an investigation is structured between the EU and U.S. as, for instance, EU subsidiaries receiving a boycott request should make their U.S. parent entity aware of it so that the U.S. corporation can comply with potential reporting obligations.

Second, scoping an investigation correctly facilitates a thorough review of all aspects that might be relevant both for the company in identifying the deficiencies in its systems and procedures, but also for the competent national authorities in order to have a complete overview of the remedial measures that the company concerned has taken to remedy the situation and their adequacy. Identifying the root causes of a problem might not be easy, in particular in companies with presences in several countries and complex internal structures. In cases like these, there might be elements in transactions that would not necessarily strike an auditor but which might have a big part in creating a compliance issue. Such elements are, for example, U.S.-nexus such as transactions denominated in US$ that immediately trigger U.S. sanctions rules. Or technology transfer, which might be a particularly sensitive issue from an export control perspective. Therefore, initiating an investigation with a broader scope than would usually be expected might prove useful in dealing with the situation in a holistic manner.

A further issue of particular importance for scoping an investigation is that sanctions rules, by their nature, can rapidly change due to political developments as demonstrated by the agreement on partial lifting of the Iran nuclear-related sanctions. This makes it difficult for companies to keep their compliance system up to date. For instance, from time to time entities or individuals will be added to or removed from the asset freezing and blocking of economic resources lists. In other areas, rapidly-introduced sanctions sometimes make provision for the "grandfathering" of existing contracts otherwise covered under the new regime. These grandfathering provisions can differ between EU and U.S. sanctions regimes, between contracts entered into in a variety of different time frames, and sometimes only apply on a temporary

basis, in effect stipulating a grace period for winding up existing contracts. Following the relaxation of EU and certain U.S. sanctions on Iran in 2016, this appears to have increased scope for disparities between the two regimes in this area, and the phenomenon of EU banks requesting further information in relation to certain actions of EU clients which they consider may lead to exposure under U.S. law still occurs, which raises difficulties for European companies doing business in Iran. Thus, before starting an investigation a legal assessment by a sanctions law expert should be sought in order to identify the factual scope of the investigation. This aims at ensuring that the investigation uncovers all relevant material, including both incriminating and exculpatory material.

Third, investigations of export control infringements are particularly complex. Unlike in other investigations, emails often do not contain all the relevant facts required for a risk assessment. Even interviews with the key employees involved, e.g. the export control officer, do not ensure that all facts can be sufficiently established. In companies with complex internal structure and business organisation, identifying the person(s) in charge of exports might prove to be a complicated exercise, given that often different employees in different positions across the supply chain are involved in dealing with exports. Many infringements therefore require a broad scope of interviews with the company's personnel involved in all stages of the export process across the supply chain, from taking and recording an order to the finance department.

Moreover, an in-depth review of the company's electronic accounts is useful in identifying the number of shipments involved, the items shipped and the consignees of the goods. So-called structured data that needs to be reviewed resides in an electronic repository. For instance, this may originate in SAP systems tracking all orders and shipments a company handles in its day-to-day business operations. In order to understand and investigate such data files, it is important to obtain the database schema, which helps to determine the relationships between tables within the database. Accordingly, a thorough legal investigation goes hand-in-hand with the involvement of forensic experts experienced in the e-discovery of structured data.

This is also true for exports of technology items, or exports which take the form of technical assistance. In particular the use of cloud servers can easily expand the impact of export control and sanctions laws to business conduct even within the same group of companies. For instance sending via email, travelling abroad with a business laptop containing or uploading to a cloud server technical drawings or CAD files of technology that may both be used for civil and military applications ("dual-use technology") can trigger export control questions and require prior authorisation. This may be the case even where the technology never leaves the business, but physically or virtually crosses a border. For those investigating potential technology transfer infringements compliance with export control provisions is likewise important, e.g. when sending emails with attachments from Europe to the U.S. in the course of an internal review.

The complexity of export control law and the difficulties in reviewing the vast amount of data is also a problem for the authorities. Many national export control authorities or customs authorities therefore appreciate the cooperation of companies which investigate potential infringements internally and present the results of their review to the officials. Depending on the concrete infringements, companies may qualify for a voluntary disclosure programme that in some jurisdictions provides companies with full immunity from fines. But even if full immunity is not available, disclosing information voluntarily is often considered as a mitigating factor in determining a fine, and may even lead to a termination of administrative procedures without a conviction. In this process, it is important that national authorities see that the company concerned has taken measures to rectify the situation and correct the root cause of the problem. Steps such as conducting training to its personnel at all stages of the supply chain or introducing appropriate software tools, such as Enterprise Resource Planning systems, to help track correctly exports are crucial in actively showing that a company takes compliance seriously and invests resources in remediation.

Increased regulator attention on the area of trade compliance is necessarily leading to the maturing of internal compliance policies, often with guidance provided by different authorities on key aspects to consider. These policies should cover the full range of possible export control or sanctions issues, taking into account a company's individual risk profile in this area. For example, as well as covering supply chain issues, a trade compliance policy may also lay down

rules on taking business laptops abroad where there is a risk of inadvertently exporting controlled technology stored on the computer. A robust internal compliance policy assists investigations in three main ways. First, such a policy should prevent or at least pick up possible infringements. Secondly, it provides a structure for investigation of any infringement that does occur: identifying gaps in hierarchy or supply chains which may be susceptible to such infringements, as well as helping to track information flow within a supply process. Finally, these two reasons also mean that such a policy provides reassurance to authorities that a company not only takes this topic seriously but has the means to implement any lessons learned in the case of a genuinely mistaken infringement. This may act as a mitigating factor in determining a fine.

Export control and sanctions problems generally gain high management attention. This is not only due to the risk of fines and reputational damage. Under certain legal systems in the EU, it is mandatory for companies exporting goods to have a board member taking legal responsibility for export control compliance. Governmental procedures are often directed against this board member. Accordingly, investigations of export control infringements require professional handling including experience both of substantive export control laws and of the procedural aspects of handling an investigation in order to fulfil management expectations.

CONCLUSION

In times of dynamic international relations, export control and sanctions law gains importance as a political instrument. Infringements carry a high risk of fines, criminal prosecution and reputational damage for companies, members of their management, as well as their personnel. Internal investigations in this area require specialised expertise regarding the substantive legal assessment, the procedural management of the investigation, the forensic review of electronic data and the internal procedures followed at all stages of the supply chain until export is completed.

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Country overview

The following countries are covered in this guide

Albania

Kalo & Associates

 Shirli Gorenca

 Eni Kalo

 Adi Brovina

TABLE

	Corporate Liability	Public Bribery	Commercial Bribery	Extraterritorial Applicability of Criminal Laws	Adequate Procedures Defence
Yes	X	X	X		X
No				X	

QUESTION LIST

1. Do any specific procedures need to be considered in case a whistleblower report sets off an internal investigation (e.g. for whistleblower protection)?

A whistleblower protection law, Law No. 60/2016, was approved by the Albanian Parliament in June 2016 and came into effect on 1 October 2016 (the "**Whistleblowing Law**"). The law establishes mechanisms for the protection of whistleblowers and obligations for public and private entities vis-à-vis whistleblowers.

Under the Whistleblowing Law, private companies and public authorities must establish an internal whistleblowing unit, composed of one or more employees, which is responsible for the examination of whistleblower reports and the protection of the whistleblowers. Although normally a whistleblower should provide his/her name and contact information in any report, the Whistleblowing Law permits the submission of an anonymous report, where the whistleblower can justify the need for anonymity and the report contains sufficient information to begin an investigation.

During the investigation, the whistleblower's identity may not be disclosed to third parties without his/her written consent. Information relating to the report is confidential and may not be shared with, or transmitted to, internal or external third parties without the written consent of the whistleblower, unless disclosure is required to fulfil a legal obligation.

Under the Whistleblowing Law, an investigation must be, barring special circumstances, concluded within 60 days of commencement of the investigation. The whistleblower may request information about the progress and results of the investigation, which must be provided within 30 days of receipt of the written request. In any event, the whistleblowing unit must notify the whistleblower about the status and, if applicable, of the results of the investigation within 30 days from the moment the report was made.

2. Do the following persons/bodies have the right to be informed about an internal investigation before it is commenced and/or to participate in the investigation (e.g. the interviews)?

a) Employee representative bodies, such as a works council

b) Data protection officer or data privacy authority

c) Other local authorities

What are the consequences in case of non-compliance?

a) An employees' council is charged with representing the interests of employees and, to that end, is entitled to supervise the enforcement of laws, collective agreements, and a company's articles of association (Article 20 of Law No. 9901 of 14 April 2008). Councils have a statutory right to information and the right to make suggestions about the general policies at their companies.

Nevertheless, the information rights of the employees' council likely do not apply to internal investigations. Nevertheless, an obligation to inform the employees' council may stem from an individual employment contract, a collective agreement or another agreement between the employer and the employees' council.

In practice, employees' councils are very rarely formed in Albania and, therefore, no unified practice exists in this area.

b) The Whistleblowing Law provides that personal data of individuals involved in investigations must be processed in compliance with the principles and procedures provided under Law No. 9887 of 10 March 2008 (the "**Data Protection Law**"). Under the Data Protection Law, the data controller (i.e. typically the employer) has the general obligation to notify the Information and Data Protection Commissioner ("**DPA**"), an independent public authority, of any data processing activities prior to the commencement of such activities. The notification is made through the submission of an official notification form, in which the data controller must disclose, among other things, who will receive the personal data and whether the data will be transferred internationally. In principle, once the notification is filed, a controller may move forward with the processing (except when authorisation of the DPA is required, i.e. for processing sensitive data or for transfers of data to third countries).

Per the Whistleblowing Law, violations of the Data Protection Law are referred to the DPA.

c) There is no legal obligation to inform local authorities before beginning an internal investigation. However, the Whistleblowing Law provides reporting obligations, which require the internal whistleblowing units to file an annual written report with the High Inspectorate of the Declaration and Control of Resources and Conflicts of Interest (the "**ILDKP**"), describing any investigations of whistleblower complaints in the preceding year.

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3. Do employees have a duty to support the investigation, e.g. by participating in interviews? If so, may the company impose disciplinary measures if the employee refuses to cooperate?

Even though not expressly provided by applicable law, the duty to support an investigation is implied in the Whistleblowing Law, which grants the whistleblowing unit or the relevant state authority conducting the internal investigation (i.e. ILDKP) the right to collect statements and conduct interviews. The Whistleblowing Law also provides investigators the right to collect relevant documents from the whistleblower as well as from third parties, if it is deemed necessary by the head of the investigation.

The company may impose disciplinary measures on employees refusing to cooperate during the investigation, as it may be subject to administrative or criminal penalties for such behaviour. However, there are no legal penalties for employees, who refuse to participate in the investigation.

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4. May any labour law deadlines be triggered or any rights to sanction employees be waived by investigative actions? How can this be avoided?

The duty to terminate an employee immediately or with notice is triggered when the person or body with the authority to terminate the employee becomes sufficiently aware of the conduct warranting termination. However, there this no deadline by which these sanctions must be imposed.

In practice, it is advisable to wait until the end of an investigation, or at least until a late stage, before initiating any termination procedure. In any case, under the Whistleblowing Law, an investigation must be, barring special circumstances, concluded within 60 days of commencement of the investigation.

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5. Are there any relevant data privacy laws, state secret laws, or blocking statutes in your country that have to be taken into account before

a) Conducting interviews?

In accordance with the Data Protection Law, an interviewee should be notified, ahead of the interview, if applicable, that his/her data is being processed. The interviewee should also be informed of the reason for the processing, who is processing the data (i.e. the data processor), and the means of processing, unless the interviewee (i.e. the data subject) is already aware of such information.

b) Reviewing emails?

The reviewing/monitoring of emails is not expressly regulated by the Labour Code. The employer is allowed to collect, during the employment relationship, any information about the employee that relates to his/her professional capabilities or to the applicability of the employment contract. Notwithstanding this, the employee as well as his/her personal items cannot be subject to control, unless this is required to protect the assets of the employer, other employees, or third parties from an illegal violation.

Employers should therefore have in place clear policies regarding the use of email, outlining under which circumstances employees may be monitored, and explaining how any information gathered through monitoring may be used. Also, for the monitoring process to be lawful, it is important that the employee is aware of such activity. It is strongly advised to obtain his/her consent in writing.

c) Collecting (electronic) documents and/or other information?

From a data privacy perspective, collecting electronic documents does not trigger any notification obligation, unless such documents contain data classified as personal. Personal data is any information relating to an identified or identifiable natural person. Under the Data Protection Law, data controllers have the obligation to: (1) inform the data subjects that personal data are going to be collected; and (2) notify the DPA before starting data processing activities through the submission of an official notification form. The form should contain: the name and address of the controller; the scope of the processing; the categories of data subjects and personal data; the receivers and/or categories of receivers of the personal data; whether the controller intends to transfer the personal data internationally; and a general description of the safety measures for the protection of personal data.

d) Analysing accounting and/or other mere business databases?

To the extent the business databases do not contain personal data, they are not subject to the Data Protection Law.

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6. Before conducting employee interviews in your country, must the interviewee

a) Receive written instructions?

There is no legal obligation to provide an employee written instructions before conducting an interview.

b) Be informed that he/she must not make statements that would mean any kind of self-incrimination?

There is no legal obligation to inform an employee of his right to remain silent during an internal investigation. Such a requirement exists only in criminal investigations led by prosecutors.

c) Be informed that the lawyer attending the interview is the lawyer for the company and not the lawyer for the interviewee (so-called "Upjohn warning")?

There is no legal obligation to provide an employee an Upjohn warning at the beginning of an internal interview.

d) Be informed that he/she has the right that his/her lawyer attends?

There is no legal obligation to inform an employee of his right to counsel during an internal investigation. Such a requirement exists only in criminal investigations led by prosecutors.

e) Be informed that he/she has the right of a representative from the works council (or other employee representative body) to attend?

As explained above, employees' councils are very rarely formed in Albania. Therefore, an employee does not generally have a right to have an employee representative attend his/her interview. Nevertheless, where there is such a council, the employee's contract should be consulted to confirm that no such right exists.

f) Be informed that data may be transferred cross-border (in particular to the United States)?

As explained above, under the Data Protection Law, an interviewee should be notified, ahead of the interview, if applicable, that his/her data is being processed. The interviewee should also be informed of the reason for the processing, who is processing the data (i.e. the data processor), and the means of processing, unless the interviewee (i.e. the data subject) is already aware of such information. Any international transfer should be disclosed to the data subject as part of this notification.

g) Sign a data privacy waiver?

An individual cannot waive his rights under the Data Protection Law. However, the controller may obtain a written declaration from the data subject, in which the subject freely and knowingly consents to the collection and processing of his/her personal data. Consent of the data subject constitutes one of the grounds for lawful processing of personal data.

h) Be informed that the information gathered might be passed on to authorities?

Under the Data Protection Law, data subjects must be informed by the controller about the recipients of their personal data.

i) Be informed that written notes will be taken?

There is no legal obligation to inform an employee that written notes will be taken during his/her interview.

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7. Are document hold notices or document retention notices allowed in your country? Are there any specifics to be observed (point in time/form/sender/addressees etc.)?

The Whistleblowing Law provides that the whistleblowing unit must take all the necessary measures to protect evidence of wrongful conduct from disappearance or destruction. Companies that do not take such protective measures may be subject to administrative or criminal penalties.

Although the question of the admissibility of document hold notices has not been tested by court practice, in light of the obligations under the Whistleblowing Law, they may be admissible. The internal policies of the company should provide that the company may issue hold notices from time to time and that employees agree to abide by them, otherwise they may be subject to disciplinary measures imposed by the employer.

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8. May attorney-client privilege be claimed over findings of the internal investigation? What steps may be taken to ensure privilege protection?

Under Law No. 9109 (the "**Legal Profession Law**") the attorney-client privilege extends to any facts or information that an attorney has obtained in the course of representing his/her client. An "attorney" is defined as an individual, who is professionally licenced and registered with the tax authorities as an attorney, and who practices law, whether as a solo practitioner or in cooperation with other attorneys (i.e. in a law firm). The privilege protection applies to written documents and oral communications. Unfortunately, there is little case law in Albania concerning the scope and application of the attorney-client privilege and the Legal Profession Law itself provides limited guidance. However, the findings of an internal investigation would likely be protected.

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9. Can attorney-client privilege also apply to in-house counsel in your country?

Attorney-client privilege does not apply to in-house counsel, as they are not registered as attorneys with the tax authorities and are not practicing law, as defined under the Legal Profession Law. In-house counsel that are

employed as independent contractors, rather than company employees, may be covered by the privilege, but this rarely occurs in Albania.

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10. Are any early notifications required when starting an investigation?

a) To insurance companies (D&O insurance etc. to avoid losing insurance coverage)?

There is no statutory legal obligation to provide early notification to insurance companies. The relevant insurance contracts should, however, be checked.

b) To business partners (e.g. banks and creditors)?

There is no statutory legal obligation to provide early notification to business partners. The relevant contracts should, however, be checked for specific stipulations.

c) To shareholders?

There is no statutory legal obligation to provide early notification to shareholders.

d) To authorities?

There is no legal obligation to inform authorities before beginning an internal investigation.

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11. Are there certain other immediate measures that have to be taken in your country or would be expected by the authorities in your country once an investigation is started, e.g. any particular immediate reaction to the alleged conduct?

There are no immediate measures that have to be taken in Albania once an investigation is started. However, pursuant to the Albanian Criminal Procedure Code, any person, who has knowledge of or suspects the commission of a crime, must report the information to the relevant prosecutor office. In addition, the company must make sure that on-going criminal behaviour in the company is stopped.

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12. Will local prosecutor offices generally have concerns about internal investigations or do they ask for specific steps to be observed?

Local prosecutors do not generally have any particular concerns about internal investigations or ask for specific steps to be observed. However, prosecutors may try to use the findings of an internal investigation as evidence during criminal proceedings.

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13. Please describe the legal prerequisites for search warrants or dawn raids on companies in your country. In case the prerequisites are not fulfilled, may gathered evidence still be used against the company?

Pursuant to the Albanian Criminal Procedure Code, search warrants and dawn raids must be authorised by a court of competent authority. Information concerning, among other things, the nature of the search, the person(s) to be searched, and the authority conducting the search must be provided in the court order. Once a search is over, all involved parties should sign a record documenting the results of the search. In case a party refuses to sign the record, such refusal should be noted in the record. Where the procedural prerequisites are not fulfilled, there is a risk that the search will be declared invalid. Findings from an invalidated search may not be used in subsequent criminal proceedings.

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14. Are deals, non-prosecution agreements, or deferred prosecution agreements available and common for corporations in your jurisdiction?

Pursuant to the Albanian Criminal Procedure Code, before the initiation of court proceedings, and in the case of crimes subject to a maximum penalty of seven years' imprisonment or fines ranging from 500,000 to five million Albanian lek, the prosecutor and the defendant (including corporations) may enter into a deal. In practice, however, deals are not common in Albania.

Non-prosecution agreements and deferred prosecution agreements are not available to corporations. However, there are several mitigating factors, such as remedying the damages and eliminating the consequences, which may reduce the penalty on a corporation.

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15. What types of penalties (e.g. fines, imprisonment, disgorgement, or debarment) may companies or its directors, officers, or employees face for misconduct of (other) individuals of the company?

A legal person (i.e. corporation) is liable under Albanian law for crimes committed, through action or omission, in its name, or for its benefit, by its representatives, leaders, and managers (Law No. 9754 of 14 June 2007). A legal person is not liable for crimes committed by any employee, only those who are under the authority of the person, who represents, leads, and manages the entity. In practice, this includes managers of departments, who are directly under the authority of the administrator of the company. In addition, a legal person may be liable only for the omissions of the person, who leads, represents, and manages the entity (i.e. its administrator), where this results in an absence of control and supervision.

A legal person is subject to so-called "principal" and "complementary" penalties. Principal penalties include fines and liquidation of the entity. Complementary penalties include, *inter alia*, the placement of the legal person under supervised administration, a ban from public procurement procedures and from obtaining or using of licences, and the revocation of the right to perform one or more activities or operations.

Pursuant to the Criminal Code, the liability of the company does not discharge the individual, who has committed the offence/crime. Individuals who have committed a criminal offence may be personally subject to principal penalties (mainly imprisonment and fines) and other complementary penalties in accordance with the Albanian Criminal Code. However, directors, administrators, and/or officers are not personally liable for crimes committed by other employees of the company.

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16. Please briefly describe any investigations trends in your country (e.g. recent case law, upcoming legislative changes, or special public attention on certain topics)?

As the Whistleblowing Law is relatively new, no notable case law has yet developed concerning its interpretation and application. Companies operating in Albania are becoming increasingly aware of the law and taking steps to comply, for example, by establishing internal whistleblowing units.

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Founded in 1994, KALO & ASSOCIATES has been in the forefront of legal services in Albania and Kosovo in representing prominent business organizations and IFIs, including many Fortune 500. The Firm enjoys international reputation and is "best friend" to many international law firms and IFI-s, development agencies and embassies. The firm has significant contribution in drafting modern commercial legislation such as banking, commercial arbitration, concessions, renewable energy, gambling, insolvency, secured transactions, financial leasing, insurance, corporate and municipal bonds, pension funds and the collective investment funds law. It is a founding member of the South East Legal Group, the largest legal services provider in the Balkans, established in 2003 (www.seelegal.org). The firm has contributed in modernizing the practice in Albania, by adopting the structured practice areas, professional liability insurance, Corporate Social Responsibility, Pro Bono services, anti-corrupt' practices, art support, etc. which together give a law firm an undisputed reputation. The firm earned reputation is related with the reputation of its founder, Perparim Kalo, who was representative of IBA for Albania since 1992 and invited as speaker to many international business and legal forums in four continents.

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Adi is a Senior Associate in the Corporate and M&A Department, consolidating his expertise in the field of all aspects of corporate issues, including but not limited to company establishment, business restructuring, M&A, competition, concessions/PPP etc. As part of the corporate department, Adi provides legal advice to companies across all sectors on M&As and restructuring of companies, legal due diligence and drafting of relevant legal reports, drafting of letters of intent, share purchase agreements, shareholder agreements and advises clients on various corporate issues through the corporate life cycle. His focus area also extends to competition and concessions/PPP procedures.

Austria

KNOETZL HAUGENEDER NETAL Rechtsanwälte GmbH

 Bettina Knoetzl

TABLE

	Corporate Liability	Public Bribery	Commercial Bribery	Extraterritorial Applicability of Criminal Laws	Adequate Procedures Defence
Yes	X	X	X	X	
No					X The lack of "adequate procedures" has to be shown by the prosecution authority (see more details question 15) and may - if additional requirements are fulfilled - lead to the company's criminal liability.

QUESTION LIST

1. Do any specific procedures need to be considered in case a whistleblower report sets off an internal investigation (e.g. for whistleblower protection)?

Whistleblower protection has become increasingly important in Austria. A recently introduced law imposes on companies listed on the stock exchange and certain financial institutions a duty to set up an internal, anonymous whistleblowing mechanism to flag violations. The law further grants whistleblowers criminal immunity with regard to the report and prohibits employers from discriminating against employees who notify the authorities of violations.

Companies which set up an internal whistleblowing protection mechanism need to report this measure to the data protection authority and comply with the following general principles: (i) complete separation of the whistleblowing department from all other departments; (ii) safeguards guaranteeing full protection of the identity of the whistleblower; (iii) access by the accused to the incriminating allegations, unless the investigation is jeopardised by such disclosure; (iv) deletion of all collected data within two months of the closure of the internal investigation; and (v) only data of executive employees may be passed on to the parent company.

The law does not stipulate explicit requirements of how to react to a whistleblower's report. Best practices suggest immediate action. Depending on the content of the report, appropriate steps have to be taken, including - for example - the initiation of an internal investigation and perhaps even the filing of a report to the criminal authorities.

2. Do the following persons/bodies have the right to be informed about an internal investigation before it is commenced and/or to participate in the investigation (e.g. the interviews)?

a) Employee representative bodies, such as a works council

b) Data protection officer or data privacy authority

c) Other local authorities

What are the consequences in case of non-compliance?

a) There is no provision under the Austrian Constitutional Labour Law which specifically concerns internal investigations. Moreover, there is no obligation to inform the works council about suspected cases or internal investigations already started, or to allow a works council representative to participate. However, if a company decides to set up a whistleblowing system, the works council has to be involved in the setup of the same and needs to provide its consent to the planned changes.

b) If data in an internal investigation will be processed or transmitted, its use has to be registered with the so-called Data Processing Register (*Datenverarbeitungsregister*) ("**DVR**"). In some cases (e.g. if sensitive data is involved or if data shall be transferred to states, which have no equivalent level of data protection), a preliminary approval by the data protection authority is obligatory. Failure to comply with this requirement can lead to a fine of up to €25,000. Under the new the General Data Protection Regulation ("**GDPR**"), these requirements will be replaced by the duty to record data processing in an internal register, which applies to companies with more than 250 employees or which process sensitive data.

c) There are no other local authorities, which have a right to be informed about the investigation or to participate in it. However, if a company wishes to take advantage of the "Crown Witness" regulation or a leniency programme, assuming all preconditions are met, it is advisable to involve the relevant authorities. The so-called "Crown Witness" regulation allows prosecutors to drop an investigation against a cooperating witness, who freely confesses his involvement in a serious offence and provides new information that contributes substantially to the investigation. Failure to involve the relevant authorities may preclude the company from obtaining the benefit.

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3. Do employees have a duty to support the investigation, e.g. by participating in interviews? If so, may the company impose disciplinary measures if the employee refuses to cooperate?

Employees are under a duty of loyalty and information vis-à-vis their employer. Pursuant to these duties, employees are obliged to participate in investigation interviews. At the same time, the interviews have to be conducted within the confines set by law, notably the employer's duty of care vis-à-vis employees. Pursuant to this duty, which extends also to executives and managers, the employer is, *inter alia*, required to respect the private life of employees, protect their honour, and treat them equally.

Although employees must participate in interviews, Austrian legal scholars are engaged in a contentious debate over whether employees are also obliged to answer the questions of private investigators, which may reveal personal misconduct.

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4. May any labour law deadlines be triggered or any rights to sanction employees be waived by investigative actions? How can this be avoided?

Under Austrian law, an employer may only dismiss an employee with instant effect if the employer exercises this right immediately after becoming aware of the justification for the dismissal. The employer forfeits this right, if he fails to immediately (i.e. "without delay") exercise it. In cases of doubt, the employer can suspend the employee until the investigation yields more evidence or terminate the employee in a consensual manner (with the option for re-employment in case the employee is exonerated).

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5. Are there any relevant data privacy laws, state secret laws, or blocking statutes in your country that have to be taken into account before

a) Conducting interviews?

On 25 May 2018 the GDPR and the Datenschutzanpassungsgesetz 2018 ("**DSAG**") will take effect. Until such time, data protection is governed by the Law on Data Protection ("**DSG**").

While only natural persons are covered by the GDPR and DSAG, the DSG extends to legal persons. Pursuant to the DSG, data may only be used in accordance with the law and in good faith, and only collected for specific legitimate purposes. The principle of proportionality also has to be respected.

The GDPR provides for, *inter alia*, the right to be informed about the processing of personal data.

b) Reviewing emails?

A search with the express consent of the user is generally permitted. Without the consent of the user, it is important that the email account belongs to the company and is deemed to be for professional use. The interests of the parties and proportionality need to be considered.

Emails with private content may not be searched. If private emails are identified (e.g. by the subject line), only spot checks are allowed to clarify that the email is indeed private. As soon as an email is identified as private, it must be excluded from the search. If it has been opened by coincidence or as part of the spot check, it needs to be closed immediately after identification or confirmation that it is private.

c) Collecting (electronic) documents and/or other information?

Data processing, as defined in the DSG, has to be registered in the DVR. Pursuant to the DSG, a pre-approval by the data protection authority is required if the internal investigation involves processing of data related to suspected criminal offences or if states are involved whose data protection level is inferior to that of the European Union.

d) Analysing accounting and/or other mere business databases?

If accounting/business data contains no personal data, the data privacy rules do not apply.

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6. Before conducting employee interviews in your country, must the interviewee

a) Receive written instructions?

There is no legal obligation to provide the employee with written instructions prior to the interview.

b) Be informed that he/she must not make statements that would mean any kind of self-incrimination?

The applicability of the right against self-incrimination in internal investigations is unsettled. As long as legal uncertainty persists, it is advisable to inform interviewees of their potential right against self-incrimination. There is, however, no duty of care between a company and third parties, who are not employees.

c) Be informed that the lawyer attending the interview is the lawyer for the company and not the lawyer for the interviewee (so-called "Upjohn warning")?

If an interview is conducted by outside counsel, he/she will have to comply with the attorneys' Code of Conduct. This Code requires the avoidance of conflicts of interests. Therefore, the interviewee has to be informed that the outside counsel is only acting on behalf, and for the benefit of, the company.

d) Be informed that he/she has the right that his/her lawyer attends?

Prior to the interview, the employer (or third party acting for the employer) should inform the employee that he/she has a right to be accompanied by his/her own legal representative.

e) Be informed that he/she has the right of a representative from the works council (or other employee representative body) to attend?

Employees have no specific right to have a works council representative attend their interviews or otherwise participate in the investigation. They, therefore, also do not have to be informed in that regard.

f) Be informed that data may be transferred cross-border (in particular to the United States)?

The DSG protects against the transmission of personal data abroad. Uncontrolled data transfer to the United States is, therefore, problematic. Mere notice to the affected person will not suffice. The employee will have to provide his/her informed consent prior to the transfer, which can be revoked at any time.

g) Sign a data privacy waiver?

Employees are under a duty to share any information, which they obtain in their capacity as employees, with their employer. Such data is not considered to be "private" and no waiver is required. The situation is different for data which qualifies as private. The employer must respect the employee's private sphere. A waiver to collect and use private data is required and may be legitimately withheld by the employee.

h) Be informed that the information gathered might be passed on to authorities?

The employer has a duty to inform the employee of the exact use of the information gathered in an internal investigation, including the persons outside the company with whom the information might be shared. It is of particular importance if information might be passed onto prosecution authorities.

i) Be informed that written notes will be taken?

It is common that written minutes are made of an interview and the interviewee should be informed of this. Data protection law requires, moreover, the respect of the principle of proportionality in using data gained from the interview. Therefore, the company should not collect more personal data than the minimal amount required to conduct the investigation properly.

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7. Are document hold notices or document retention notices allowed in your country? Are there any specifics to be observed (point in time/form/sender/addressees etc.)?

All persons are under a legal duty to refrain from destroying evidence, including material which may become relevant in a legal dispute. Under Austrian law, suppression of evidence is a criminal offence. In order to protect employees from violating the law, it is advisable to remind them of this duty. Such warnings contain clear instructions to refrain from deleting emails or documents from the system.

Best practices in Austria require the preservation of relevant data immediately (by, for example, "imaging" an employee's computer), if allegations of illicit behaviour arise.

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8. May attorney-client privilege be claimed over findings of the internal investigation? What steps may be taken to ensure privilege protection?

The attorney-client privilege only extends to attorney work product created for the purpose of defending the client and not to previously existing evidence. Hence, investigation reports are protected by the privilege.
To ensure privilege protection, it is advisable to store attorney work product in a way that the data remains in the custody of the attorney (e.g. sharing work product over a secure server provided by the attorney).

Attorney work product and correspondence of a client with his lawyer or similar documents, which have been created in the context and/or for the purpose of the legal defence of this client, may neither be seized at the law firm nor at the client's site (Since November 2016 this protection also extends to attorney documents in the custody of a client accused of criminal conduct.).

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9. Can attorney-client privilege also apply to in-house counsel in your country?

In Austria, the attorney-client privilege applies only to outside counsel.

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10. Are any early notifications required when starting an investigation?

a) To insurance companies (D&O insurance etc. to avoid losing insurance coverage)?

Austrian law does not require companies to issue notifications when starting investigations. Usually, insurance policies encourage policyholders to inform the insurer of internal investigations. If there is a concrete risk that the insurer will be asked to cover the event, if a claim arises, then the insurance company must be informed.

b) To business partners (e.g. banks and creditors)?

In general, there is no duty to inform business partners of the start of an investigation. For stock exchange listed companies, *ad hoc* or regular notification duties might apply. Banks tend to include provisions in their contracts, which require notification of events, which affect a partner company's creditworthiness.

c) To shareholders?

Companies publicly listed on the Vienna Stock Exchange are under a legal obligation to issue *ad hoc* notifications regarding inside information, i.e. information that has not been made public and which, if it were made public, would be likely to have a significant impact on the price of the company's shares or other related financial instruments.

d) To authorities?

There is no legal duty for private companies to report misconduct to law enforcement authorities. There may be such a duty for state companies exercising sovereign power.

Self-reporting may be advisable in circumstances in which the company can take advantage of a leniency programme, such as the "Crown Witness" regulation or the so-called "diversion" or to gain the "victim status" in proceedings (as injured party).

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11. Are there certain other immediate measures that have to be taken in your country or would be expected by the authorities in your country once an investigation is started, e.g. any particular immediate reaction to the alleged conduct?

Authorities would expect among other measures: sanctions to be imposed, including the immediate termination of employment contracts or - if the situation needs to be clarified - at least a suspension; a revision of existing policies; a repetition or improvement of training programmes; and the compensation of damages suffered by victims of the criminal conduct.

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12. Will local prosecutor offices generally have concerns about internal investigations or do they ask for specific steps to be observed?

Internal investigations, which are conducted according to best practices, may be regarded as helpful, if the results are openly shared with the prosecutor's office. The sharing of the results of an internal investigation may be taken into account and can be an important factor in leading the prosecutor to refrain from prosecution. It may happen that the prosecutor expressly asks for certain questions to be asked or certain investigative measures to be taken. Companies tend to comply with such requests.

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13. Please describe the legal prerequisites for search warrants or dawn raids on companies in your country. In case the prerequisites are not fulfilled, may gathered evidence still be used against the company?

With the approval of the court, the public prosecutor may order the search of a specific location – for instance, an office building – to collect, temporarily secure, or seize evidence to be used in criminal and civil proceedings. In highly urgent matters, the public prosecutor may order the search warrant and subsequently seek court approval.

House searches shall only be ordered if there is a "founded suspicion" (this threshold is higher than the "initial suspicion" required to open investigations) and the coercive measure complies with the principle of proportionality,

meaning that there is no less intrusive means available. If, for example, the information could be obtained through obtaining the cooperation of the defendant, the application of coercive means, such as house searches or dawn raids, could be deemed to lack the requisite proportionality.

Persons against whom a search warrant was issued or whose premises were subject to a house search can file an objection with the competent office of the public prosecutor within six weeks from the measure. The public prosecutor can either comply or, within four weeks, pass the objection on to the competent criminal court.

Improperly obtained evidence can be used against the company. Some exceptions apply, for example in cases of attorney-client privilege.

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14. Are deals, non-prosecution agreements, or deferred prosecution agreements available and common for corporations in your jurisdiction?

Non-prosecution agreements do not exist in Austria. There are, however, two related concepts: the so-called "diversion" and termination of proceedings. Owing, in part, to cultural opposition to "agreements" offered by the prosecution authorities, neither option is used frequently.

"Diversion" allows the prosecutor to end the criminal prosecution of a corporation, if punishment of the corporation does not seem to be necessary. A number of factors are considered, including the conduct of the corporation after the alleged offence (here, self-reporting is of particular importance), the weight of the alleged offence, the amount of the fine to be imposed, and the detriment suffered by the corporation due to the misconduct. In some instances, the prosecutor must pursue diversion if certain requirements are met.

While a termination of proceedings leads to a full acquittal, "diversion" is positioned in between a conviction and an acquittal. In contrast to a conviction, a "diversion" is not entered in the criminal register for corporations and the related fines are lower.

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15. What types of penalties (e.g. fines, imprisonment, disgorgement, or debarment) may companies or its directors, officers, or employees face for misconduct of (other) individuals of the company?

Corporations are liable for the unlawful and culpable actions of their "decision makers" (i.e. higher ranked individuals with authority to represent the company) and, under more restrictive conditions, also for the actions of their "normal" employees, provided that the offence was either committed for the benefit of the corporation or the offence violated duties incumbent upon the corporation itself.

If the offence was committed by a "normal" employee, it must have been either rendered possible or facilitated by the decision makers' failure to take essential precautionary measures (e.g. implement a proper compliance system). The prosecution bears the burden of establishing the lack of adequate procedures. In practice, the corporation will usually try to show the proper implementation of adequate procedures.

Corporations are subject to fines, which are measured in per diem units, as well as to court directives (e.g. to compensate harm done, to implement a proper compliance system, or to make charitable donations). The current maximal fine for offences, such as severe fraud, embezzlement, or corruption is €1.3 million (the fine depends on the corporation's earnings).

Natural persons are subject to the whole set of penalties and other sanctions if they are found personally guilty of an offence.

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16. Please briefly describe any investigations trends in your country (e.g. recent case law, upcoming legislative changes, or special public attention on certain topics)?

Fighting corruption has been an express goal of the Austrian Ministry of Justice. Since Austria's ratification of the UN Convention against Corruption in January 2006, anti-corruption laws have improved. Most recently, a number of legislative improvements have been implemented to fight corruption, including the creation of the Federal Bureau of Anti-Corruption in 2010 and the central public prosecution office for economic crimes and corruption

(the "**WKStA**") in 2011. The WKStA implemented a well-functioning anonymous whistleblowing tool, which is frequently used. Owing to the tool and the recent promulgation of the "Crown Witness" regulation, self-reporting has notably increased.

The upcoming entry into force of the GDPR and, in Austria, the DSAG, as well as the applicability of the right against self-incrimination in internal investigations, continue to be hot topics in Austria.

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Bettina is a trial lawyer with 25 years' experience in international and Austrian matters of high profile, scoring notable successes in criminal defence work in insider trading, price fixing, fraud and corruption cases. For more than a decade Bettina has been assigned the highest tier rankings by international directories, such as Chambers, in both civil litigation and white collar crime. In 2017 she has been awarded worldwide recognition as "Lawyer of the Year" in Asset Recovery by Who's Who Legal, London Business Research Society. She is a designated thought leader in the legal community and is known for her vast, practical and creative, experience in structuring settlements in complex disputes. In addition to her civil litigation work, she handles business crime cases, internal investigations, including FCPA and "Me too" matters, in the banking, insurance, pharma and automotive industry, with a significant focus of her practice on investors' protection and asset recovery. Bettina advises clients in mission-critical and notorious disputes, including class actions, and has a demonstrable track record of winning judgments and strong, favourable, settlements for both companies, government instrumentalities and private clients.

Bettina is the President of Transparency International (Austrian Chapter), the exclusive Austrian representative of the ICC-FraudNet and lectures in the Austrian Lawyers' Academy (AWAK) in dispute resolution. She is heavily engaged in the International Bar Association where she co-chaired the global Litigation Committee throughout 2016/2017.

Belgium

Eubelius

 Tom Bauwens

 Margot Vandebeek

 Dr. Stijn Lamberigts

TABLE

	Corporate Liability	Public Bribery	Commercial Bribery	Extraterritorial Applicability of Criminal Laws	Adequate Procedures Defence
Yes	X	X	X	X	
No					X No formal "Adequate Procedures Defence", but such procedures are recommended to show lack of intent/negligence.

QUESTION LIST

1. Do any specific procedures need to be considered in case a whistleblower report sets off an internal investigation (e.g. for whistleblower protection)?

There is no comprehensive statutory approach under Belgian law to whistleblowers and internal investigations. Nevertheless, such investigations need to comply with general provisions, for instance in the field of labour law or privacy law.

Even though there is no general whistleblower statute, some sector specific statutes address the issue of whistleblower protection. The recently amended Act of 2 August 2002 on the Supervision of the Financial Sector and the Financial Services includes protection for whistleblowers (Article 69 ff.). Moreover, legislation both at the regional (Decree of 7 July 1998 establishing the Flemish Ombudsman) and at the federal level (Act of 15 September 2013 on the notification of presumed infringements of integrity at federal administrative authorities by staff members) provides for protection of civil servants. In the context of investigations related to bullying, violence or sexual harassment at the workplace, specific statutory provisions apply.

There is some Belgian case law on the dismissal of employees that became whistleblowers, in addition to the case law of the European Court of Human Rights ("**ECtHR**") on this issue. In *Heinisch v Germany*, the ECtHR developed criteria that need to be considered when assessing the dismissal of whistleblowers in light of their freedom of expression.

2. Do the following persons/bodies have the right to be informed about an internal investigation before it is commenced and/or to participate in the investigation (e.g. the interviews)?

a) Employee representative bodies, such as a works council

b) Data protection officer or data privacy authority

c) Other local authorities

What are the consequences in case of non-compliance?

a) Employee representative bodies need to be involved when some specific tools such as surveillance of online communication are used, in accordance with Collective Agreement ("**CA**") No. 81 or other applicable CAs. Failure to comply with such Collective Bargaining Agreements can result in criminal sanctions. Moreover, companies may have included specific provisions in their internal labour regulations that require them to inform employee representatives when an internal investigation is launched.

b) Internal investigations extensively involve the processing of personal data and the investigations should thus comply with the Data Protection Act of 8 December 1992 ("**DPA**"), as well as with the reinforced obligations under the EU General Data Protection Regulation ("**GDPR**"), which will enter in force on 25 May 2018. In light of the broad scope of Article 38 GDPR, this will in principle include the involvement of the Data Protection Officer, provided the company has one. Failure to comply with the aforementioned instruments can result in punitive sanctions, particularly once the GDPR will be applicable.

c) As a general principle, Belgian law does not provide a right for the prosecutor to be informed of the launch of an internal investigation, nor to participate in it. Nevertheless, when the internal investigation concerns facts that can be qualified as crimes against public safety or against the life or property of an individual, every witness is in principle under an obligation to report such facts to the public prosecutor. Nevertheless, failure to comply with this obligation, enshrined in Article 30 Code of Criminal Procedure ("**CCP**") is not penalised.

Some statutes require that the authorities are notified when specific criminal offences may have been committed. For example, a broad list of entities have to report suspicious financial elements and transactions linked to money laundering or terrorist financing to the Financial Intelligence Unit (CFI – CTFI). Other authorities to which potential risks have to be reported are the Federal Agency for the Safety of the Food Chain (FAVV – AFSCA) and the Federal Agency for Medicines and Health Products (FAGG – AFMPS). Such a report can trigger an investigation by one of those agencies. They will not participate in the companies' internal investigation. Failure to comply with a reporting duty is punishable with criminal penalties.

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3. Do employees have a duty to support the investigation, e.g. by participating in interviews? If so, may the company impose disciplinary measures if the employee refuses to cooperate?

Employees are, within the context of their employment contract, under a duty to comply with instructions of their employer, including requests to participate in interviews during an internal investigation. Nevertheless, the employer may not take recourse to compulsion, for example by preventing employees from leaving the interview room. Failure to comply with legitimate instructions of the employer can result in disciplinary measures.

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4. May any labour law deadlines be triggered or any rights to sanction employees be waived by investigative actions? How can this be avoided?

Immediate dismissal (e.g. for serious misconduct) requires respecting a strict deadline that lapses after three days. This deadline starts running as soon as the employer obtained certainty about the facts. Determining the point in time at which the employer had sufficiently precise knowledge of those facts and is merely fact-based. An internal investigation may disclose important elements. Yet, where the company is already aware of the relevant acts or omissions of the employee, the internal investigation does not suspend the strict deadline. Even though some

internal company regulations state that an employee should be heard before he is dismissed, companies wishing to dismiss an employee for pressing reasons should make sure to do so in a timely fashion.

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5. Are there any relevant data privacy laws, state secret laws, or blocking statutes in your country that have to be taken into account before

a) Conducting interviews?

In light of the broad scope of the concept "personal information" it is almost inevitable that an interview during an internal investigation will entail the processing of such information. For example, when the interviewer keeps records of the interviews, this will amount to data processing. Thus, the interviews during an internal investigation should comply with the DPA and, as of 25 May 2018 with the GDPR.

b) Reviewing emails?

As reviewing emails will typically entail the processing of personal data this measure should also comply with the general principles of privacy law. Further, it is highly recommended that companies draft a policy outlining the corporate policy on the use of professional email addresses and the possible supervision of those emails. Failure to put in place a clear policy on this issue entails risks for the company, particularly in light of the fact that several provisions, such as Articles 124 and 125 of the Electronic Communications Act and Article 314bis of the Criminal Code ("**CC**") preclude certain types of communication interception. Moreover, the company should respect the provisions of CA No. 81.

c) Collecting (electronic) documents and/or other information?

Collecting electronic documents and/or other information also needs to comply with the general provisions of privacy law that we have outlined under section 5a. In order to set clear standards and in order to make sure that employees have realistic privacy expectations, companies should put in place a clear corporate policy on the use of electronic devices provided by the employer or personal devices used for professional purposes.

d) Analysing accounting and/or other mere business databases?

As soon as these accounting and other databases contain personal data, such an analysis is likely to amount to data processing and the company thus has to respect the aforementioned DPA as well as the GDPR (as of 25 May 2018).

In case these databases do not contain such data, and only hold mere data that cannot contribute to the identification of a natural person, their analysis is not subject to privacy legislation.

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6. Before conducting employee interviews in your country, must the interviewee

a) Receive written instructions?

Belgian law does not provide rules concerning employee interviews during an internal investigation. Thus, prior notifications that are mandatory during interviews conducted in a proper criminal investigation, are not required.

Nevertheless, case law has repeatedly stressed the importance of the voluntary nature of the statements. Failure to respect that requirement can limit the possibility for the employer or the prosecutor to rely on the statements made by the employee during such interviews. The voluntary nature of the statements has to be considered by taking into account all circumstances of the interview. For example, the use of false promises or physical or psychological violence would undermine the voluntary nature of the person's statements.

In order to prove the voluntary nature of the employee's statements, it is useful to provide a document that contains the rights of the employee during the interview. When the employer does provide such document, it is recommended that the employee signs it, as proof of acknowledgment.

b) Be informed that he/she must not make statements that would mean any kind of self-incrimination?

In an internal investigation, prior to a criminal prosecution, no notification needs to be given to the employee that he can exercise the right to silence and the privilege against self-incrimination. In a 2015 ruling the Belgian Court of Cassation ("**CoC**") ruled that a self-incriminating statement made during an internal investigation was admissible in evidence, since there was no indication that improper compulsion had been exercised or that irregularities had taken place during the internal investigation.

c) Be informed that the lawyer attending the interview is the lawyer for the company and not the lawyer for the interviewee (so-called "Upjohn warning")?

Belgian law does not contain clear rules concerning such situations, but case law determines that the employer cannot use deception to obtain an interviewee's statement. By not informing the interviewee about the identity and the capacity of all persons present, the employee could claim that the employer gathered the statement through trickery, which deprives the statement of its credibility.

Thus, it is recommended to inform the interviewee that the lawyer represents the company and not the employee. Should other persons attend the interview, it is advisable to introduce them to the interviewee as well.

Further, the attorney that conducts the interview during the internal investigation would be at risk of violating professional ethics rules if he fails to indicate on whose behalf he is acting.

d) Be informed that he/she has the right that his/her lawyer attends?

The aforementioned 2015 CoC ruling explicitly rejected the idea that an employee would be entitled to the assistance of a lawyer on the basis of Article 6 of the European Convention on Human Rights or on another ground. Nevertheless, the company may decide that the employee can be assisted by a lawyer, as this helps guarantee the voluntary nature of the employee's statements.

e) Be informed that he/she has the right of a representative from the works council (or other employee representative body) to attend?

There is no general obligation in Belgium to inform the interviewee about this right. However, as indicated under section 6a, case law ruled that the voluntary nature of the statements has to be guaranteed.

Therefore, although it is not obligatory to inform the employee that he can be accompanied by a union representative, it can be helpful to do so to demonstrate the voluntariness of the statement. His presence reduces the chance that the employee makes a compelled statement.

Certain companies include the possibility to be assisted by a union representative during interviews in their internal labour regulations.

f) Be informed that data may be transferred cross-border (in particular to the United States)?

Cross-border data transfers within and outside the European Union are allowed, yet for transfers outside the European Union an adequacy decision or appropriate or suitable safeguards need to be in place. These decisions have to be reviewed case by case.

g) Sign a data privacy waiver?

In light of the possible use of the employee's statement, for example in civil or criminal proceedings, such a waiver is to be welcomed. Nevertheless, such a waiver is not needed where another ground, such as the legitimate interests of the company, justifies the use of the statements.

h) Be informed that the information gathered might be passed on to authorities?

In case personal data is included in the information that is provided to the authorities, the employee should in principle be notified of this data transfer. Moreover, guaranteeing the voluntary nature of a statement, as explained under section 6a, is easier when the interviewee is aware of the purposes for which his statements can be used. At the same time informing him of the possible use of his statements in court proceedings may have chilling effects on his willingness to cooperate.

i) Be informed that written notes will be taken?

Although no legal obligation requires such a notification, it is recommended to do so. Providing the employee with clear indications of the process of the interview is generally beneficial.

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7. Are document hold notices or document retention notices allowed in your country? Are there any specifics to be observed (point in time/form/sender/addressees etc.)?

Several sector-specific statutory provisions require the retention of documents such as accounting documents and documents related to the employment of individuals. Nevertheless, document retention notices issued during an internal investigation by an employer to his employees are largely left unregulated. In light of the general duty of employees to comply with the instructions of their employer, such notices are allowed. To be effective, they should be clear in terms of scope and be sent in a timely fashion in order to avoid a loss of documents.

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8. May attorney-client privilege be claimed over findings of the internal investigation? What steps may be taken to ensure privilege protection?

The attorney-client privilege protects the information exchanged between the lawyer and his client, as well as the information received by the attorney from other persons, provided that it is obtained for the purpose of advising his client. In order to ensure the most stringent protection of the privilege it is essential for external counsel to conduct the internal investigation. In the context of seizure by the authorities of documents regarding the internal investigation, drafted by the attorney (e.g. an investigation report), a specific procedure is in place for the assessment of the confidential character of documents, whereby the President of the bar will prevent the authorities to take note of the content of those documents. Contrary to other jurisdictions, Belgian case law on this issue is limited.

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9. Can attorney-client privilege also apply to in-house counsel in your country?

Article 5 of the Act of 1 March 2000 establishing the Institute for In-house Counsels provides that advice provided by an in-house counsel to his employer in his capacity of legal advisor is confidential. This confidentiality can in specific cases be set aside more easily, as was demonstrated by the ruling of the Court of Justice of the European Union in *Akzo* (Case C-550/07 P).

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10. Are any early notifications required when starting an investigation?

a) To insurance companies (D&O insurance etc. to avoid losing insurance coverage)?

Belgian law does not provide a notification requirement, but the agreements between entities and insurance companies will usually contain a clause requiring the policy holder to notify the insurance company in case of potential claims within a specific period of time.

b) To business partners (e.g. banks and creditors)?

There is no general and statutory obligation to inform business partners when starting an internal investigation. Nevertheless, it can be recommended to inform a business partner, which might be harmed by the misconduct that is under investigation. Such an act can be seen as an indication of the innocence and the good faith of the entity itself in case of an investigation by public authorities. Nevertheless, such a decision requires careful consideration of the interests of the business partner and the interests of the entity itself. According agreements with business partners should therefore be checked as a precaution.

c) To shareholders?

The launch of an internal investigation clearly amounts to sensitive information. Any obligation to disclose the launch of such an investigation to shareholders should be considered on a case-by-case basis. Due to amendments made to the Company Law Code (see Articles 96 and 119 "**CLC**"), certain corporations may

now be required to disclose internal investigations in their annual report, unless they invoke the comply or explain clause of Article 96 CLC, and thus by means of adequate reasoning justify why they may deviate from this obligation. An untimely notification may alert employees that have committed wrongdoing and give them the chance to destroy evidence. At the same time, companies need to consider applicable insider trading statutes (and the possible related disclosure of inside information). For certain companies the obligation to inform the public of inside information that directly concerns the company is provided by law, as for example Article 17 Market Abuse Regulation (that provides such obligation for issuers of financial and emission allowance market participants).

d) To authorities?

See section 2c.

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11. Are there certain other immediate measures that have to be taken in your country or would be expected by the authorities in your country once an investigation is started, e.g. any particular immediate reaction to the alleged conduct?

Being confronted with damage, the victim should take all reasonable measures to limit aggravation of the damage. The company must therefore make sure to stop any on-going criminal behaviour. Further, it will be in the interest of the company to dissociate itself from the wrongful behaviour of its employee(s) and to undertake disciplinary actions against them to avoid suspicions of bad faith and complicity on the part of the entity.

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12. Will local prosecutor offices generally have concerns about internal investigations or do they ask for specific steps to be observed?

Internal and external investigations are independent from each other. Nevertheless, the company can decide to share the results of its internal investigation with the prosecutor's office, e.g. when the company files a criminal complaint against an employee. In case an entity intends to submit a file to the prosecutor, it is recommended to ensure its credibility by documenting every investigative measure and by entrusting it to external counsel.

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13. Please describe the legal prerequisites for search warrants or dawn raids on companies in your country. In case the prerequisites are not fulfilled, may gathered evidence still be used against the company?

Search warrants – in criminal proceedings – normally have to be executed by the investigating judge (Article 87 CCP), but they can and often are delegated to judicial police officers. For this purpose, the investigating judge is required to draft and sign a reasoned search warrant, which – according to case law – should include the name of the appointed judicial police officer(s), the offence(s) the entity is being accused of, and a clear description of the location of the place that has to be searched.

According to case law of the CoC of 2003, which is now enshrined in Article 32 of the preliminary title of the CCP, evidence that has been obtained without fulfilling those requirements can be used unless the irregularity affects the reliability of the evidence and/or the use of this evidence violates the right to a fair trial. Further, according to Article 32 of the preliminary title of the CCP, a third exclusionary ground is the failure to comply with formal requirements that is sanctioned by nullity.Whether these conditions have been met or not will be examined by the competent court on a case-by-case basis.

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14. Are deals, non-prosecution agreements, or deferred prosecution agreements available and common for corporations in your jurisdiction?

Settlements (Article 216bis CCP) and guilty pleas (Article 216 CCP) are available to corporations. Guilty pleas have only been introduced in 2016 and are currently not applied often. The Constitutional Court ruled in June 2016 that Article 216bis paragraph 2 CCP, is unconstitutional to the extent that the prosecutor can put an end to cases which

are already being handled by a judge, without sufficient judicial control. The Act of 18 March 2018 has amended Article 216bis CCP in order to bring it in line with the Constitution.

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15. What types of penalties (e.g. fines, imprisonment, disgorgement, or debarment) may companies or its directors, officers, or employees face for misconduct of (other) individuals of the company?

Companies can be held liable for misconduct of individuals where the offences have a sufficiently strong connection to the interests of the corporation. The possible penalties for companies as provided in the CC are fines, confiscation, dissolution, prohibition to exercise a certain activity, the closure of one or more establishments, and the publication or dissemination of the decision. The Act of 17 June 2016 concerning public procurements adds debarment to this list of penalties.

Under specific conditions, directors, officers and/or employees can be punished for misconduct of other individuals. The penalties that apply to natural persons are fines, imprisonment, electronic surveillance, confiscation, deprivation of civil or political rights, and autonomous probation sentences. Further, Royal Decree No. 22 of 24 October 1934 provides a legal basis for imposing a prohibition to pursue certain professional activities.

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16. Please briefly describe any investigations trends in your country (e.g. recent case law, upcoming legislative changes, or special public attention on certain topics)?

A whistleblower provision has recently been introduced in the Act of 2 August 2002 on the Supervision of the Financial Sector and the Financial Services. Meanwhile, the legislation on market abuse has been tightened in light of EU law. Whereas it used to be common practice to reach out to the police in case of alleged wrongdoing, recently internal investigations and internal audits have been increasingly used, as was demonstrated by the *Samusocial* case.

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Tom Bauwens has been a member of the Brussels Bar since 2001 and a partner at Eubelius since 2015.

His practice focuses on criminal law, and in particular on white collar crime, as well as on compliance and assistance during investigations by regulatory authorities. Moreover, he has a profound interest in human rights law. He regularly acts before Belgian courts at all levels, including the Court of Cassation, in criminal cases, as well as before the European Court of Human Rights.

He lectures on criminal procedure law at the Police Academy (*ad hoc*) and at the academy of the Dutch Bar of Brussels. He is a member of various commissions at the Flemish Bar and the Dutch Bar of Brussels dealing with criminal law, money laundering and professional confidentiality.

Tom is a regular conference speaker, contributes to legal publications and is a member of the editorial staff of a leading Belgian journal on criminal law.

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Dr. Stijn Lamberigts has been a member of the Brussels Bar since 2017.

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Prior to joining Eubelius, Stijn worked at the University of Luxembourg as a researcher where he worked on European criminal law, white-collar crime and comparative criminal procedure.

He presents regularly at seminars and conferences and continues to contribute to legal publications. He is a senior affiliated researcher at the Criminal Law Institute of the KU Leuven.

Bulgaria

Kambourov & Partners


Ivo Alexandrov

TABLE

	Corporate Liability	Public Bribery	Commercial Bribery	Extraterritorial Applicability of Criminal Laws	Adequate Procedures Defence
Yes		X	X	X	
No	X No criminal liability for companies, but administrative sanctions may be applied in case of employee misconduct.				X No explicit legislation.

QUESTION LIST

1. Do any specific procedures need to be considered in case a whistleblower report sets off an internal investigation (e.g. for whistleblower protection)?

There is no specific law for whistleblower protection in Bulgaria. However, Bulgaria is a party to the United Nations Convention against Corruption, the Council of Europe ("**COE**") Civil Law Convention on Corruption, and the COE Criminal Law Convention on Corruption. To fulfil its treaty obligations, Bulgaria provides some measure of protection to whistleblowers through its regulatory framework.

Whistleblower reports and internal investigations in the public sector are subject to the Administrative Procedure Code ("**APC**"). The APC does not contain explicit provisions concerning protection of whistleblowers. However, the APC generally protects whistleblowers in the public sector by protecting them from persecution by the authority against which they have filed a report. Anonymous reporting is not permitted under the APC.

The Bulgarian Counter-Corruption and Unlawfully Acquired Assets Forfeiture Act ("**CCUAAFA**") recently came into force, creating a new anti-corruption state body, the Counter-Corruption and Unlawfully Acquired Assets Forfeiture Commission (the "**Commission**"). Every citizen with information on corrupt practices will be able to report to the Commission, which has the authority to initiate proceedings against public officials.

Anonymous reporting is not permitted under the CCUAAFA, but the Commission may not disclose the identity of the whistleblower to the public. Moreover, the Commission may take affirmative steps to protect the whistleblower from retaliation. Any whistleblower, who has been dismissed, persecuted or harassed, shall be entitled to compensation for any damages suffered thereby.

Whistleblowing in the private sector is less regulated. Sanctions against whistleblowers, including dismissal, are allowed under certain conditions. For instance, under the Labour Code ("**LC**"), an employee may be dismissed for abusing the employer's confidence or disclosing confidential data, although the dismissal may be challenged in court.

2. Do the following persons/bodies have the right to be informed about an internal investigation before it is commenced and/or to participate in the investigation (e.g. the interviews)?

a) Employee representative bodies, such as a works council

b) Data protection officer or data privacy authority

c) Other local authorities

What are the consequences in case of non-compliance?

a) Works councils do not exist in Bulgaria. The collective interests of employees are represented by trade unions and employee representatives elected by the employer. In general, trade unions represent and protect employees' interests before government bodies and employers. The trade unions enjoy, however, very limited rights. The LC does not require that trade unions be informed about internal investigations. Hence, the participation of trade unions in internal investigations is not prevalent.

b) Under the EU General Data Protection Regulation ("**GDPR**"), which enters into force in May 2018, the Data Protection Officer ("**DPO**") must consult with employees about their data privacy rights. An employer must, therefore, inform the DPO about all investigations that implicate data privacy. Furthermore, the Bulgarian Personal Data Protection Act ("**PDPA**") requires employers to inform the Bulgarian Commission on Personal Data Protection when personal data collected during investigations is intended to be transferred to a non-EU state. Pursuant to the GDPR, infringements (such as transferring personal data without explicit consent, when it is needed) may be sanctioned by fines up to €20 million or up to four percent of the total worldwide annual revenue of the preceding financial year, whichever is higher.

c) The Criminal Procedure Code ("**CPC**") obliges employees to inform competent public authorities of criminal offences, regardless of the status of an internal investigation.

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3. Do employees have a duty to support the investigation, e.g. by participating in interviews? If so, may the company impose disciplinary measures if the employee refuses to cooperate?

Employees are not statutorily obliged to support an investigation, e.g. by participating in interviews. However, employees have a general duty to obey the lawful orders of the employer, to follow internal rules adopted by the employer, and to discharge other duties provided by law. Employers may adopt internal rules regarding the conduct of investigations and may request that employees answer work-related questions during an investigation. An employee's refusal may be regarded as misconduct, which could justify imposing disciplinary measures. Prior to imposing disciplinary measures, however, an employer must consider an employee's verbal explanations or examine his/her written notes. Failure to do so may lead to revocation of the imposed disciplinary sanction by the court.

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4. May any labour law deadlines be triggered or any rights to sanction employees be waived by investigative actions? How can this be avoided?

Under the LC, disciplinary sanctions (e.g. dismissal) must be imposed within two months after discovery of the breach and no later than one year after the commission of the offence. Sanctions imposed outside of the statutory period are invalid. Investigations should, therefore, be concluded quickly.

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5. Are there any relevant data privacy laws, state secret laws, or blocking statutes in your country that have to be taken into account before

a) Conducting interviews?

"Personal data" is defined in the PDPA as any information related to an individual, which directly or indirectly, identifies the individual or makes him/her identifiable. If an employer plans to collect personal

data during an interview, it is necessary to obtain the consent of the person whose personal data shall be collected prior to the interview.

b) Reviewing emails?

Before reviewing emails containing personal data or information, consent of the data subject should be obtained. The data subject has the right to be informed about the purpose of the processing, the categories of data concerned, and the identity of the recipient(s) of the data.

Although the constitutional right to confidential correspondence in Bulgaria is not thought to apply to business or private correspondence sent or received via, or stored on, a company's electronic devices, the European Court of Human Rights ("**ECHR**") recently ruled in *Bărbulescu v. Romania* that a company may not monitor an employee's work email without explicitly informing him/her in advance. As a member of the Council of Europe and a party to the European Convention on Human Rights and Fundamental Freedoms, Bulgaria is obliged to implement the decision of the ECHR.

c) Collecting (electronic) documents and/or other information?

While collecting electronic documents, one should take into account the obligations under the PDPA and the Electronic Document and Electronic Signature Act ("**EDESA**"). According to Article 43 paragraph 4 of the EDESA, only personal data relating to the data subject may be collected; data from a third person may only be gathered with his/her explicit consent. Pursuant to the PDPA, a company must file an application with the Commission for Personal Data Protection prior to collecting or processing any personal data. This obligation is expected to be revoked after the GDPR enters into force on the 25 May 2018.

d) Analysing accounting and/or other mere business databases?

It is not necessary to obtain an employee's consent to review accounting or financial records that do not contain personal data.

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6. Before conducting employee interviews in your country, must the interviewee

a) Receive written instructions?

While there is no legal obligation to provide an interviewee with written instructions, such a requirement might be found in a company's internal rules.

b) Be informed that he/she must not make statements that would mean any kind of self-incrimination?

There is no legal obligation to inform an interviewee about the right to be free from self-incrimination during an internal interview. During a criminal interrogation, however, prosecutors must inform the individual of his/her right to remain silent.

c) Be informed that the lawyer attending the interview is the lawyer for the company and not the lawyer for the interviewee (so-called "Upjohn warning")?

Although there is no legal obligation to provide an "Upjohn warning", it is regarded as good practice to do so and may even be required by the employer's internal rules.

d) Be informed that he/she has the right that his/her lawyer attends?

There is no such obligation. The internal rules of the employer should also be consulted in this regard, as they may not allow third parties to attend interviews, including counsel for the interviewee.

e) Be informed that he/she has the right of a representative from the works council (or other employee representative body) to attend?

Employees do not have the right to have trade union representatives attend their interviews.

f) Be informed that data may be transferred cross-border (in particular to the United States)?

The PDPA requires employers to inform the Bulgarian Commission on Personal Data Protection when personal data collected during investigations is intended to be transferred to a non-EU member state.

g) Sign a data privacy waiver?

Employers must receive written, informed consent in order to process personal data.

h) Be informed that the information gathered might be passed on to authorities?

The interviewee must be informed that the information might be passed on to authorities, especially when it contains personal data.

i) Be informed that written notes will be taken?

There is no legal obligation to inform that interviewee that notes will be taken during the interview.

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7. Are document hold notices or document retention notices allowed in your country? Are there any specifics to be observed (point in time/form/sender/addressees etc.)?

There is no law pertaining to the use of document hold or retention notices in Bulgaria. Employers must be careful not to retain certain documents in violation of the law. For example, retaining working files of a former employee may be, under certain circumstances, unlawful and could result in civil liability for the employer. On the other hand, employers are able to retain certain administrative documents, such as payroll files, even after the end of an employment relationship.

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8. May attorney-client privilege be claimed over findings of the internal investigation? What steps may be taken to ensure privilege protection?

The attorney-client privilege is provided by the Bulgarian Bar Act ("**BA**"). According to Article 33 of the BA, correspondence and conversations between a lawyer and a client are confidential. Attorney papers, files, electronic documents, computer equipment, and other carriers of information may not be subject to inspection, copying, verification, or seizure. The scope of protection is broad in order to guarantee the protection of privileged information. An internal investigation report would fall under the attorney-client privilege, as it is considered information exchanged in the course of an attorney-client relationship. The best way to ensure the applicability of attorney-client privilege is to engage outside counsel.

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9. Can attorney-client privilege also apply to in-house counsel in your country?

Communication with an in-house lawyer is not considered privileged under Bulgarian law. However, in-house counsel, as a regular employee of the company, should handle correspondence according to the internal rules of the company.

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10. Are any early notifications required when starting an investigation?

a) To insurance companies (D&O insurance etc. to avoid losing insurance coverage)?

Pursuant to the Bulgarian Insurance Code, the insured entity is obliged to declare to the insurer all new circumstances, which the insurer has raised to the company at the conclusion of the contract. New circumstances must be revealed to the insurance company immediately after they are known. Early notification to the insurance company may be a subject of the terms and conditions of the insurance policy.

b) To business partners (e.g. banks and creditors)?

Early notification requirements may stem from contractual clauses, but, regardless, it is be advisable to provide such notification to avoid future complication. It is common practice for banks to oblige borrowers to notify them in case of an adverse event, which may harm the interests of the bank.

c) To shareholders?

If an internal investigation may affect the stock market price of a publicly traded company, this information must be disclosed in accordance with Bulgarian law. However, the volume of the disclosed information shall

be evaluated case by case, taking in consideration the imperative rules for trading with inside information and market manipulation (market abuse).

d) To authorities?

Prosecution authorities should be notified about any criminal offence that is discovered during an investigation, but no general early notification at the start of an internal investigation is necessary.

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11. Are there certain other immediate measures that have to be taken in your country or would be expected by the authorities in your country once an investigation is started, e.g. any particular immediate reaction to the alleged conduct?

There is no law or regulation concerning the need to take immediate measures. However, companies must make sure that any on-going criminal behaviour in the company is stopped as soon as possible.

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12. Will local prosecutor offices generally have concerns about internal investigations or do they ask for specific steps to be observed?

As internal investigations are not regulated by Bulgarian law, the local prosecutor does not normally concern itself with them. Should the prosecuting authorities receive reasonable information about an act that could be considered a criminal offence, they are obliged to commence an investigation. If disclosed, the findings of an internal investigation may be the basis for the prosecutors to open a case and may also be useful to the prosecutors as they collect evidence during their criminal investigation.

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13. Please describe the legal prerequisites for search warrants or dawn raids on companies in your country. In case the prerequisites are not fulfilled, may gathered evidence still be used against the company?

Search warrants or seizure warrants are strictly regulated in Bulgarian law. A search or seizure may only be conducted where there is sufficient reason to believe that information significant to the prosecutors' investigation may be found.

A valid warrant must be in writing, signed by a judge, and contain the necessary material requirements. The individual subject to the search or seizure or, in the case of legal persons, a representative thereof, must be present during the search or seizure. Where no representative of a legal person can be present, the search and seizure may be carried out in the presence of a representative of the municipality.

In urgent cases, authorities may perform an examination without prior judicial authorisation, should it be necessary to preserve evidence. However, in this case, a report documenting the investigative actions taken must be made and submitted for approval to a judge no later than 24 hours after the search or seizure.

Improperly gathered evidence may not be used against the company. Only evidence collected lawfully, as provided under the CPC, may be used in criminal proceedings.

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14. Are deals, non-prosecution agreements, or deferred prosecution agreements available and common for corporations in your jurisdiction?

Corporations are not subject to criminal liability under Bulgarian law. Thus, they cannot be subject to deals and non-prosecution agreements.

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15. What types of penalties (e.g. fines, imprisonment, disgorgement, or debarment) may companies or its directors, officers, or employees face for misconduct of (other) individuals of the company?

Companies are not subject to criminal liability, but may be subject to administrative sanctions, such as fines. Should the activities of a company be regulated by the state, the regulatory authority may suspend or revoke the company's licence.

Individuals may be subject to the general criminal and administrative penalties for misconduct.

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16. Please briefly describe any investigations trends in your country (e.g. recent case law, upcoming legislative changes, or special public attention on certain topics)?

According to a European University Institute report, Transparency International Bulgaria's Advocacy and Legal Advice Centre ("**ALAC**"), a non-governmental organisation providing free and confidential legal advice to witnesses and victims of corruption, has, thus far, received very few complaints from employees or civil servants reporting illegal activities or wrongdoing by their employers. Operating since 2006, the ALAC has received only two whistleblowing-related notifications (one coming from a public official and one from the private sector). However, given increased discussion of whistleblowing on the EU level, changes to Bulgarian law in this area are expected in the future.

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Ivo Alexandrov heads the Kambourov & Partners' Restructuring & Enforcement of Securities department and is a key member of the Banking & Finance and Corporate practices. Ivo represents local and international companies with respect to corporate crime-investigations as well as financial institutions, investment and hedge funds, project sponsors, etc., in a multitude of transactions, e.g. large syndicated financings, cross-border finance, transactions escrow of shares and financial instruments, enforcement of netting arrangements, custodian and escrow arrangements of financial instruments. He advises clients from a wide range of industries, including finance, banking, insurance, retail on the complex domestic and EU regulatory requirements and is experienced in all areas of business and financial services regulation, as well in cross-border M&As, foreign investments, project finance, regulatory issues (public, commercial, economic, environmental, etc.).

Croatia

Babić & Partners Law Firm LLC

 Iva Basarić  Lovro Klepac

TABLE

	Corporate Liability	Public Bribery	Commercial Bribery	Extraterritorial Applicability of Criminal Laws	Adequate Procedures Defence
Yes	X	X	X	X	
No					X No specific defence, but greater likelihood of liability for failure to implement anti-corruption programmes.

QUESTION LIST

1. Do any specific procedures need to be considered in case a whistleblower report sets off an internal investigation (e.g. for whistleblower protection)?

There are no specific whistleblower protection laws in Croatia. However, the Croatian Labour Code contains rules which prevent discrimination against whistleblowers, who justifiably or in good faith report suspected corruption to the responsible parties or public authorities. Prior internal disclosure is not mandated by law, especially when the reported misconduct of the employee, officer, or director constitutes a criminal deed. Nevertheless, dismissals of employees, who have reported violations to the public media instead of to competent authorities, have been ruled by the courts as justified.

2. Do the following persons/bodies have the right to be informed about an internal investigation before it is commenced and/or to participate in the investigation (e.g. the interviews)?

a) Employee representative bodies, such as a works council

b) Data protection officer or data privacy authority

c) Other local authorities

What are the consequences in case of non-compliance?

a) The employer must obtain the consent of the works council prior to collecting, processing, or delivering the personal data of employees to third parties. Since internal investigations typically involve collecting and processing personal data and possibly delivering such data to third parties, employers practically cannot initiate such investigations without the prior consent of the works council. In addition, union representatives, if appointed by the employer, generally also need to be informed of investigations concerning employees, who are members of the union.

b) Under Croatian data protection legislation, one of the duties of the data protection officer is to ensure that employees' rights with respect to personal data processing are observed. In this regard, it would be advisable to inform the data protection officer of the investigation and to provide the data protection officer with any information requested.

c) There is no legal requirement to inform the prosecution authorities of an internal investigation, unless the company has sufficient information to qualify the investigated misconduct as a criminal deed.

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3. Do employees have a duty to support the investigation, e.g. by participating in interviews? If so, may the company impose disciplinary measures if the employee refuses to cooperate?

Employees have a general duty to cooperate in an investigation by providing information, which directly relates to their work. Violation of this duty may qualify as a breach of employment duties, especially if it leads to economic loss for the employer. Depending on the severity of the breach, non-compliance with an employer's request to support an investigation may result in termination of the employee. Company policy may provide more detailed rules governing employee duties and sanctions for violating such duties.

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4. May any labour law deadlines be triggered or any rights to sanction employees be waived by investigative actions? How can this be avoided?

Investigative measures may initiate a 15-day deadline for summary dismissal for cause, in cases where the investigation uncovers gross misconduct of the employee. The deadline is triggered when the employer (i.e. a representative with authority to dismiss) becomes aware of the facts or circumstances reasonably leading to the conclusion that misconduct has been committed. To avoid triggering this deadline too early, the employer should be informed of the results of the investigation at a later stage, after comprehensive information has been gathered.

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5. Are there any relevant data privacy laws, state secret laws, or blocking statutes in your country that have to be taken into account before

a) Conducting interviews?

Before conducting interviews, the employee must be informed of the purpose for which his/her personal data has been collected and processed. Interviews should be limited to questions about work-related issues.

b) Reviewing emails?

Employees' electronic communications may be monitored only in extraordinary circumstances when the following prerequisites are met: (1) the processed data may only be collected to satisfy the specific purpose of such surveillance and cannot be used for any other purpose; (2) the possibility of electronic communication surveillance must be transparently communicated to the employees (e.g. by way of company policies); (3) there must be a legitimate purpose for monitoring; and (4) a proportionality test must be met, i.e. the surveillance should generally be limited to data traffic and not include content, which may only be monitored if absolutely necessary.

c) Collecting (electronic) documents and/or other information?

The Croatian Personal Data Protection Act, which is based on the European data protection directive, will be superseded by Regulation (EU) 2016/679 in May 2018. Although communication with authorities can trigger applicability of data protection laws, the request of the authority will often be a sufficient justification for gathering and using data. Any personal data of the employee can be collected if there is a valid legal basis, such as protection of the employer's legitimate interests.

d) Analysing accounting and/or other mere business databases?

A company is generally free to analyse any accounting and other mere business databases.

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6. Before conducting employee interviews in your country, must the interviewee

a) Receive written instructions?

Croatian law does not provide for an express obligation on the employer to deliver written instructions to the employee before starting an interview. As a best practice, it is advisable to provide the employee with general information about the investigation and to document this in writing, along with employee's consent to the interview (e.g. minutes of the interview co-signed by the employee).

b) Be informed that he/she must not make statements that would mean any kind of self-incrimination?

In contrast to investigations initiated by the prosecution authorities, there is no right to remain silent during an internal investigation conducted by a company. However, the employer should avoid putting any pressure on the employee to self-incriminate, in order to mitigate potential future duress claims by the employee.

c) Be informed that the lawyer attending the interview is the lawyer for the company and not the lawyer for the interviewee (so-called "Upjohn warning")?

There is no duty under Croatian law to provide an "Upjohn warning" to the interviewee, though it is advisable to do so.

d) Be informed that he/she has the right that his/her lawyer attends?

Croatian law does not expressly provide that an interviewee has a right to have an attorney present at his/her interview. However, if the employee requests to have his/her attorney present, it is advisable to allow it.

e) Be informed that he/she has the right of a representative from the works council (or other employee representative body) to attend?

Employees do not, under the default rules of Croatian labour law, have a right to have a works council representative present at their interviews. Company policies and collective agreements, if any, should be consulted in order to assess whether such rights are provided therein. In any case, it is advisable to allow the attendance of a member of the works council or other representative body upon employee request.

f) Be informed that data may be transferred cross-border (in particular to the United States)?

Under Croatian data privacy law, transfer of data to non-EU states or organisations is only permissible if adequate safeguards and procedures are deemed to have been established in such states or organisations. With respect to the United States, the adequacy requirement is deemed to have been met for U.S. organisations that are privacy shield certified. Where the adequacy requirement is not met, the prior approval of the local data protection authority will be required. An employee may consent to the transfer of his/her data to countries that do not ensure an adequate level of protection.

g) Sign a data privacy waiver?

Employee consent is required to process any personal data other than data that the employer is required to process under law and/or to administer the employment relationship. A data privacy waiver may be beneficial if the employer intends to process the employee's data for a different purpose.

h) Be informed that the information gathered might be passed on to authorities?

The employer must inform the data subject that the gathered personal data may be passed on to authorities, unless reporting to authorities is mandated by law. If an interview yields evidence of a crime, the employer must pass on such information and evidence to the authorities and does not need to inform the employee either (i) that there is a duty to deliver such information to authorities; or (ii) that the information will be passed on to prosecution bodies. Processing of such data is expressly mandated by the rules of criminal procedure.

i) Be informed that written notes will be taken?

There is no obligation under Croatian law to inform the interviewee that notes of the conversation will be taken. It is, nevertheless, advisable to inform the employee and to ask the employee to co-sign the notes, as confirmation of their accuracy, in case any litigation is subsequently initiated.

7. Are document hold notices or document retention notices allowed in your country? Are there any specifics to be observed (point in time/form/sender/addressees etc.)?

Croatian law does not address document hold or retention notices. However, the rules of criminal procedure provide for a general duty of any legal entity reporting a crime to preserve existing traces or evidence of a committed offence. In addition, special procedural rules exist to secure evidence in civil litigation. An application may be filed by any of the parties before or during (civil) litigation proceedings if justified doubt exists that certain events would hinder the examination of evidence at a later stage of the proceedings. If such an application is filed before the proceedings are initiated, the evidence shall be examined by the competent court in the territory where the evidence is located.

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8. May attorney-client privilege be claimed over findings of the internal investigation? What steps may be taken to ensure privilege protection?

Attorney-client privilege may generally only be claimed with respect to correspondence with outside counsel and documents in the possession of outside counsel. In order to ensure privilege protection, internal investigations, including interviews, should be conducted by/through outside counsel.

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9. Can attorney-client privilege also apply to in-house counsel in your country?

Under Croatian law, attorney-client privilege does not extend to in-house counsel.

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10. Are any early notifications required when starting an investigation?

a) To insurance companies (D&O insurance etc. to avoid losing insurance coverage)?

Generally, early notification to insurance companies will be required where circumstances are uncovered that may form the basis for an insurance claim. However, notification obligations depend on the agreement and the type of insurance.

b) To business partners (e.g. banks and creditors)?

The company may be required to inform its business partners of internal investigations and related findings, if required by the agreements with the respective partners. The company may also be required by the good faith principle to inform its business partners of an investigation, if the investigation and its consequences may have significant impact on the business partners. This should be assessed on a case-by-case basis, balancing the opposing interests.

c) To shareholders?

Depending on the information and/or misconduct uncovered and any provisions to this effect in the company's internal policies, the management board may be obligated to notify shareholders. However, the management board has rather broad discretionary power in assessing whether to notify shareholders or maintain confidentiality.

According to Croatian securities trading legislation, if the information gathered by an internal investigation is of a precise nature and would probably significantly influence the price of financial instruments issued by the company, it is the duty of the management board to report such information to the public.

d) To authorities?

There is no general duty to notify the State Attorney's Office or any other authority of an on-going internal investigation. However, every person is obliged to report criminal activities. In some instances, such as for company directors or officers, violation of this duty may result in criminal prosecution.

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11. Are there certain other immediate measures that have to be taken in your country or would be expected by the authorities in your country once an investigation is started, e.g. any particular immediate reaction to the alleged conduct?

Depending on the nature and severity of the alleged wrongful conduct, the company should strive to mitigate any further damage. Subject to the company's code of conduct and other policies, employees may be sanctioned for uncovered misconduct. In addition to sanctioning employees, the company should re-evaluate and improve its compliance system.

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12. Will local prosecutor offices generally have concerns about internal investigations or do they ask for specific steps to be observed?

Local prosecutor offices do not generally have concerns about internal investigations conducted by companies. Documents gathered during a corporate internal investigation may be used in subsequent proceedings initiated by the local prosecutor. Therefore, the company should ensure retention of documents and any information that may be later requested by the prosecutors.

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13. Please describe the legal prerequisites for search warrants or dawn raids on companies in your country. In case the prerequisites are not fulfilled, may gathered evidence still be used against the company?

A dawn raid may be undertaken when it is probable that a person who committed a criminal deed, the object of a criminal offence, or traces of evidence can be found in particular spaces. Dawn raids conducted by the Croatian competition regulator must be approved in advance by the High Administrative Court. Warrants required to conduct a dawn raid are governed by the Croatian Competition Act and subject to special rules. The court must render a decision within two days of the regulator's request. The warrant, which is issued by the High Administrative Court, must identify the object(s) of the search, the legal basis for the raid, the person(s) authorised to conduct the raid and the deadline for execution of the warrant. The warrant must be presented to the owner or operator of the premises on which the dawn raid is conducted. Authorised officials conducting the dawn raid may: inspect the entire premises; inspect and copy business records and other documents; and seal the premises, business records, or other documentation as long as necessary to conduct the raid.

Search warrants must be issued by a competent court, unless an immediate search is necessary to preserve evidence directly related to a crime, which is in danger of being lost or destroyed. A search warrant must identify the object of the search and its purpose and name the authority conducting the search. A search warrant must be issued in writing and signed by a judge. The search must be conducted within three days of issuance of the warrant. The warrant must be presented to the person whose premises are to be searched and the search must be witnessed by at least two persons of legal age. An authorised representative of the company must be informed of his/her right to attend the search. Failure to inform is a violation of criminal procedure, but would not lead to the inadmissibility of evidence uncovered during the search.

Not every procedural infringement during a search will lead to the evidence collected being deemed inadmissible. Croatian criminal law and Supreme Court practice both recognise that only serious procedural violations may lead to a finding of inadmissibility in criminal proceedings. Specifically, only evidence gathered during a search undertaken without a warrant or without the required witnesses may be excluded from criminal proceedings.

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14. Are deals, non-prosecution agreements, or deferred prosecution agreements available and common for corporations in your jurisdiction?

Deals, non-prosecution agreements, and deferred prosecution agreements are available and encouraged in Croatian criminal law and the practice of the State Attorney's Office. For a non-prosecution agreement or deferred prosecution agreement to be implemented, several substantive and procedural requirements must be met. First, the penalty prescribed for that particular offence cannot be more than five years' imprisonment. Second, the suspect or the accused must undertake either to compensate the injured person for damages suffered by the crime, donate to

humanitarian or social causes, or participate in community service. If the suspect or accused satisfies the requirements within one year, the State Attorney must dismiss the criminal charge.

Plea bargains are also available under Croatian criminal procedural law. The accused and the State Attorney may negotiate the conditions of the plea and the subsequent sanctions. During such negotiations, the accused must be represented by an attorney. The deal negotiated between the accused and the State Attorney must be executed in writing, signed by both parties, and confirmed by the competent criminal court. Criminal procedural rules concerning the content of such deals must also be observed.

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15. What types of penalties (e.g. fines, imprisonment, disgorgement, or debarment) may companies or its directors, officers, or employees face for misconduct of (other) individuals of the company?

Under Croatian law, companies and other legal entities may be subject to criminal liability for the criminal conduct of officers and directors. Companies that are found liable are subject to monetary fines, dissolution, and associated protective measures, such as operating bans, disgorgement of profits, exclusion from public tenders, and exclusion from obtaining licences, permits and concessions. Administrative or misdemeanour fines may be imposed for less serious violations.

A company's directors and officers may be held liable for failing to report misconduct of other directors, officers, or employees and may face up to three years' imprisonment.

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16. Please briefly describe any investigations trends in your country (e.g. recent case law, upcoming legislative changes, or special public attention on certain topics)?

Certain non-governmental organisations and media have recently criticised the Croatian whistleblower protection system as ineffective and inadequate. One of the main criticisms is the fact that whistleblowers, who feel their employer is retaliating against them for their external reporting activity, have no remedy other than to litigate and pursue recourse through the courts. Although whistleblower protection is a topic of public discussion, no legislative steps have been taken, thus far, to revise or expand the law.

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Iva Basarić is a partner at Babić & Partners. Iva earned an LL.M. degree in International Transactions and Comparative Law at the University of San Francisco, USA. She regularly advises clients from diverse industries on various corporate/commercial, regulatory and data privacy issues. Iva has vast experience in assisting international clients with all aspects of internal investigations conducted in their Croatian subsidiaries. In 2006/2007 Iva participated in the Willem C. Vis international Commercial Arbitration Moot, as a member of the University of Zagreb moot team that was awarded second place in the oral rounds of the competition.

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Lovro Klepac is an associate and member of employment law group at Babić & Partners. After graduating from the University of Zagreb, Faculty of Law, he earned an LL.M. degree in international business law at the Central European University in Budapest. Lovro's practice comprises all aspects of the firm's employment law practice, including advising on data privacy issues and employee investigations. He was a member of the University of Zagreb moot team at the Willem C. Vis international Commercial Arbitration Moot that was awarded honorable mention for Memorandum for Respondent in 2015/2016.

Cyprus

Chrysses Demetriades & Co LLC

 Demetris L. Araouzos  Sophia Nearchou

TABLE

	Corporate Liability	Public Bribery	Commercial Bribery	Extraterritorial Applicability of Criminal Laws	Adequate Procedures Defence
Yes	X	X	X	X Depending on the type of offence.	X
No					

QUESTION LIST

1. Do any specific procedures need to be considered in case a whistleblower report sets off an internal investigation (e.g. for whistleblower protection)?

In general, there are no whistleblower protection laws in Cyprus. However, other laws offer protection, both direct and indirect, for individuals who report wrongdoing, such as bribery or corruption. Whistleblowers in the public sector are protected by law from retaliation. They cannot be punished in any way or otherwise treated unfairly as a result of submitting a report.

The only body issuing provisions exclusively for whistleblower protection in the private sector is the Cyprus Securities and Exchange Commission ("**CySec**"). CySec issued a circular on the Market Abuse Law in line with European Council and European Commission directives. The circular establishes procedures for the receipt of whistleblower reports and follow-up measures and provides an electronic whistleblowing disclosure form. Entities listed and regulated by CySec are bound by the circular.

The Reference of Acts of Corruption Law of 2017, which would provide additional measures for whistleblower protection, is currently pending before parliament. Until its passage, whistleblower protection can be sought under the provisions of the Council of Europe ("**COE**") Civil Law Convention on Corruption, according to which an employee cannot face any sanctions for whistleblowing, and the COE Criminal Law Convention on Corruption. According to Article 22 of the Criminal Law Convention, authorities and agencies must ensure effective and appropriate protection for whistleblowers and witnesses, who cooperate with authorities to prosecute offences listed in Articles 2 to 14.

2. Do the following persons/bodies have the right to be informed about an internal investigation before it is commenced and/or to participate in the investigation (e.g. the interviews)?

a) Employee representative bodies, such as a works council

b) Data protection officer or data privacy authority

c) Other local authorities

What are the consequences in case of non-compliance?

a) Although employee representative bodies do not have a legal right to be informed of the start of an investigation, it is considered a best practice to allow an employee to have a union representative attend his/her interview, if the employee requests such attendance.

b) According to the Personal Data Protection Law ("**PDPL**"), the Data Protection Officer ("**DPO**") must supervise all processing of personal data to ensure data security and prevent unauthorised disclosure or unfair treatment. "Personal data" means any information relating to an identified or identifiable natural person. Hence, the DPO should be notified before starting an internal investigation, which will require the collection and processing of personal data. The PDPL will be superseded in May 2018 by the European Union's General Data Protection Regulation ("**GDPR**"). Pursuant to the GDPR, a company conducting an internal investigation, must also inform the DPO of all processing activities being conducted for the investigation.

c) No other local authority needs to be informed of an internal investigation, other than the regulators (if necessary) and/or the prosecution authorities, who must be notified if criminal conduct is uncovered during the investigation. The Public Service Law and the Code of Ethics of the Public Services oblige civil servants to report suspected cases of corruption or bribery to their respective authority. Failure to do so constitutes an offence.

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3. Do employees have a duty to support the investigation, e.g. by participating in interviews? If so, may the company impose disciplinary measures if the employee refuses to cooperate?

No law in Cyprus provides an affirmative obligation for an employee to cooperate with an internal investigation. However, pursuant to the Employment Law (24/1967), if an employee's refusal to cooperate clearly and unequivocally shows that the employment relationship can no longer be continued, the employee can be dismissed without notice.

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4. May any labour law deadlines be triggered or any rights to sanction employees be waived by investigative actions? How can this be avoided?

No reference to the initiation or waiver of labour law deadlines is made in the Employment Termination Law of 1967.

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5. Are there any relevant data privacy laws, state secret laws, or blocking statutes in your country that have to be taken into account before

a) Conducting interviews?

The PDPL applies to any processing of personal data, including the gathering or recording of such data in an interview. Before personal data may undergo any kind of processing, the data subject must be informed who is collecting the data, for what purpose and with whom the data is to be shared. The consent of the data subject must also be obtained. Consent must be freely given.

b) Reviewing emails?

According to the PDPL, personal data, such as emails, may only be collected and processed when: (1) the data subject has given explicit consent; (2) the processing is necessary for the data controller to fulfil its obligations or to perform its duties; and (3) the Data Protection Commissioner, the data protection authority in Cyprus, has authorised the collection, where data will be transferred outside of the European Union.

c) Collecting (electronic) documents and/or other information?

The PDPL must be observed not only with respect to emails, but to all documents and information containing personal data.

d) Analysing accounting and/or other mere business databases?

Analysing mere business databases does not fall under the definition of personal data processing. Therefore, the provisions of the law regarding the right to be informed do not apply.

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6. Before conducting employee interviews in your country, must the interviewee

a) Receive written instructions?

There is no statutory obligation to give written instructions to an employee before an interview, but the employee must be given advance notice that an interview may occur.

b) Be informed that he/she must not make statements that would mean any kind of self-incrimination?

Only when an individual is interviewed by criminal authorities, such as the police, does he/she have the right to remain silent.

c) Be informed that the lawyer attending the interview is the lawyer for the company and not the lawyer for the interviewee (so-called "Upjohn warning")?

There is no obligation under Cyprus law to provide an "Upjohn warning".

d) Be informed that he/she has the right that his/her lawyer attends?

Parliament is currently debating a bill that would provide an individual the right to request the presence of his/her lawyer during questioning by police and/or prosecutors. Currently, no such right exists. The bill does not apply to internal investigations.

e) Be informed that he/she has the right of a representative from the works council (or other employee representative body) to attend?

It is considered a best practice to allow an employee to have a union representative attend his/her interview, if the employee requests such attendance. However, the employee does not have a legal right to have the representative attend.

f) Be informed that data may be transferred cross-border (in particular to the United States)?

The PDPL requires that the data subject to be informed of data transfers, as the data subject's consent is required. If the data is to be processed for any purpose other than that for which it was originally obtained, the data subject must again be informed. According to the PDPL, the cross-border transmission of data must be authorised by the Data Protection Commissioner. The Data Protection Commissioner will typically only authorise a transfer to another country if the country to which the data will be sent provides an adequate level of protection.

g) Sign a data privacy waiver?

Under the PDPL, a waiver may be required if the personal data of the employee may be used for a purpose other than the original purpose given for the collection or may be given to third parties. The employee must be informed of the purpose and give his/her consent.

h) Be informed that the information gathered might be passed on to authorities?

There is currently no legal obligation under the PDPL to inform an employee that information gathered during the interview may be passed on to authorities. However, under the GDPR, the data subject must be informed why his/her data is being collected and how it will be processed. The data subject must also be informed if his/her data will be transmitted to a third party, including authorities.

i) Be informed that written notes will be taken?

There is no legal obligation under Cyprus Law to inform the employee that written notes will be taken, but it is common practice to do so.

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7. Are document hold notices or document retention notices allowed in your country? Are there any specifics to be observed (point in time/form/sender/addressees etc.)?

There is no specific provision in the law on whether document holds or retention notices are allowed. As internal investigations are not yet common in Cyprus, such notices are also not customary.

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8. May attorney-client privilege be claimed over findings of the internal investigation? What steps may be taken to ensure privilege protection?

The Legal Professional Privilege derives from the Advocates' Law (Cap. 2) and the Advocates' Code of Conduct 2002 (the "**Regulations**"). According to the Regulations and, as a general rule, communications and dealings of advocates with their client are protected by the Legal Professional Privilege. The advocate is under a duty to keep strictly confidential information derived from communication with the client, once the advocate-client relationship has been established. However, the privilege only extends to legal communications, i.e. communications seeking/obtaining legal services or advice. As internal investigations are not yet common in Cyprus, it is unclear whether the Legal Professional Privilege would apply to them. The privilege does apply in criminal and regulatory investigations by authorities.

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9. Can attorney-client privilege also apply to in-house counsel in your country?

Legal Professional Privilege also applies to in-house counsel in Cyprus, provided that in-house counsel is admitted to the Cyprus Bar.

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10. Are any early notifications required when starting an investigation?

a) To insurance companies (D&O insurance etc. to avoid losing insurance coverage)?

Early notification requirements may stem from individual insurance policies, but there is no statutory notification obligation.

b) To business partners (e.g. banks and creditors)?

Notification to business partners is only necessary if required by the agreement between the partners and the company.

c) To shareholders?

A shareholders' agreement may provide an early notification requirement. Otherwise, if a company's shares are publicly traded, it has a duty to inform the public about information that could affect the stock price. However, a company is not required to provide notification at the start of an investigation.

d) To authorities?

Generally there is no obligation to inform authorities about internal investigations within a company. The obligation may arise if a criminal offence is involved.

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11. Are there certain other immediate measures that have to be taken in your country or would be expected by the authorities in your country once an investigation is started, e.g. any particular immediate reaction to the alleged conduct?

There is no law concerning the need to take immediate measures, but best practices would mean that any criminal conduct is stopped immediately. Mitigation measures may include the dismissal of wrongdoers and the protection of whistleblowers against unfair dismissal or other punishment.

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12. Will local prosecutor offices generally have concerns about internal investigations or do they ask for specific steps to be observed?

Generally prosecutors play no role in internal investigations. However, prosecutor offices may become involved if they are notified by the company that an internal investigation is on-going and their involvement is deemed necessary.

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13. Please describe the legal prerequisites for search warrants or dawn raids on companies in your country. In case the prerequisites are not fulfilled, may gathered evidence still be used against the company?

For searches and dawn raids of companies in Cyprus, certain prerequisites must be fulfilled.

According to Section 27 of the Criminal Procedure Law, a judge can issue a search warrant on the basis of a sworn statement that there are reasonable grounds to believe that evidence, which may be used as proof of the commission of an offence, will be found. The search warrant authorises person named in the sworn statement to enter the premises and seize such evidence.

Various regulatory authorities, including CySec and the Competition Commission, as well as government agencies, such as tax authorities, have the right to enter and seize evidence for their administrative purposes without warrants (dawn raids).

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14. Are deals, non-prosecution agreements, or deferred prosecution agreements available and common for corporations in your jurisdiction?

Deals, non-prosecution agreements, and deferred prosecution agreements are not available for corporations under Cyprus law.

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15. What types of penalties (e.g. fines, imprisonment, disgorgement, or debarment) may companies or its directors, officers, or employees face for misconduct of (other) individuals of the company?

Depending on the type of criminal offence, a company may be fined and its directors, officers and employees imprisoned and/or fined.

For administrative violations, regulatory authorities may, among other things, impose administrative fines, suspend professional licences, order disgorgement of profits earned through wrongful conduct, and/or ban individuals from discharging managerial responsibilities.

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16. Please briefly describe any investigations trends in your country (e.g. recent case law, upcoming legislative changes, or special public attention on certain topics)?

Political efforts to strengthen whistleblower rights began in 2011 following a catastrophic explosion at a central army base in Cyprus, which killed 13 people. The committee investigating the incident reported in its findings that the disaster may have been avoided had whistleblower protections been in place.

In 2014 Transparency International-Cyprus ("**TI-C**") launched the European programme "Speak UP II" to provide support, guidance, and information to victims of corruption and to whistleblowers. TI-C has recommended 43 measures to the Minister of Justice and Public Order in Cyprus to prevent corruption and promote integrity.

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Established in 1948 – Chrysses Demetriades has always been instrumental to the development of Cyprus as an offshore and international financial centre. Widely acknowledged and consistently ranked as one of the leading law firms in Cyprus by the independent legal directories the Legal 500, Chambers and Law Firm Directory.

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- Litigation & Dispute Resolution

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Demetris has extensive experience, *inter alia*, in commercial/corporate contentious matters that often involve large and well-known local or international groups or wealthy individuals, the proceedings of which invariably have to take place in multiple jurisdictions. Amidst the banking crisis in Cyprus in 2012-2013 and the collapse of one of the two major banks, Demetris was instructed to advise and bring proceedings on behalf of a failing bank against some of its ex-directors. He was also appointed by the Government of Cyprus as member of the legal team that defends Cyprus in on-going ICSID proceedings that have been brought against it by certain Greek shareholders with substantial participation in the failing bank. He is occasionally retained to act for listed companies and their directors/officers on various regulatory issues and, as he invariably undertakes criminal work, he has been retained to defend ex-directors and senior officers of the largest Cyprus bank in market abuse criminal cases. Although Demetris spends most of his time before the Courts, he is often engaged in the negotiation and drafting of different types of agreements.

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Sophia is a lawyer in the Compliance department of our firm, dealing with all Anti-Money Laundering ("AML") cases and regulatory compliance.

During the course of her employment, Sophia has also completed various courses relating to the Anti-Money Laundering (AML) compliance as well as various other forms of regulatory compliance such as in the fields of Personal Data Protection and tax related fields such as FATCA/CRS.

In July 2016, Sophia successfully passed the Financial Services and Regulatory Advanced Examination of the by Cyprus Securities and Exchange Commission (CySEC), which is recognised by the Charted Institute for Securities and Investment.

Czech Republic

Kinstellar

 Michal Kníž

 Kristýna Del Maschio

TABLE

	Corporate Liability	Public Bribery	Commercial Bribery	Extraterritorial Applicability of Criminal Laws	Adequate Procedures Defence
Yes	X	X	X	X	X
No					

QUESTION LIST

1. Do any specific procedures need to be considered in case a whistleblower report sets off an internal investigation (e.g. for whistleblower protection)?

Currently, there is no comprehensive law dealing with whistleblowers in the Czech Republic. State employees are protected by a regulation prohibiting any form of discrimination or retaliation against them. However, this regulation is considered vague by most. As part of its anti-corruption initiative, the government plans to improve whistleblower protection laws in the immediate future, most likely by amending the Code of Civil Procedure.

Should an employer receive a whistleblower report, it might have a general obligation to prevent certain crimes (e.g. bribery) from being committed or to report certain crimes that have been committed to respective authorities under the Criminal Code. No other specific obligations (e.g. reporting back to the individual) currently exist pursuant to Czech law.

2. Do the following persons/bodies have the right to be informed about an internal investigation before it is commenced and/or to participate in the investigation (e.g. the interviews)?

a) Employee representative bodies, such as a works council

b) Data protection officer or data privacy authority

c) Other local authorities

What are the consequences in case of non-compliance?

a) Pursuant to Sections 279 and 280 of the Czech Labour Code, certain matters must be discussed with or, at least, brought to the attention of employee representative bodies. However, internal investigations do not fall within the scope of these matters.

b) Data protection officers, as understood under the European Union data protection regime, do not yet exist in the Czech Republic. The data privacy authority must be notified, in general, about any personal data processing, including for internal investigations. However, such notification can be made in a general manner in order to exclude any leakage of information about the internal investigation (e.g. the investigation can be described as an audit of business operations or a compliance review).

c) A public prosecutor has neither the right to participate nor to be informed about an internal investigation, but voluntary disclosure of the results of the investigation may be advantageous in the event of subsequent

criminal proceedings. However, a voluntary disclosure must be considered carefully. Due to insufficient regulations on structured criminal settlements and very few specific cases of leniency, the impact of voluntary disclosure on the outcome of a criminal proceeding is highly uncertain.

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3. Do employees have a duty to support the investigation, e.g. by participating in interviews? If so, may the company impose disciplinary measures if the employee refuses to cooperate?

While the obligation to cooperate with the investigation is not explicitly stipulated by law, such obligation may be inferred from general employee duties, such as the duty to protect the employer's property, the duty not to act in violation of the employer's legitimate interests, and the duty to prevent damage to the employer. Refusal to cooperate with the investigation may be treated as a breach of the employee's duties. Therefore, the employee would be subject to disciplinary proceedings, which may eventually lead even to dismissal. The employer may also claim damages. However, the calculation of such damages, in practice, might be complicated.

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4. May any labour law deadlines be triggered or any rights to sanction employees be waived by investigative actions? How can this be avoided?

Investigative actions may trigger labour law deadlines under the Czech Labour Code. A supervisor, manager, or other person with authority must terminate or instantly dismiss an employee within two months of being informed of the employee's misconduct. To avoid triggering these deadlines, information about the investigation or its results should be shared with these decision makers at a late stage in the investigation.

---

5. Are there any relevant data privacy laws, state secret laws, or blocking statutes in your country that have to be taken into account before

a) Conducting interviews?

It is essential to take into account data protection laws when conducting interviews, especially the Data Protection Act (No. 101/2000 Coll.), because Czech data protection laws apply to any processing of data. The Data Protection Act will be superseded by the European Union's General Data Protection Regulation ("**GDPR**") in May 2018.

b) Reviewing emails?

As when conducting interviews, data protection laws must be considered before reviewing emails. General provisions of the Czech Civil Code and Labour Code regarding privacy protection should also be considered.

c) Collecting (electronic) documents and/or other information?

Pursuant to the Czech Civil Code, electronic documents enjoy the same level of protection as paper ones. Therefore, while collecting documents, the relevant provisions of the Data Protection Act, Civil Code, and Labour Code should be taken into account.

d) Analysing accounting and/or other mere business databases?

No specific laws have to be considered when analysing accounting and/or other mere business databases.

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6. Before conducting employee interviews in your country, must the interviewee

a) Receive written instructions?

There is no obligation under Czech law to provide written instructions. However it is advisable in certain cases to provide background information on the investigation to help expedite the investigation (i.e. no time has to be spent clarifying during the interviews).

b) Be informed that he/she must not make statements that would mean any kind of self-incrimination?

In contrast with criminal proceedings, no warning regarding self-incrimination must be provided under Czech law during an internal interview.

c) Be informed that the lawyer attending the interview is the lawyer for the company and not the lawyer for the interviewee (so-called "Upjohn warning")?

Czech law does not require providing an "Upjohn warning" to an interviewee, but it is advisable to do so.

d) Be informed that he/she has the right that his/her lawyer attends?

There is no obligation under Czech law to inform the employee of the right to counsel, as there is no right to counsel during an internal investigation. Participation in an interview is merely a fulfilment of an employee's duties and, therefore, there is no need for a lawyer to attend the interview.

e) Be informed that he/she has the right of a representative from the works council (or other employee representative body) to attend?

An employee has no right to have a representative from an employee representative body present during the interview.

f) Be informed that data may be transferred cross-border (in particular to the United States)?

Pursuant to the Data Protection Act, an interviewee must be notified of potential cross-border data transfers. Privacy Shield provisions should also be considered.

g) Sign a data privacy waiver?

Generally, the consent of the data subject is necessary to process any personal data. However, the data controller (i.e. the employer) may process personal data without the data subject's consent if it is necessary for the rights or legitimate interests of the controller or another person. However, as there is no case law on this point, the application of this exception should be considered carefully on a case-by-case basis.

h) Be informed that the information gathered might be passed on to authorities?

There is no legal obligation to inform the interviewee that information gathered might be passed on to authorities.

i) Be informed that written notes will be taken?

There is no legal obligation to inform the interviewee that written notes will be taken during the interview.

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7. Are document hold notices or document retention notices allowed in your country? Are there any specifics to be observed (point in time/form/sender/addressees etc.)?

There are no specific laws governing hold or retention notices in the Czech Republic.

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8. May attorney-client privilege be claimed over findings of the internal investigation? What steps may be taken to ensure privilege protection?

The attorney-client privilege is defined differently under Czech law than in common law jurisdictions. In the Czech Republic, it is an obligation of confidentiality on attorneys-at-law, which extends to all information that the attorney receives while providing legal services (with a few particular exceptions). The best way to ensure privilege protection over the findings of an internal investigation is to hire outside counsel. Only attorneys-at-law are exempt from the general duty to report to law enforcement certain crimes (e.g. suspicion of bribery). Any third parties involved in the investigation (e.g. forensic accountants) should be subcontracted by the external counsel.

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9. Can attorney-client privilege also apply to in-house counsel in your country?

Pursuant to Czech law, in-house lawyers do not enjoy the attorney-client privilege.

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10. Are any early notifications required when starting an investigation?

a) To insurance companies (D&O insurance etc. to avoid losing insurance coverage)?

Notification to insurance companies is not required by law, but each insurance policy should be reviewed for such a possible obligation.

b) To business partners (e.g. banks and creditors)?

There are no statutory requirements when it comes to notifying business partners, but such an obligation may arise from agreements between the partners.

c) To shareholders?

Shareholders do not need to be notified at the start of an internal investigation. Publicly traded companies do not have any general notification requirements.

d) To authorities?

Generally, there is no duty to notify the prosecutor or any other authority of the start of an investigation. However, it is essential to take into account the reporting duty arising from the Criminal Code. This duty applies only to a limited list of crimes, including bribery offences. A breach of this duty is a criminal offence. Every investigation should be therefore structured in a way to minimise the risk of falling under this reporting duty by, for example, hiring external counsel to conduct the investigation, as attorneys-at-law are not subject to the reporting duty.

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11. Are there certain other immediate measures that have to be taken in your country or would be expected by the authorities in your country once an investigation is started, e.g. any particular immediate reaction to the alleged conduct?

Apart from the above-mentioned reporting duty, there are no special immediate measures to take into consideration once an investigation has started. However, the company has to make sure that on-going criminal behaviour is stopped as soon as possible.

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12. Will local prosecutor offices generally have concerns about internal investigations or do they ask for specific steps to be observed?

It is uncommon in the Czech Republic for local prosecutor offices to be involved in any way in internal investigations.

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13. Please describe the legal prerequisites for search warrants or dawn raids on companies in your country. In case the prerequisites are not fulfilled, may gathered evidence still be used against the company?

Search warrants as well as dawn raids must be prior approved by the courts. Evidence obtained without prior court approval may not be used in subsequent criminal proceedings.

---

14. Are deals, non-prosecution agreements, or deferred prosecution agreements available and common for corporations in your jurisdiction?

Corporations are able to enter into so-called "plea bargain" agreements with the prosecution, wherein the defendant pleads guilty to certain offences and accepts a certain sanction. Plea bargains must be approved by a court.

Corporations charged with misdemeanour offences (i.e. offences with maximum penalty of five years' imprisonment) are also able to receive a conditional suspension of criminal prosecution and a settlement.

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15. What types of penalties (e.g. fines, imprisonment, disgorgement, or debarment) may companies or its directors, officers, or employees face for misconduct of (other) individuals of the company?

The most common sanctions for individuals are imprisonment or fines, but the Czech Criminal Code recognises a wide range of sanctions, e.g. prohibition of an activity or forfeiture of assets.

The range of sanctions for companies under the Corporate Criminal Liability Act is even broader and includes, among other penalties: fines; forfeiture; prohibition of certain activities; publication of judgment; prohibition on receiving grants or subsidies; prohibition on taking part in procurement, concession proceedings, or competitive bidding; and dissolution.

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16. Please briefly describe any investigations trends in your country (e.g. recent case law, upcoming legislative changes, or special public attention on certain topics)?

New rules on whistleblower protection may come into effect later in 2018. Rather than a comprehensive whistleblower protection act, the changes will come via amendments to the Code of Civil Procedure and other existing laws.

Another widely discussed topic in the Czech Republic is when a new Code of Criminal Procedure will be adopted. The current Code dates to 1961. Although attorneys, the government, and legal scholars all agree that a new Code should be adopted, no proposal has yet been drafted. The Minister of Justice may pursue this task in the future.

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Kinstellar is a leading independent law firm in Emerging Europe, Turkey and Central Asia, with offices in Almaty (Kazakhstan), Belgrade (Serbia), Bratislava (Slovakia), Bucharest (Romania), Budapest (Hungary), Istanbul (Turkey), Prague (the Czech Republic), Sofia (Bulgaria) and Kyiv (Ukraine).

Operating as a single fully integrated firm, Kinstellar delivers consistently high quality services across all jurisdictions in an integrated and seamless style. We are particularly well suited to servicing complex transactions and advisory requirements spanning several jurisdictions.

We have the leading Compliance, Risk and Sensitive Investigations and White Collar Crime Practice in Emerging Europe and Central Asia. Our strengths include a multi-jurisdictional approach, deep knowledge of the region's anti-corruption laws and culture, familiarity with regional enforcement trends and proficiency in dealing with local authorities.

We have experience in crisis management and communications, and expert knowledge in matters of legal privilege, data protection, employee privacy, document retention, security, and corporate and director liability.

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Michal Kníž is an associate in Kinstellar's Prague office. He is a member of the Corporate group and his specialisation includes compliance, risk and sensitive investigations, white collar crime defence, corporate matters and personal data protection. Michal graduated from the Faculty of Law and the Faculty of Economics of Masaryk University in Brno. During his studies, he spent one semester at the University of Bergen, Norway, and he completed an internship at the Supreme Administrative Court of the Czech Republic. Michal has advised various clients in matters relating to internal investigations (including a global pharmaceutical company) and white collar crime matters (including global IT company, international professional services firm and a major Czech insurance company).

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Kristýna Del Maschio is a junior associate in Kinstellar's Prague office. She is a member of the Compliance, Risk & Sensitive Investigations team and her specialisation includes white-collar crime defence, corporate criminal liability and corporate investigations. During her studies, she spent a year at the university in Germany and was involved in projects of restructuring of companies in Rwanda and Zambia. She also completed an internship at the District Court for Prague 1. Kristyna has advised various clients in matters relating to internal investigations (including a global pharmaceutical company) and white collar crime matters (including an international automotive company and major Czech chemical company).

Denmark

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TABLE

	Corporate Liability	Public Bribery	Commercial Bribery	Extraterritorial Applicability of Criminal Laws	Adequate Procedures Defence
Yes	X	X	X	X	X
No					

QUESTION LIST

1. Do any specific procedures need to be considered in case a whistleblower report sets off an internal investigation (e.g. for whistleblower protection)?

No specific Danish law includes procedural rules that must be considered prior to commencing an internal investigation. However, in all cases, no disciplinary or other actions should be taken until the allegations against an individual employee have been properly investigated, e.g. by interviews or reviewing files. Further, it is recommended that the employee be provided with the relevant documents and information in order for the employee to be able to provide an explanation for the alleged misconduct.

There is no specific Danish law that protects the whistleblower. However, the whistleblower as well as the individual reported are entitled to their rights as stipulated in the Danish Act on Processing of Personal Data ("**APPD**"), which implements the European data protection directive (EU) 95/46/EU, and as stipulated in the European Data Protection Regulation (EU) 2016/679 ("**GDPR**"), which applies as of 25 May 2018. The individual reported has the right to request certain information about the reported matter. Further, the individual reported and the whistleblower have the right to rectification, the right to erasure, and the right to restriction of processing. Also, no whistleblower may be dismissed due to filing a report in good faith (such dismissal will be deemed unfair under Danish law and the employee will be entitled to compensation).

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2. Do the following persons/bodies have the right to be informed about an internal investigation before it is commenced and/or to participate in the investigation (e.g. the interviews)?

a) Employee representative bodies, such as a works council

b) Data protection officer or data privacy authority

c) Other local authorities

What are the consequences in case of non-compliance?

a) In general, there is no obligation under Danish law to allow employee representative bodies to participate in internal investigations. However, such obligations may be in the employee's employment agreement, in the company policies, or in collective bargaining agreements, including local collective agreements. Even absent a local obligation, it is recommended that the employer gives the employee the opportunity to have an employee representative present during the interview.

b) There is no requirement to notify the data protection officer or data privacy authority pursuant to the APPD. According to the GDPR, which applies as of 25 May 2018, some companies are required to appoint a Data Protection Officer ("**DPO**"). If a DPO is appointed voluntarily or because of the legal requirement, he/she must be involved, properly and in a timely manner, in all issues which relate to the protection of personal data. An internal investigation will likely be such an issue.

c) The prosecution authorities do not have the right to be informed before starting an investigation. However, depending on the circumstances, a voluntary disclosure to authorities might be advantageous.

Failure to inform the appropriate parties prior to beginning an investigation, if obliged to do so, will in some cases void the investigation. However, under Danish case law, the results of the investigation may still be valid despite non-compliance. Where evidence is illegally obtained, the company may still, in certain circumstances, be granted the right to use such evidence in a civil lawsuit between the employer and the employee.

---

3. Do employees have a duty to support the investigation, e.g. by participating in interviews? If so, may the company impose disciplinary measures if the employee refuses to cooperate?

Employees are obliged to support the investigation in a loyal and truthful manner to the greatest possible extent, e.g. by participating in interviews. If the employee refuses to cooperate, and the refusal is regarded as misconduct, the employer may dismiss the employee if he/she continues to refuse. However, the employee's obligation to cooperate does not apply to the extent that the employee would be subject to self-incrimination.

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4. May any labour law deadlines be triggered or any rights to sanction employees be waived by investigative actions? How can this be avoided?

If, due to the results of the internal investigation the employer is entitled to dismiss the employee with immediate effect, the employer must react immediately after having received sufficient knowledge of the facts, i.e. most likely within one or two days. If the employer fails to do so, the employer cannot justify the summary dismissal with the results from the internal investigation.

---

5. Are there any relevant data privacy laws, state secret laws, or blocking statutes in your country that have to be taken into account before

a) Conducting interviews?

Danish data privacy laws apply with regard to processing of personal data, which includes collecting, recording, structuring, reviewing and using data. The laws also apply to the creation of work product such as interview file notes and final reports. Therefore, it is very important to perform an early assessment of the applicable Danish data privacy laws and to document the steps taken.

b) Reviewing emails?

Private communication is highly protected under Danish law. Reviewing private emails may even constitute a criminal offence (i.e. breach of mail secrecy) if data privacy requirements are not observed. Therefore, before conducting an email review, a thorough analysis of legal exposure should always be performed.

c) Collecting (electronic) documents and/or other information?

The APPD and jurisprudence and guidelines from the Danish Data Protection Agency have to be taken into account before collecting documents and/or other information comprising personal data. The collection must be for a legitimate purpose and be of relevance to the case. In addition, personal data may only be stored for a limited period. Under Danish law, there is no specific time limit for which the data may be stored. Therefore, the allowed period will always depend on an assessment of whether the processing is still necessary for the legitimate purpose for which the data is stored in the specific case.

d) Analysing accounting and/or other mere business databases?

Only documents that contain personal data are subject to the general principles in the APPD.

---

6. Before conducting employee interviews in your country, must the interviewee

a) Receive written instructions?

There is no statutory obligation to instruct an employee before conducting an interview. However, it is advisable that the employer informs the employee of the background of the investigation. Further, it is recommended that the employer gives the employee the opportunity to have a representative present during the interview, e.g. the employee's lawyer, a union representative, a family member or a friend.

b) Be informed that he/she must not make statements that would mean any kind of self-incrimination?

There is no statutory rule as to the right to remain silent with respect to employee interviews as part of internal investigations. Nevertheless, the Association of Danish Law Firms' (*Danske Advokater*) non-binding Guideline on Legal Investigations states that the responsible attorney should inform the interviewee that he/she has the right to remain silent and that any statement made by the interviewee can be used against him/her. To ensure "equality of arms", the lawyer should, thus, refer to Section 10 of the Danish Due Process of Law Act concerning the privilege against self-incrimination.

c) Be informed that the lawyer attending the interview is the lawyer for the company and not the lawyer for the interviewee (so-called "Upjohn warning")?

An Upjohn warning must be given if the investigation relates to issues of U.S. law, but there is no explicit legal obligation to do so under Danish law. However, giving an Upjohn warning is in line with the Guidelines set forth by the Association of Danish Law Firms.

d) Be informed that he/she has the right that his/her lawyer attends?

There is no explicit legal obligation to inform an employee about the right to counsel under Danish law. However, according to the Association of Danish Law Firms' guidance, persons affected by the investigation have, at all stages of the investigation, the right to appoint an "assessor", e.g. a lawyer, union representative, or a union member representative.

e) Be informed that he/she has the right of a representative from the works council (or other employee representative body) to attend?

The employee is not entitled to have an employee representative present during the interview. However, it is recommended that the employer gives the employee such an opportunity.

f) Be informed that data may be transferred cross-border (in particular to the United States)?

The employee should be informed about any potential cross-border data transfer. Under Danish data privacy law, an additional legal basis is required when transferring data to non-EEA countries and such transfer is only permitted if adequate safeguards and procedures are established. Depending on the circumstances, the consent of the employee may be the legal basis to allow the transfer of data to countries, which do not ensure an adequate level of protection (see APPD, Sec. 27(3)(1)). Special rules apply in relation to the transfer of data to the United States. The easiest solution is if the data receiver is self-certified in accordance with the EU-U.S. Self-Certification Agreement, i.e. the Privacy Shield.

g) Sign a data privacy waiver?

The APPD is mandatory. Consequently, the rights of the data subject cannot be legally waived.

h) Be informed that the information gathered might be passed on to authorities?

Depending on the circumstances, the employer may be required to inform the employee that information may be passed on to the authorities. In general, the employer is obliged to inform the employee. However, such an obligation does not exist if the employee's interest in obtaining this information is found to be overridden by essential considerations of the employer's private interests or of public interests, including in particular national security.

i) Be informed that written notes will be taken?

Although it is not mandatory, it is advisable to inform the employee that notes will be taken during the interview. It is also advisable to give the employee the opportunity to read and sign the minutes of the meeting, in order to indicate acceptance of/agreement with the content.

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7. Are document hold notices or document retention notices allowed in your country? Are there any specifics to be observed (point in time/form/sender/addressees etc.)?

Document hold notices and/or document retention notices are generally not usual practice in Denmark. However, the employer may instruct the employee not to delete specific information, provided that such preservation is necessary for a legitimate purpose, e.g. as evidence or for documentation. This would be particularly relevant for legal proceedings or on-going investigations.

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8. May attorney-client privilege be claimed over findings of the internal investigation? What steps may be taken to ensure privilege protection?

In Danish law, legal professional privilege is a procedural guarantee protected by the Danish Administration of Justice Act covering civil as well as criminal proceedings. Under Section 170 of the Danish Administration of Justice Act, defence counsels and lawyers may not be required to provide evidence about matters having come to their knowledge in the course of the exercise of their functions. The protection also extends to written advice and reports prepared by them in connection with such proceedings.

In civil proceedings, a similar protection is afforded with regard to advice received from the acting counsel provided the advice relates to legal proceedings. Generally, the privilege will apply if material covered by the privilege is clearly marked as privileged.

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9. Can attorney-client privilege also apply to in-house counsel in your country?

Under Danish law, there are no specific rules governing the applicability of the attorney-client privilege with respect to in-house counsel. Communication with, and documents created by, in-house counsel are, generally, not subject to attorney-client privilege under Danish law. However, communication with, and documents created by, outside attorneys are, generally, subject to attorney-client privilege, even when such communications or documents may be in the possession of in-house counsel.

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10. Are any early notifications required when starting an investigation?

There is no explicit obligation to provide early notifications under Danish law. However, the Association of Danish Law Firms recommends that a lawyer leading an investigation prepare written terms of reference, which lay down guidelines for the investigation. In general, the terms of reference include a description of the subject matter and the scope of the investigation.

a) To insurance companies (D&O insurance etc. to avoid losing insurance coverage)?

Any obligation to notify an insurance company of an investigation would stem from the individual insurance agreement. Where the investigation may reveal information that could form the basis of an insurance claim, the policy holder should notify the insurer.

b) To business partners (e.g. banks and creditors)?

There are no statutory duties in this regard. Notification requirements may arise from the contractual obligations between the company and its business partners.

c) To shareholders?

Internal investigations may deal with important matters that could be seen as inside information. On a case-by-case basis, the company needs to evaluate if there is a duty to notify its shareholders and the public, in

accordance with the Market Abuse Regulation. Violation of disclosure requirements is a criminal offence (see Sec. 93(1) of the Danish Securities Trading Act).

d) To authorities?

In general, there is no statutory obligation to inform the prosecutor or any other authority about an internal investigation or potential misconduct within the company. However, a cooperative approach with the authorities may be deemed wise depending on the subject matter of the investigation.

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11. Are there certain other immediate measures that have to be taken in your country or would be expected by the authorities in your country once an investigation is started, e.g. any particular immediate reaction to the alleged conduct?

There is no statutory obligation to take any immediate measures. However, the company has an ordinary obligation to minimise damages and take adequate steps to prevent new ones. In this regard, on-going criminal behaviour must be stopped. The company may also have to re-evaluate its compliance system in order to eliminate potential deficits and to improve its existing system. Further, the company may impose sanctions on the concerned employees to show that misconduct is not tolerated inside the company.

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12. Will local prosecutor offices generally have concerns about internal investigations or do they ask for specific steps to be observed?

In general, the prosecutor's office appreciates internal investigations carried out by external investigators, e.g. law firms. Communicating and coordinating with local prosecutors may be beneficial to the company. The use of court-approved forensic tools should be considered carefully to ensure the evidentiary value of materials collected for any subsequent civil or criminal court proceedings.

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13. Please describe the legal prerequisites for search warrants or dawn raids on companies in your country. In case the prerequisites are not fulfilled, may gathered evidence still be used against the company?

Under Chapter 73 of the Danish Administration of Justice Act, search warrants must fulfil formal and material requirements stipulated by law. Search warrants are issued by the court. A search warrant may be issued if there is a reasonable suspicion that an offence under public prosecution has been committed and the search is of material importance to the case. The police may carry out a warrant-less search, where there is a risk that the evidence sought by the search would be lost should the police wait for a warrant.

Generally, even when the formal prerequisites for search warrants are not observed, the seized evidence may still be used against the company.

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14. Are deals, non-prosecution agreements, or deferred prosecution agreements available and common for corporations in your jurisdiction?

Deals, non-prosecution agreements, and deferred prosecution agreements are not available or common for corporations under Danish law. Nevertheless, corporations can and commonly do accept fixed penalty notices, when offered by the prosecution.

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15. What types of penalties (e.g. fines, imprisonment, disgorgement, or debarment) may companies or its directors, officers, or employees face for misconduct of (other) individuals of the company?

Both legal and natural persons are subject to criminal liability under Danish law.

Pursuant to Chapter 5 of the Danish Criminal Code, any legal person may be subject to fines where so provided by, or pursuant to, statute. For example, Section 306 of the Danish Criminal Code states that companies and other incorporated bodies (legal persons) may incur criminal liability, under the rules of Chapter 5, for violations of the Criminal Code. Section 306 covers all offences in the Danish Criminal Code. In addition, legal persons may be subject to disgorgement and debarment. Sanctions in relation to legal persons generally are tied to gross revenue, but it depends on the regulatory regime governing the industry in question.

The ordinary penalties for individuals are imprisonment and/or fines, but individuals may also be subject to disgorgement and debarment.

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16. Please briefly describe any investigations trends in your country (e.g. recent case law, upcoming legislative changes, or special public attention on certain topics)?

Data protection legislation and whistleblower regulation are topics of general interest in Denmark now. On 26 June 2017, a new version of the Danish Act on Measures to Prevent Money Laundering and Financing of Terrorism, implementing the EU Fourth Anti-Money Laundering Directive, entered into force.

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Tina Brøgger Sørensen is primarily engaged in data protection, employment and labour law. Tina is head of Kromann Reumert's Personal Data and Whistleblower Schemes practice group and is an internationally Certified Information Privacy Professional (CIPP/E). Tina became a partner in January 2011.

Tina is widely engaged in data protection, including processing of employee data, demands of permission from the Data Protection Agency, preparation of data processing agreements, international data transfers, preparation of policies, setting-up of Whistleblower Schemes, etc.

Tina has considerable experience in advising employers on employment law, discrimination issues, mergers and acquisitions, dismissals in connection with restructuring, rationalisation or closure of businesses, stock exchange listings, incentive programmes, and senior management issues.

In addition, Tina has advised clients in several cases of general public importance, and has also represented a company in a discrimination case before the European Court of Justice.

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Daiga Grunte-Sonne is attached to Kromann Reumert's group for Personal Data and Whistleblower Schemes. Internationally certified in European data protection law (CIPP/E), she works with personal data law in a number of contexts.

Daiga typically advises on the framework for the processing of personal data, including the rules of consent, the requirements for objective processing and use of personal data for specific purposes. Daiga has extensive experience in the drafting of declarations of consent and other notices about processing of personal data.

Daiga is an experienced drafter of data processing agreements and often advises on international data transfers. She is also experienced in the use of cloud-based data storage solutions. She also often assists on transactions for acquisitions or sale that require an assessment of compliance with data protection rules. Daiga has considerable experience conducting data protection compliance projects in preparation for the GDPR, including conducting interviews and workshops, preparing gap analyses and action plans and providing assistance in connection with implementation.

Hans Jakob Folker

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Hans Jakob heads Kromann Reumert's corporate criminal law practice, focusing on corporate compliance, corporate criminal law and regulatory dispute resolution, including litigation and internal investigations in Denmark and abroad.

He joined Kromann Reumert in 2013 after having served as deputy public prosecutor with the State Prosecutor for Serious Economic and International Crime.

As a seasoned litigator, Hans Jakob has acted as prosecutor and defence counsel in complex criminal proceedings. He deals with regulatory matters and corporate criminal law in general within all business sectors, including anti-corruption, conflicts of interest, money laundering, financial regulation, export control and sanctions. He also assists in anti-fraud cases.

Finland

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 Markus Kokko

 Jani Syrjänen

TABLE

	Corporate Liability	Public Bribery	Commercial Bribery	Extraterritorial Applicability of Criminal Laws	Adequate Procedures Defence
Yes	X Criminal corporate fines possible in case an offence has been committed in the operations of the company.	X	X	X	
No					X

QUESTION LIST

1. Do any specific procedures need to be considered in case a whistleblower report sets off an internal investigation (e.g. for whistleblower protection)?

In Finland, there is no comprehensive whistleblower protection legislation. Some limited industry-specific regulations have been adopted, e.g. in the financial sector, where the Financial Supervisory Authority maintains a system for receiving reports of any suspected infringements of financial market provisions. The Financial Supervisory Authority protects the personal information and identity of the whistleblower.

On a more general level, the Finnish Employment Contracts Act (55/2001, as amended) and other employment laws provide some measure of protection to whistleblowers by requiring an employer to have a substantial reason for dismissing an employee and to first provide a warning prior to dismissal. In other words, the employer would need to demonstrate that the employee seriously breached or neglected his/her obligations by filing a whistleblower report. Dismissal may also be justified if the employee disclosed information with the clear intention to damage the employer. However, if the employee had a duty to report the information to the authorities, dismissal is unlawful.

Generally, the employee should disclose information internally before reporting to the authorities or going public, unless there is a clear legal duty to report directly to the authorities. The employer has no duty to investigate the whistleblower report. However, should the authorities investigate the matter and find that the employer has been aware of the state of affairs, this would likely constitute an aggravating circumstance.

2. Do the following persons/bodies have the right to be informed about an internal investigation before it is commenced and/or to participate in the investigation (e.g. the interviews)?

a) Employee representative bodies, such as a works council

b) Data protection officer or data privacy authority

c) Other local authorities

What are the consequences in case of non-compliance?

a) There are no specific regulations that grant employee representative bodies the right to be informed about, or to participate in, the investigation process. However, under the Finnish Act on Cooperation within Undertakings (334/2007, as amended, "**Act on Cooperation**"), companies that regularly employ 20 or more employees must negotiate policies and processes for collecting employee personal data with the employees or their representatives. Some collective agreements may include more specific obligations and, therefore, should be consulted before beginning an investigation. Non-compliance with the Act on Cooperation may be sanctioned with a fine.

b) A Data Protection Ombudsman ("**DPO**") has the right to access any personal data being processed, as well as any information necessary to supervise the processing and assess its legality. Under the European data protection regulation (EU) 2016/679 ("**GDPR**"), the DPO is charged with advising employees on their data privacy rights and monitoring data protection. Consequently, the company is required to, on the DPO's request, report to the DPO any data privacy-related procedures and processes that are part of an investigation.

c) There is no obligation to inform the prosecution authorities before starting an internal investigation. However, voluntary involvement of the authorities can be beneficial depending on the circumstances of the specific case.

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3. Do employees have a duty to support the investigation, e.g. by participating in interviews? If so, may the company impose disciplinary measures if the employee refuses to cooperate?

Employees have a general duty of loyalty toward their employer. The scope of this duty depends on the employee's position in the company. For example, supervisors owe a greater duty to the employer than employees in non-supervisory positions. Ultimately, the employer has a general right to direct and supervise its employees and can, therefore, require them to participate in an internal investigation.

An employee's refusal to participate can, in some cases, be deemed misconduct and justify a warning or even dismissal, if the employee has previously received a warning for the same or similar misconduct.

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4. May any labour law deadlines be triggered or any rights to sanction employees be waived by investigative actions? How can this be avoided?

According to the Employment Contracts Act, if an employee's misconduct leads to a warning or dismissal, these measures should be initiated within a reasonable period after the relevant facts have become known. The reasonable period of time is evaluated on a case-by-case basis depending on the circumstances.

The employer may only with substantial cause cancel an employment contract with immediate effect. However, the right to cancellation lapses if the employment contract is not cancelled within 14 days of the date on which the employer was informed of the existence of the grounds for cancellation.

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5. Are there any relevant data privacy laws, state secret laws, or blocking statutes in your country that have to be taken into account before

a) Conducting interviews?

Data privacy regulations apply to the processing of all personal data. That includes personal information obtained from interviews. Therefore, it is essential to assess which data protection laws may or may not apply and to document the measures taken before conducting interviews.

b) Reviewing emails?

Pursuant to the Finnish Act on Protection of Privacy in Working Life (759/2004, as amended), the employer can only process personal data that is directly necessary for employment. This is a mandatory legal provision that may not be waived by the employee. Under the Act, an employee's work-related emails can only be

viewed if detailed provisions are observed. If these requirements are not met, reviewing employees' emails can constitute a criminal offence.

By contrast, employers are not permitted to review employees' personal emails. Personal correspondence may only be reviewed by authorities in connection with a criminal investigation. Therefore, careful assessment of possible legal risks should always be carried out before reviewing emails.

c) Collecting (electronic) documents and/or other information?

Finland has no blocking statute regime. Finnish data protection statutes are based on the European Data Protection Directive, until the GDPR comes into effect in May 2018.

Under the Finnish Personal Data Act (523/1999, as amended, "**Personal Data Act**"), the processing of personal data must be appropriate and justified. This means that, before the employer can process any personal data, the purpose of the processing, the data sources, and the data recipients must be determined. Processing or using personal data in a manner incompatible with the specified purpose (e.g. processing irrelevant data) is prohibited. At the employee's request, the employer must inform the employee of any personal data collected. As noted above, the employer can only process personal data that is directly necessary for employment. Processing of other personal data can only occur in connection with investigations by the authorities.

d) Analysing accounting and/or other mere business databases?

Data privacy laws do not apply to analysing accounting and other mere business databases.

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6. Before conducting employee interviews in your country, must the interviewee

a) Receive written instructions?

In Finland, there is no statutory obligation to give written instructions to the interviewee, but it is advisable to do so. Generally, the instructions would include a brief explanation of the background and focus of the investigation. It is advisable to provide these instructions in writing and ask the interviewee to sign them.

b) Be informed that he/she must not make statements that would mean any kind of self-incrimination?

With regard to internal investigations, there is no right to remain silent to avoid self-incrimination, as is the case during criminal interrogations. Nevertheless, it is advisable not to pressure interviewees to incriminate themselves, especially if the interviewee is also subject to a criminal investigation.

c) Be informed that the lawyer attending the interview is the lawyer for the company and not the lawyer for the interviewee (so-called "Upjohn warning")?

An Upjohn warning is only mandatory if there are links to U.S. law. However, in general, it is advisable to avoid behaviours that could mislead the employee into thinking that the company's lawyer represents him/her.

d) Be informed that he/she has the right that his/her lawyer attends?

In Finland, employers are free to handle internal matters independently without the involvement of outside lawyers. However, should the employer seek to terminate the employee or cancel the employment contract, the employee has the right to be heard in the matter. Under such circumstances, the employee has the right to have a lawyer and should be informed of this right.

e) Be informed that he/she has the right of a representative from the works council (or other employee representative body) to attend?

In Finland, there is no statutory obligation to inform the employee of the right to have an employee representative present during an interview, even though such right usually exists. However, the specific rights of an employee and corresponding obligations of an employer might vary depending on the applicable collective agreement.

f) Be informed that data may be transferred cross-border (in particular to the United States)?

The employee should be informed of any potential cross-border transfers of personal data. Under Finnish data privacy legislation, the transfer of data to non-EU states is only permitted if an adequate level of data protection is guaranteed in the recipient country. However, the Personal Data Act includes certain provisions that allow cross-border transfers even if the recipient country does not guarantee an adequate level of protection. These include the use of European Union Commission's model clauses and the employee's unambiguous consent.

g) Sign a data privacy waiver?

Under Section 8 of the Personal Data Act, an employee's consent is needed, as far as personal data is concerned and as far as no legal exceptions apply. A data privacy waiver is particularly advantageous if the personal data of the interviewee may be used in future legal proceedings.

h) Be informed that the information gathered might be passed on to authorities?

It is highly advisable to inform the employee that information gathered may be passed on to authorities. This is particularly true if information may be passed on to U.S. authorities.

i) Be informed that written notes will be taken?

There is no legal obligation under Finnish law to inform the interviewee that written notes will be taken, but it is advisable to do so. It is also advisable that the documentation of the interview (e.g. for reports and potential court proceedings) be shown to the employee for approval. There is, however, no statutory obligation to provide the employee with physical copies of notes from an internal interview.

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7. Are document hold notices or document retention notices allowed in your country? Are there any specifics to be observed (point in time/form/sender/addressees etc.)?

In Finland, there are no document hold notices or document retention notices. However, as previously mentioned, the employer has the right to direct and supervise its employees and, based on this right, can instruct them to preserve relevant documents and records. An objection to the employer's instruction can constitute misconduct.

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8. May attorney-client privilege be claimed over findings of the internal investigation? What steps may be taken to ensure privilege protection?

Findings of internal investigations are generally not protected by attorney-client privilege, which is not absolute in Finland. To ensure privilege, it is advisable to consult outside counsel. In principle, documents in the possession of outside counsel are protected. Documents and communications from outside counsel to in-house counsel in the possession of in-house counsel are not automatically protected. Whether such documents and communications are protected depends, in part, on when they were provided by the outside counsel. For example, documents and communications containing general advice provided prior to any investigation by the authorities have a smaller chance of enjoying protection than documents and communications given by outside counsel during a trial or a criminal investigation. It is advisable to clearly label correspondence and documents between in-house and outside counsel as being under the scope of attorney-client privilege. Ultimately, however, the courts will rule on what is admissible as evidence.

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9. Can attorney-client privilege also apply to in-house counsel in your country?

Generally, communication with in-house counsel and documents created by inside counsel are not privileged under Finnish law.

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10. Are any early notifications required when starting an investigation?

a) To insurance companies (D&O insurance etc. to avoid losing insurance coverage)?

There is no statutory duty. However, if there is a risk that the circumstances at hand could give rise to a claim, the policyholder should notify the insurer of these circumstances.

b) To business partners (e.g. banks and creditors)?

The decision to notify business partners must be determined on a case-by-case basis. For instance, a contractual obligation may provide that such information must be disclosed to the business partner. However, even absent such a contractual provision, a company may still owe a general duty of loyalty to its business partner.

c) To shareholders?

Insider information that could influence stock prices must be disclosed to shareholders of publicly listed companies. A company may be liable for damages for breach of its reporting duties, in accordance with Chapter 16 of the Finnish Securities Market Act (746/2012, as amended).

d) To authorities?

In general, there is no obligation to inform the authorities of an internal investigation or potential misconduct within a company. However, voluntary cooperation with the authorities can prevent harmful or unexpected measures by the local prosecutor or other authorities. The benefits of such cooperation must, therefore, be considered.

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11. Are there certain other immediate measures that have to be taken in your country or would be expected by the authorities in your country once an investigation is started, e.g. any particular immediate reaction to the alleged conduct?

According to general tort law principles, the company must minimise damages and try to prevent further damages. The company can, for example, impose sanctions, such as warnings, on the concerned employees to deter from future misconduct. Additionally, the company should conduct an assessment of its compliance systems to eliminate potential deficits and, if necessary, make improvements. In any case, on-going criminal conduct in the company should be stopped immediately.

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12. Will local prosecutor offices generally have concerns about internal investigations or do they ask for specific steps to be observed?

As previously mentioned, depending on the nature of the investigation, early engagement with the local prosecutors can help ensure satisfactory cooperation and prevent unwanted measures. It is of paramount importance that the company does not destroy or otherwise remove any potential evidence or give the local prosecutors reason to fear that such conduct could occur.

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13. Please describe the legal prerequisites for search warrants or dawn raids on companies in your country. In case the prerequisites are not fulfilled, may gathered evidence still be used against the company?

According to the Finnish Criminal Investigation Act (805/2011, as amended), a search warrant must be issued by an official with the power to arrest, i.e. certain police officers. A search warrant may be issued if there is reason to believe that the search will reveal objects or information relevant to the investigation of an offence. The general principles of proportionality, minimum intervention, and sensitivity apply.

It is worth noting that even if these legal prerequisites are not met, the evidence can usually still be used in court proceedings, unless the use of such evidence would jeopardise a fair trial. This assessment must take into account, among other factors, the nature of the matter, the severity of the infringement relating to the obtaining of evidence, and the reliability and significance of the evidence.

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14. Are deals, non-prosecution agreements, or deferred prosecution agreements available and common for corporations in your jurisdiction?

While plea bargaining is available for individuals under some circumstances, it is not an option for corporations under Finnish law. Deals are also not available for corporations. However, cooperation with authorities might, in some cases, be taken into account as a mitigating circumstance in sentencing.

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15. What types of penalties (e.g. fines, imprisonment, disgorgement, or debarment) may companies or its directors, officers, or employees face for misconduct of (other) individuals of the company?

Corporations can be fined up to €850,000 for certain criminal offences, such as bribery. Individuals can face sanctions, such as imprisonment, fines, or business prohibition. In some cases, e.g. failure to adequately supervise, a manager or director may be liable for the misconduct of other employees.

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16. Please briefly describe any investigations trends in your country (e.g. recent case law, upcoming legislative changes, or special public attention on certain topics)?

As there is no comprehensive legislation in Finland providing whistleblower processes or governing internal investigations, the practices are somewhat inconsistent. In recent years, several authorities and NGOs have taken up this issue. Consequently, some industry-specific tools were introduced. For example, the Finnish Financial Supervisory Authority (*Finanssivalvonta*) has established a whistleblower tool, effective since 1 January 2016. Whistleblowers can now report violations of supervisory provisions. Moreover, on 17 June 2016, Finland's Ministry of Justice published a report (25/2016) recommending the establishment of an anonymous online whistleblowing tool to report suspected corruption. Whistleblower legislation in Finland is expected to evolve substantially in the near future.

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Borenius Attorneys Ltd is one of the largest leading law firms in Finland. Borenius has been providing high quality services in all areas of law since 1911. Borenius employs over 100 lawyers at offices based in Helsinki, Tampere, St. Petersburg, and New York and is ranked as a top tier firm by all leading legal directories.

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Markus regularly advises major domestic and international clients on dispute resolution and corporate crime cases.

Markus has in-depth experience of domestic and international corporate and commercial disputes and he has acted as lead counsel in numerous extensive cases. His field of experience encompasses cases related to a wide variety of business sectors, such as the chemicals industry, financial markets, international trade, retail and wholesale, mining, services and consultancy. Markus also has an exceptional track record in handling a broad range of litigation and arbitration cases, including *ad hoc* proceedings as well as proceedings governed by ICC Rules, SCC Rules and the Arbitration Rules of the Finland Chamber of Commerce.

In addition, Markus frequently advises companies and executives in relation to complex corporate crime cases and criminal investigations regarding, *inter alia*, insider trading, environmental violations, corruption, imports and exports and tax.

Markus' efficient and client oriented approach has earned him an excellent reputation which has been recognised by rankings in Chambers Global, Chambers Europe, Legal 500 and Best Lawyers. Furthermore, Markus also serves as an arbitrator and he has written many articles on litigation and arbitration.

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Jani advises international and domestic clients in all employment law and pension & benefits related questions including also occupational safety, discrimination and immigration matters. Jani has extensive experience in litigating employment law matters; negotiating and drafting top management agreements, company policies and procedures; as well as advising employers confronting a wide range of employment law issues including, *inter alia*, outsourcing, reorganisations and redundancies.

He is also an accredited mediator of the Finnish Bar Association and a frequent speaker about employment law issues at domestic and foreign seminars.

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TABLE

	Corporate Liability	Public Bribery	Commercial Bribery	Extraterritorial Applicability of Criminal Laws	Adequate Procedures Defence
Yes	X	X	X	X	
No					X

QUESTION LIST

1. Do any specific procedures need to be considered in case a whistleblower report sets off an internal investigation (e.g. for whistleblower protection)?

Under statute No. 2016-1691 of 9 December 2016 (the "**Sapin II Law**"), companies with at least 50 employees must implement a whistleblowing policy. The Sapin II Law defines the whistleblower as a natural person who reveals, in good faith, an offence, a violation of international commitments ratified by France, or a serious threat or injury to the public interest. A whistleblower alert must be first brought to the attention of the whistleblower's employer. If the alert is not addressed within a reasonable time, the whistleblower may refer it to judicial, administrative, or professional authorities. If the latter fail to address the alert within three months, the whistleblower may go public. In cases of serious or imminent danger, or when there is a risk of irreversible damage, the whistleblower may go directly to the authorities or the public.

The identity of the whistleblower and any individuals targeted in the alert are to remain confidential and may not be disclosed to anyone, except to judicial authorities. Any unauthorised disclosure is punishable by up to two years of imprisonment and a €30,000 fine.

A whistleblower, whose alert is filed in accordance with the procedures set out above, is protected both under employment and criminal law. The whistleblower, as defined in the Sapin II Law, may not be retaliated against by his/her employer and may not be held criminally liable for the disclosure of secrets protected by law, if the procedures were followed and the disclosure was necessary and proportionate to protect the interests at stake.

The French Commission Nationale de l'Informatique et des Libertés ("**CNIL**"), an independent administrative body entrusted with ensuring that computing and data processing do not violate fundamental rights, has since set out mandatory rules to be complied with when a whistleblowing report is filed in accordance with the Sapin II Law. CNIL's Single Authorisation No. AU-004, updated in June 2017, defines, *inter alia*, the categories of data that can be collected in connection with a report, the confidentiality measures to be implemented and the retention period applicable to the collected data.

2. Do the following persons/bodies have the right to be informed about an internal investigation before it is commenced and/or to participate in the investigation (e.g. the interviews)?

a) Employee representative bodies, such as a works council

b) Data protection officer or data privacy authority

c) Other local authorities

What are the consequences in case of non-compliance?

a) The French Labour Code requires informing and consulting employee representative bodies before implementing employee monitoring tools and techniques. Thus, such bodies must be informed and consulted before an internal investigation proceeds. Non-compliance may result in a criminal fine of up to €7,500.

b) Data collection and monitoring must be declared in advance to CNIL. Additional declarations to CNIL may also be required. For example, CNIL must be notified prior to the implementation of internal procedures dedicated to whistleblowing with the filing of the AU-004 form, given that such procedures include data processing.

Failure to declare data collection is punishable by five years' imprisonment, a criminal fine of up to €300,000 (€1.5 million for legal entities) and an administrative fine of up to €3 million. Non-compliance with data protection requirements may also jeopardise the validity of an employee dismissal.

c) Under French law, there is no legal obligation for an employer to report its decision to conduct an internal investigation or its findings to judicial authorities, including prosecution authorities, unless the investigation uncovers conduct that could qualify as a crime (i.e. offences punishable by at least ten years' imprisonment) and its effects can still be mitigated.

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3. Do employees have a duty to support the investigation, e.g. by participating in interviews? If so, may the company impose disciplinary measures if the employee refuses to cooperate?

Employees are not legally required to support an internal investigation. Due to stringent French labour law requirements, it may be difficult to sanction an employee for refusing to cooperate.

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4. May any labour law deadlines be triggered or any rights to sanction employees be waived by investigative actions? How can this be avoided?

Disciplinary sanctions must be imposed on an employee within two months of the employer becoming aware of the wrongdoing, unless it has given rise to criminal proceedings within the same period of time. After this two-month period, no sanctions can be taken for the concerned wrongdoing. If the employer conducts a fact-finding investigation, the two-month deadline starts running on the day on which the findings are issued.

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5. Are there any relevant data privacy laws, state secret laws, or blocking statutes in your country that have to be taken into account before

a) Data protection

As of 25 May 2018 the General Data Protection Regulation will be directly applicable to all European Union Member States. The duty to make a declaration to CNIL will be replaced by the obligation, for companies with more than 250 employees, to declare all data collection processes in an internal register. Smaller companies are required to comply with this rule if the collection presents a risk to the rights and liberties of the concerned individuals (e.g. disclosure of personal data likely to violate their right to privacy) or if sensitive data are collected.

b) Secret State Law

French banking law provides that employees working in the financial sector are bound by professional secrecy. Consequently, credit institutions cannot share information covered by banking secrecy absent a court order (this covers information including, but not limited to, names, account numbers and transactions). Violation of banking laws is punishable by up to one year's imprisonment and a €15,000 fine (€75,000 for legal entities).

Since 2009 the communication of national defence secrets is punishable by five to seven years' imprisonment and a fine of up to €75,000 or €100,000, depending on how the discloser learned of the defence secrets (e.g. in the course of his/her work). The fine may reach €375,000 or €500,000 for legal entities. Negligent or reckless receipt of national defence secrets is punishable by three years' imprisonment and a fine of up to €45,000.

c) Blocking Statute

The French Blocking Statute punishes anyone who tries to obtain or transfer documents or information for use in foreign judicial or administrative proceedings. Its broad scope covers any information or documents of an economic, commercial, industrial, financial or technical nature. This broad scope may be interpreted as including information gathered in the course of interviews for use in foreign judicial or administrative proceedings. Breach of the Blocking Statute is punishable by six months' imprisonment and a fine of up to €18,000 (€90,000 for legal entities).

The Blocking Statute provides a legal defence to parties facing discovery requests abroad. However, it has rarely been enforced by French courts since its implementation in 1968. Foreign jurisdictions, thus, tend to disregard the Blocking Statute as a valid defence against discovery requests. The U.S. Supreme Court notably dismissed this defence in the *Aérospatiale* Case.

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6. Before conducting employee interviews in your country, must the interviewee

a) Receive written instructions?

There is no legal obligation to give written instructions to an interviewee beforehand. Yet, it is advisable at the outset of the interview to explain the general subject matter of the investigation, thank the interviewee for participating, and ask the interviewee to treat the interview as confidential. In practice, this information is generally provided in writing and the interviewee is asked to sign an acknowledgement of receipt. Written instructions, if provided, should be in French.

b) Be informed that he/she must not make statements that would mean any kind of self-incrimination?

There is no legal obligation to inform the interviewee of his/her right against self-incrimination. It is advisable to frame the interview as a discussion, rather than an examination. Accordingly, the interviewer should not subject the interviewee to pressure during the interview.

c) Be informed that the lawyer attending the interview is the lawyer for the company and not the lawyer for the interviewee (so-called "Upjohn warning")?

In September 2016 the Paris Bar Council published a Vade mecum for lawyers conducting internal investigations, advising them to inform interviewees that their exchanges are not covered by attorney-client privilege, as they represent the company and not the interviewee (see Article 2.2).

d) Be informed that he/she has the right that his/her lawyer attends?

No binding rules govern an interviewee's right to legal assistance in connection with internal investigations. However, the Paris Bar Council recommends informing interviewees that they can be assisted by an attorney when they are under serious suspicion of misconduct.

e) Be informed that he/she has the right of a representative from the works council (or other employee representative body) to attend?

Although employees have the right to be assisted by an employee counsellor during a meeting prior to dismissal (*entretien préalable*), the French Labour Code does not provide for such assistance during interviews conducted in connection with an internal investigation. The French Supreme Court recently ruled that an employer remains free to refuse assistance to the employee in this context.

f) Be informed that data may be transferred cross-border (in particular to the United States)?

French data protection laws prohibit data transfers outside of France to countries that are not deemed to provide a sufficient level of protection, like the United States. Transfers are only authorised when: (i) Binding Corporate Rules have been implemented; (ii) standard contractual clauses have been signed with the foreign recipient; or (iii) the foreign entity is self-certified as complying with the EU-U.S. Privacy Shield. All data subjects must also be informed about the potential transfer of their data, including, among other things, the purpose of the transfer, the recipient countries, and their right to oppose the transfer (for legitimate reasons). The employees' right of opposition enables them to challenge the processing and transfer of their personal data.

g) Sign a data privacy waiver?

It is not possible for data subjects to sign a data privacy waiver. The only exclusions from data protection are expressly laid out in connection with data transfers. Under Article 69 of the Data Protection Law, exceptions notably cover the data subject's express consent to the transfer or if the transfer is necessary to: (i) safeguard the data subject's life; (ii) protect public interest; (iii) comply with obligations ensuring the establishment, exercise, or defence of legal claims; (iv) consult a public register that is intended for public information and is open for public consultation or by any person demonstrating a legitimate interest; (v) perform a contract between the data controller and the data subject, or of pre-contractual measures taken in response to the data subject's request; or (vi) conclude or perform a contract with a third party entered into in the data subject's interest.

h) Be informed that the information gathered might be passed on to authorities?

There is no legal obligation requiring a company to disclose the findings of an internal investigation to judicial authorities and, accordingly, there is no obligation to inform the interviewee of this possibility.

i) Be informed that written notes will be taken?

There is no legal obligation to inform interviewees that written notes will be taken. However, it is a best practice to allow the interviewee to read a transcript of his/her statements after the interview. It is not advisable to give the interviewee minutes of the interview in order to preserve confidentiality.

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7. Are document hold notices or document retention notices allowed in your country? Are there any specifics to be observed (point in time/form/sender/addressees etc.)?

Document preservation notices are admissible, but this practice is not yet common. No specific legal provisions govern the issuance of legal holds. They shall, however, be written in French and comply with mandatory retention periods imposed by the Data Protection Law.

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8. May attorney-client privilege be claimed over findings of the internal investigation? What steps may be taken to ensure privilege protection?

French professional secrecy applies to communications between outside counsel and clients in all matters, whether advisory or litigation related. Lawyers cannot waive privilege.

Judicial authorities have the possibility to issue a production order or perform a dawn raid to gather evidence, including the findings of an internal investigation. However, they cannot seize documents covered by professional secrecy. Having outside counsel conducting the internal investigation ensures that its findings are protected by privilege.

9. Can attorney-client privilege also apply to in-house counsel in your country?

There is no attorney-client privilege for in-house counsel in France. They are considered as a distinct profession and do not benefit from the same status as members of the Bar.

10. Are any early notifications required when starting an investigation?

a) To insurance companies (D&O insurance etc. to avoid losing insurance coverage)?

There is no legal obligation to notify insurance companies of the launch of an internal investigation. Such notification could even be detrimental to the investigation and jeopardise confidentiality. However, it is advisable to check whether applicable insurance policies contractually require disclosure.

b) To business partners (e.g. banks and creditors)?

There is no legal obligation to notify business partners of the launch of an internal investigation. Such notification could even be detrimental to the investigation. However, it should be confirmed that disclosure is not contractually required.

c) To shareholders?

There is no legal obligation to inform shareholders of the launch of an internal investigation *per se*. However, to the extent an investigation's findings may be characterised as inside information, publicly listed companies must disclose this information. A duty to disclose the findings of an internal investigation may also be inferred from shareholders' general right to information. Company bylaws or shareholders' agreements may provide enhanced information rights, targeting internal investigations.

d) To authorities?

There is no legal obligation to disclose the start of an internal investigation to judicial authorities. However, auditors are legally required to reveal to the prosecutor any criminal offence they become aware of when performing their duties.

As an exception to attorney-client privilege, lawyers are bound by a similar obligation to disclose suspicious transactions regarding money laundering or terrorist financing when acting in an advisory capacity (e.g. advising on the sale or purchase of real estate), rather than as litigators. Generally speaking, a lawyer is considered to be acting as a litigator when he/she is representing the client in judicial proceedings. In all cases, if the lawyer is acting as a litigator, attorney-client privilege will not be waived.

11. Are there certain other immediate measures that have to be taken in your country or would be expected by the authorities in your country once an investigation is started, e.g. any particular immediate reaction to the alleged conduct?

There is no legal obligation *per se* to take immediate measures once an investigation is started in France. However, failing to do so in the presence of a potential offence renders the company susceptible to later being held liable as an accomplice or for other offences. In parallel, companies launching internal investigations should be particularly cautious when considering employee sanctions due to very stringent labour law requirements.

12. Will local prosecutor offices generally have concerns about internal investigations or do they ask for specific steps to be observed?

Internal investigations are not yet part of the French legal culture. Prosecutors do not have specific concerns nor do they expect the company to take specific steps. This may change with recent creation of the French Anti-Corruption Agency ("**AFA**"), which appoints experts, such as lawyers, to monitor corporate compliance programmes and perform *ad hoc* investigations.

13. Please describe the legal prerequisites for search warrants or dawn raids on companies in your country. In case the prerequisites are not fulfilled, may gathered evidence still be used against the company?

Dawn raids may be performed (i) as part of a flagrancy enquiry; (ii) as part of a police preliminary enquiry under the authority of a prosecutor; or (iii) under a judicial investigation headed by an investigating judge. Prerequisites for dawn raids vary depending on the type of investigation. For example, absent special circumstances, express, written consent of a company's legal representative is required to carry out a dawn raid that is part of a preliminary enquiry, but not required for a dawn raid that is part of a flagrancy enquiry. Specific conditions may apply to dawn raids carried out in the context of tax, competition, and consumer law proceedings.

Save under specific circumstances, dawn raids can only be launched between 6 a.m. and 9 p.m., though they may extend past these hours. Police officers must establish an inventory of all documents and articles seized and sealed. They must also implement necessary measures to protect professional secrecy. If these prerequisites are not fulfilled, the seizure of documents may be deemed void and may not be used as evidence.

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14. Are deals, non-prosecution agreements, or deferred prosecution agreements available and common for corporations in your jurisdiction?

Negotiating deals with prosecutors is not yet a common practice in France.

A guilty plea procedure (*Comparution sur Reconnaissance Préalable de Culpabilité* or "**CRPC**") is available to both individuals and legal entities for most criminal offences (a notable exception is tax fraud). CRPC is mainly used for non-complex cases, which do not require trial, and for which penalties and fines are capped by law. CRPC requires an admission of guilt by the defendant.

Recently, the Sapin II Law introduced the Deferred Prosecution Agreement (*Convention Judiciaire d'Intérêt Public* or "**CJIP**"). The scope of CJIP is narrower than that of CRPC: CJIP only applies to legal entities and for criminal offences related to corruption, influence peddling, money laundering, and tax fraud. Unlike CRPC, CJIP does not require an admission of guilt from the defendant. Penalties incurred under CJIP must be proportionate to the wrongdoing and may not exceed 30 percent of the company's average revenue from the past three years. The company must also implement a compliance programme monitored by the AFA.

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15. What types of penalties (e.g. fines, imprisonment, disgorgement, or debarment) may companies or its directors, officers, or employees face for misconduct of (other) individuals of the company?

Managers and employees of a legal entity may be held criminally liable if they wilfully and directly participated in the commission of an offence. Mere knowledge of the commission of an offence by an employee working under one's supervision is not sufficient to establish the supervisor's criminal liability, provided he/she did not participate in the wrongful conduct. However, a CEO may be held criminally liable when the decision to commit an offence falls within the scope of his/her authority and such decision is, in practice, approved by the CEO.

Individuals can be fined, imprisoned, and/or subject to additional penalties, such as forfeiture, court-mandated treatments, affirmative injunctions, impoundment, closure of a business, and display of the conviction.
Like individuals, legal entities may be held liable for criminal offences committed by their corporate bodies or representatives. Legal entities may be punished by a criminal fine and/or additional penalties, such as restrictions on running the business, judicial control of the company, and debarment.

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16. Please briefly describe any investigations trends in your country (e.g. recent case law, upcoming legislative changes, or special public attention on certain topics)?

Internal investigations, compliance programmes, and deal negotiations are a growing practice in France, as evidenced by the strengthening of companies' obligations under the Sapin II Law. The ability to strike deals with the prosecution authorities is a key factor for the growth of internal investigations. Increasing public interest in compliance-related matters has led to intense media coverage of these topics.

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Antonin Lévy, a partner in the Hogan Lovells Paris office, is a member of both the Paris and New York Bars. Who's Who Legal 2015 considers Antonin a "standout figure" and "revered practitioner" when it comes to criminal business law, in particular in stock exchange, financial, and industrial matters. Antonin has significant practical experience offering guidance and litigating issues related to fraud, anti-money laundering, anti-bribery and corruption, international sanctions, and other regulatory and compliance issues, defamation, and extradition. He frequently represents companies and their directors as claimants or defendants in criminal proceedings, and has undertaken internal investigations on the business activities of companies operating in several industries. Antonin has worked on several flagship cases, including the Concorde accident that took place in France in 2000 in which he obtained a non-guilty verdict for Continental Airlines.

Antonin was awarded a post-graduate degree (DEA) in private law from the University Paris II Panthéon-Assas in 2005; an LL.M., a General Studies degree from New York University (NYU) in 2004; a post-graduate degree (DESS) in law and economic globalisation from the University Paris Pantheon-Sorbonne and Sciences Po in 2003; and he graduated from the Institut d'Etudes Politiques de Paris in 2002.

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Germany

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 Dr. Sebastian Lach

 Nadine Lubojanski

TABLE

	Corporate Liability	Public Bribery	Commercial Bribery	Extraterritorial Applicability of Criminal Laws	Adequate Procedures Defence
Yes		X	X	X	X
No	X No criminal liability of companies, but administrative fines possible in case of misconduct of employees.				

QUESTION LIST

1. Do any specific procedures need to be considered in case a whistleblower report sets off an internal investigation (e.g. for whistleblower protection)?

There is no specific German law for whistleblower protection. However, case law allows dismissals and other sanctions of whistleblowers only under certain conditions. An employee cannot be dismissed instantly if he/she reported misconduct to fulfil his/her legal duties. According to other case law, however, a dismissal with immediate effect may be justified if the employee discloses information to authorities or the public before disclosing internally. Such prior internal disclosure may not be required in particular cases, e.g. in case the employee would have faced charges if he had not reported or if his direct report committed the misconduct.

2. Do the following persons/bodies have the right to be informed about an internal investigation before it is commenced and/or to participate in the investigation (e.g. the interviews)?

a) Employee representative bodies, such as a works council

b) Data protection officer or data privacy authority

c) Other local authorities

What are the consequences in case of non-compliance?

a) According to Section 80 paragraph 2 of the German Employees Representation Act ("**BetrVG**") the employer is obliged to inform the works council about the investigation. The involvement of the works council is required if electronic data and emails are reviewed, transferred to external server or being investigated with software (Section 87 paragraph 1 No. 1 BetrVG). Further, the works council has the right to participate if uniform questionnaires are used which allow a conclusion to the employees' performance (Section 94 paragraph 1 BetrVG). An exemption from this participation requirement could be achieved by guaranteed anonymisation of these questionnaires' results.

b) According to Section 4f paragraph 5 Federal Data Protection Act ("**BDSG**"), it is required to support the data protection officer ("**DPO**") with his/her duties. According to the new European data protection regulation (EU) 2016/679, one of the DPO's duties will be to consult the employees concerning their data privacy right. Further, the DPO has data protection monitoring duties. Therefore, the company in general has to inform the DPO about all data privacy related procedures and processes of an investigation.

c) The prosecution authorities do not have the right to be informed, but a voluntary involvement can be advantageous.

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3. Do employees have a duty to support the investigation, e.g. by participating in interviews? If so, may the company impose disciplinary measures if the employee refuses to cooperate?

In general, employees have the labour law duty to cooperate as far as the facts to be investigated relate to activities conducted or perceptions made as part of their work life. They must answer work-related questions truthfully and completely. If unrelated to work, a balancing of interests test is required to determine if a duty to cooperate exists. A relevant factor may for example be the employee's position in the company. A supervisory function may lead to greater cooperation duties. A balancing of interests also has to be performed in case the employee would be subject to self-incrimination. However, even then, the duty to cooperate generally applies.

In case the employee is required to participate, the employee's refusal may be regarded as misconduct. Such misconduct may justify a dismissal if the employee had already received a formal warning for the same or similar misconduct before.

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4. May any labour law deadlines be triggered or any rights to sanction employees be waived by investigative actions? How can this be avoided?

Investigative measures may trigger the two-week-deadline for instant dismissal for cause. This deadline starts when the person of the company authorised to dismiss employees receives knowledge of the relevant facts. To avoid triggering this deadline too early, the employer should be informed of the results of the investigation at an advanced stage of the investigation after comprehensive information was gathered. Further, the interviewer should especially avoid using terms such as "interrogation", "hearing", or "questioning". Using such terms increases the risk of triggering labour law deadlines, especially for possible sanctions. Therefore, the interviewer should rather refer to terms like "meeting" or "interview". Moreover, employees are also generally more willing to participate in an "interview" than in an "interrogation".

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5. Are there any relevant data privacy laws, state secret laws, or blocking statutes in your country that have to be taken into account before

a) Conducting interviews?

Data privacy laws do apply to any processing of data. This includes securing, collecting and reviewing data, as well as the creation of work products such as interview file notes and final reports. Therefore, it is very important to perform an early assessment of the applicable data privacy laws and to document the steps taken.

b) Reviewing emails?

Private communication is highly protected under German law. Reviewing such emails may even constitute a criminal offence (breach of telecommunications secrecy) if data privacy requirements are not observed. Therefore, before conducting a thorough analysis of legal exposure should always be performed.

c) Collecting (electronic) documents and/or other information?

Germany does not have a blocking statute regime. Its data protection statutes are based on the European data protection directive until Regulation (EU) 2016/679 will come into force in May 2018.

Although communication with authorities can trigger applicability of data protection laws, the request of the authority will often be a sufficient justification for gathering and using data. In critical cases, it may be advisable not to produce data on a voluntary basis but to await a written formal request with the announcement of enforcement from the authority.

d) Analysing accounting and/or other mere business databases?

In case that compliance with general accounting principles is investigated, lower standards apply. According to Section 28 paragraph 1 sentence 2 BDSG, the use of accounting and business databases is allowed during the time of the investigation.

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6. Before conducting employee interviews in your country, must the interviewee

a) Receive written instructions?

There is no general and statutory obligation to instruct an employee about the legal circumstances and his rights. Nevertheless, many companies in Germany consider explanations to be ethically required and advisable. In general, this includes a brief description on the background of the investigation and the subject matter. For documentation purposes, it is advisable to provide these instructions in written form to be countersigned by the interviewee.

b) Be informed that he/she must not make statements that would mean any kind of self-incrimination?

In contrast to an individual's right to remain silent in case of self-accusation during interrogations of criminal authorities, there is no corresponding right with regard to employee interviews as part of internal investigations. However, there are non-binding provisions of the German Federal Bar Association that recommend avoiding any behaviour of the interviewer that might put pressure on the interviewee to incriminate him-/herself.

c) Be informed that the lawyer attending the interview is the lawyer for the company and not the lawyer for the interviewee (so-called "Upjohn warning")?

An Upjohn warning must be conducted if relations to U.S. law exist. Besides, giving an Upjohn warning is an accepted best practice in Germany, too. However, there is no explicit legal obligation to do so under German law.

d) Be informed that he/she has the right that his/her lawyer attends?

Whether or not the employee has a general right to attendance of own counsel has not yet been fully confirmed or denied by case law. The companies often allow such attendance to have a fair set-up or if the employee is suspected of having committed criminal offences.

e) Be informed that he/she has the right of a representative from the works council (or other employee representative body) to attend?

The employee does not have a strict legal right to be attended by a representative of the works council. However, to reduce risks of escalation with the works council and to ensure "equality of arms", companies often allow such attendance.

f) Be informed that data may be transferred cross-border (in particular to the United States)?

The employee should be informed and his/her consent should be requested. Under German data privacy law, transfer of data to non-EU states is only permissible if adequate safeguards and procedures are established. However, according to Section 4c paragraph 1 No. 1 BDSG, the consent of the employee may allow the transfer of data even to countries which do not ensure an adequate level of protection.

g) Sign a data privacy waiver?

According to Section 4 paragraph 1 BDSG the employee needs to approve as far as personal data is concerned and as far as no permitting exception of the BDSG applies. In case that personal data of the interviewee might be used for other purposes in the future, such as in later court proceedings, a data privacy waiver of the interviewee can be very helpful.

h) Be informed that the information gathered might be passed on to authorities?

If relations to U.S. law exist the interviewee should be informed in this regard. But also if not, even though there is no legal obligation in Germany, this is a frequent practice and should be added to the interview instructions.

i) Be informed that written notes will be taken?

For reasons of transparency, the documentation of the provided information (e.g. for reports and potentially for disclosure) should be explained. However, there is no legal obligation under German law.

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7. Are document hold notices or document retention notices allowed in your country? Are there any specifics to be observed (point in time/form/sender/addressees etc.)?

There is no specific law governing this question, but issuing such notices is a common procedure. Such notices should be clear, be sent to all potentially relevant addressees and be issued as early as possible.

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8. May attorney-client privilege be claimed over findings of the internal investigation? What steps may be taken to ensure privilege protection?

German privilege rules are very limited. Privilege protection depends mainly on where the documents are located and for what reason they were created.

To ensure privilege, the safest way is to involve outside counsel. In general, documents in custody of external counsel are protected. Documents in custody of the company are, however, only protected in isolated cases. Ideally, newly generated work products should therefore only be available on outside counsel's servers instead of keeping them on company's premises. This does not mean, however, that any existing document should be moved to outside counsel as this could mean a violation of German criminal laws.

Further, privilege protection will more likely be granted if the advice is provided in relation to a (potential) investigation by authorities. This can be shown by setting up a separate engagement letter for the internal investigation.

It may also be helpful to label privileged documents accordingly to prevent investigators' accidental access. However, the labelling itself does not automatically entail privilege.

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9. Can attorney-client privilege also apply to in-house counsel in your country?

Communication with and documents created by inside counsel are generally not privileged under German law. Only individual case law provided higher privilege protection to documents prepared by an inside counsel. According to this decision, documents prepared by inside counsel can be protected if drafted for the purpose of defence by outside counsel. This decision is, however, not yet established. Therefore, there is at least a significant risk that documents created by inside counsel are not privileged.

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10. Are any early notifications required when starting an investigation?

a) To insurance companies (D&O insurance etc. to avoid losing insurance coverage)?

As far as circumstances arise which could give reason to a claim against the insurance company, the policy holder should make a notification of circumstances to the insurer.

b) To business partners (e.g. banks and creditors)?

Information duties may arise from contractual obligations between the company and the business partner. Even if there is no explicit provision in the contract, there may be an obligation in case of starting an internal investigation it is a highly important information for the other party and relevant with regard to the purpose of the agreement. These interests of the business partner need to be evaluated against the legitimate

interests of the company. Therefore, it depends on the individual case whether and when the business partner needs to be notified.

c) To shareholders?

Potential reporting duties towards shareholders compete with the company's intention to maintain (business) confidentiality. Internal investigations are highly important aspects and could be seen as insider information that may possibly influence the stock price. The corporation has to evaluate case by case if there is an *ad hoc* duty to report to the shareholders. If the internal investigation affects the market price significantly and fulfils different criteria (e.g. risk of the internal investigation, scope, involved suspects) an obligation to disclose exits. In case of a violation of the reporting duties, the company may be held liable to pay damages according to Section 37b paragraph 1 of the German Securities Trading Act (**"WpHG"**).

d) To authorities?

In general, there is no duty to inform the prosecutor about an internal investigation or potential misconduct within the company. There may only be exceptions for very significant crimes. However, a cooperative approach with the local prosecutor may prevent adverse and unexpected measures by the authorities, such as dawn raids. It also has to be checked whether the company has a standing cooperation agreement with the authorities.

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11. Are there certain other immediate measures that have to be taken in your country or would be expected by the authorities in your country once an investigation is started, e.g. any particular immediate reaction to the alleged conduct?

The company has to minimise damages and try to prevent new ones to fulfil its supervisory duties. Additionally, the company may have to re-evaluate its compliance system in order to eliminate potential deficits and to improve its existing system. Further, the company may impose sanctions on the concerned employees to show that misconduct is not tolerated inside the company.

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12. Will local prosecutor offices generally have concerns about internal investigations or do they ask for specific steps to be observed?

Local prosecutor offices generally appreciate internal investigations through external investigators e.g. law firms. Early involvement, communication and coordination may be helpful for a good cooperation with local prosecutors. In this regard, it is crucial that the company does not destroy any potential evidence or convey the impression that evidence is or will be destroyed. Therefore, data retention orders should be communicated at the earliest stage possible.

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13. Please describe the legal prerequisites for search warrants or dawn raids on companies in your country. In case the prerequisites are not fulfilled, may gathered evidence still be used against the company?

Both search warrants and dawn raids must fulfil formal and material requirements stipulated by law.

The search warrant in general has to be issued by a district court, or – in case of imminent danger – by the prosecutor. It has to be written and signed. Further, it has to describe the alleged facts and the offence that the individual is being accused of. The search warrant also has to indicate what evidence is expected to be found and why it is expected to be found at the particular place of the search. Further, there must be a reasonable suspicion that an offence was committed based on the experience of a criminal investigator. In addition, the search warrant, but also the dawn raid itself, has to be based on reasonable balancing of interests decisions. According to German case law, a search warrant is only valid for six months.

In case these legal requirements are not fulfilled, generally, the seized evidence may still be used in court proceedings. In Germany, there is no absolute "fruit of the poisonous tree" doctrine. Only in severe cases of illegally obtained evidence, the evidence may not be used in court. This may be the case if there was no reasonable suspicion

of a criminal offence or if the decision was made without balancing the interests of the searched individual/company with the state's interest to prosecute. Formal legal requirements, such as a missing signature, will generally not lead to a prohibition of use of the seized evidence. According to German case law, exceptions can only be made in very severe cases, e.g. if the investigating authorities acted arbitrary.

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14. Are deals, non-prosecution agreements, or deferred prosecution agreements available and common for corporations in your jurisdiction?

While deals and non-prosecution agreements are available for individuals, they are not provided for corporations under German law.

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15. What types of penalties (e.g. fines, imprisonment, disgorgement, or debarment) may companies or its directors, officers, or employees face for misconduct of (other) individuals of the company?

Although corporations are not subject to criminal responsibility under German law they can be subject to legal consequences, as administrative fines, disgorgement and debarment.

Individuals may face sanctions not only for their own misconduct but also for misconduct of other employees when they failed to implement a sufficient supervisory structure. Therefore they may face sanctions as imprisonment, fines or official debarment from their profession.

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16. Please briefly describe any investigations trends in your country (e.g. recent case law, upcoming legislative changes, or special public attention on certain topics)?

With effect from 2 July 2016, the German Financial Supervisory Authority (*Bundesanstalt für Finanzdienstleistungsaufsicht*, "**BaFin**") has established a whistleblower tool. Whistleblowers may use it to report violations of supervisory provisions. According to BaFin's press release, anonymity of whistleblowers will be "top priority for BaFin". Although there is still no explicit whistleblower protection law in Germany, this shows that whistleblower protections and the support of whistleblowing systems are on the rise.

Further, companies should prepare themselves and their employees for potential dawn raids, irrespective of any current cases of suspected misconduct within the company. The prosecutor's offices in Germany have increasingly conducted dawn raids in companies, also in cases where no misconduct related to the company's business was suspected.

Public prosecutors also seem to have set a stronger focus on prosecuting embezzlement. There has been very strict case law in this regard. For instance, there has been recent case law deciding that the set-up of a compliance system to prevent embezzlement within the company may still lead to criminal liability if the actual means are not eliminated (in this case not dissolving an existing petty cash).

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Sebastian Lach handles compliance and investigation issues, as well as complex product safety and liability cases. In the field of compliance and investigations, he has advised various clients on the creation of global compliance systems. Sebastian has successfully advised on criminal matters (e.g. bribery, fraud, embezzlement) and internal investigations relating to more than 50 countries worldwide, including FCPA, SEC/DOJ implications. Throughout his career, he has handled more than 20 multi-jurisdictional investigations, most of them for Fortune 500 and DAX 30 clients.

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Greece

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TABLE

	Corporate Liability	Public Bribery	Commercial Bribery	Extraterritorial Applicability of Criminal Laws	Adequate Procedures Defence
Yes		X	X	X Only in bribery cases.	X
No	X Legal entities may only be liable for administrative violations, though company directors may be held criminally liable.				

QUESTION LIST

1. Do any specific procedures need to be considered in case a whistleblower report sets off an internal investigation (e.g. for whistleblower protection)?

There is no specific procedure governing corporate internal investigations in Greek law. There are, however, some points that must be considered concerning whistleblower reports in bribery cases.

A whistleblower reporting bribery may receive some protection if granted "witness of public interest" status under Article 45B of the Greek Criminal Procedure Code. The status is granted by order of the public prosecutor and confirmed by the Greek Supreme Court. The "witness of public interest" is protected from retribution in criminal, administrative, and labour law proceedings. For example, if a criminal complaint is filed against a "witness of public interest" for defamation as a result of his/her report, the prosecutor can decide to refrain from pressing charges. Similarly, a public servant with "witness of public interest" status may not be fired or otherwise retaliated against due his/her report.

Apart from this special status, there is no institutional protection for whistleblowers in the private sector and there is no specific rule governing internal investigations. In cases of internal reports, whistleblowers without "witnesses of public interest" status are not protected against criminal allegations of defamation and they can be fired.

2. Do the following persons/bodies have the right to be informed about an internal investigation before it is commenced and/or to participate in the investigation (e.g. the interviews)?

a) Employee representative bodies, such as a works council

b) Data protection officer or data privacy authority

c) Other local authorities

What are the consequences in case of non-compliance?

There is no specific Greek law concerning the conduct of an internal investigation. There are, however, some rules which could apply:

a) Presidential Order 240/2006 (which implemented Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002) concerning the relations between employees and employers indicates that a works council has the right to be informed about a forthcoming internal investigation and an obligation to keep it secret. There is, however, no provision concerning the active participation of the works council in an internal investigation.

b) Greek data protection legislation (Greek Data Protection Law 2472/1997 as well as the EU General Data Protection Regulation 2016/679) provides an obligation to inform the data protection authority before starting an internal investigation, if the investigation results in the processing of employee personal data, unless the data subject consents to the processing.

c) Performing an internal corporate investigation falls within the employer's managerial authority. This means that there is no general obligation for the company to inform other public authorities thereof.

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3. Do employees have a duty to support the investigation, e.g. by participating in interviews? If so, may the company impose disciplinary measures if the employee refuses to cooperate?

In general, there is no specific labour law obliging employees to support internal investigations and employees are generally not obliged to report misconduct. However, an obligation to participate in an internal interview could derive from the general fiduciary duty towards the company (the "bona fides rule" under Article 288 of the Greek Civil Code).

In addition, if the employee has a special duty to report misconduct, e.g. a member of the compliance department, he/she must support the company's internal investigation or face criminal liability. Imposing disciplinary measures on an employee for refusal to cooperate during an investigation is a matter of internal company regulation.

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4. May any labour law deadlines be triggered or any rights to sanction employees be waived by investigative actions? How can this be avoided?

There are no specific deadlines to dismiss for cause if a company uncovers employee misconduct. Although a company should, in practice, act as quickly as possible, the company must be careful when sanctioning employees so as not to give the wrong impression (e.g. that the only aim of the internal investigation is to release employees without compensation).

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5. Are there any relevant data privacy laws, state secret laws, or blocking statutes in your country that have to be taken into account before

a) Conducting interviews?

Greek constitutional law protects the privacy of telephone and email communication as well as access to personal data. If an interview is recorded or summarised, the company should seek the employee's consent. Creating an archive of all employee interviews must additionally be announced to the Greek data protection authority.

b) Reviewing emails?

Telephone and email communication is protected by communication privacy laws during the communication itself. The content of the communication is protected as personal data by the data protection legislation. If an internal investigation results in the processing of employee personal data, the Greek data protection authority must be notified in advance, unless the employee consents to the processing.

Emails that have been sent from or received by an employee via his/her corporate email address are protected as personal data (Article 9A of the Greek Constitution and Law 2472/1997). However, this

protection is not absolute. Recently, the Greek Supreme Court decided in plenum that it can be limited according to the proportionality principle (Article 25 of the Greek Constitution), when the employee has acted against the company. It is not clear whether this limitation can also apply to employees who have not acted against the interests of the company, but may be implicated in an investigation. In such cases, it is, therefore, recommended to seek the employees' consent.

c) Collecting (electronic) documents and/or other information?

Collection of electronic documents and/or other information might violate Greek data protection legislation. It is, therefore, recommended to either inform the Greek data protection authority about the classification of this information during the internal investigation or to seek the employees' consent.

d) Analysing accounting and/or other mere business databases?

The Greek data protection authority should be informed in advance if the databases contain personal data.

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6. Before conducting employee interviews in your country, must the interviewee

a) Receive written instructions?

There is no specific labour law on this topic. It is, therefore, a matter of internal company regulations.

b) Be informed that he/she must not make statements that would mean any kind of self-incrimination?

In contrast to criminal procedure, the "nemo tenetur" principle does not apply in private law. Therefore, there is no legal obligation for the company to instruct the employee about self-accusation. Internal company regulations may, however, provide such an obligation.

If the company provides the interview material to the prosecution authorities, a criminal procedure may not start against the interviewee, exclusively based on his interview, as this violates the "nemo tenetur" principle. However, in practice, the prosecuting authorities will most likely proceed with the initiation of a criminal procedure using supplementary material (e.g. interviews with colleagues).

c) Be informed that the lawyer attending the interview is the lawyer for the company and not the lawyer for the interviewee (so-called "Upjohn warning")?

There is no such obligation according to Greek labour law. However, without prejudice to the internal regulation of a company, a general briefing of the interviewee on this point is advisable.

d) Be informed that he/she has the right that his/her lawyer attends?

There is no such obligation according to Greek labour law. However, without prejudice to the internal regulation of a company, informing the employee accordingly is recommended.

e) Be informed that he/she has the right of a representative from the works council (or other employee representative body) to attend?

There is no such obligation according to Greek labour law.

f) Be informed that data may be transferred cross-border (in particular to the United States)?

It is recommended to advise the employee about potential data transfers, as it would indicate that the data subject consents to the processing of their data. Informing the employee may count as silent consent if the employee is not opposed to the transfer.

g) Sign a data privacy waiver?

It is recommended to ask the employee to sign a data privacy waiver. Informing the Greek data protection authority before starting with the processing of the data is generally mandatory, unless the data subject consents to the processing.

h) Be informed that the information gathered might be passed on to authorities?

As with cross-border data transfers, it is recommended to advise the employee about potential recipients of the data, as it would indicate that the data subject consents to the processing of their data. Informing the employee may count as silent consent if the employee does not object.

i) Be informed that written notes will be taken?

It is recommended to inform the employee that notes will be taken as these notes might be considered "personal data" as well. Informing the employee may count as silent consent if the employee does not object.

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7. Are document hold notices or document retention notices allowed in your country? Are there any specifics to be observed (point in time/form/sender/addressees etc.)?

Internal investigations are not yet common in Greek practice. Document hold notices or document retention notices can be issued by a company and the employees will have to comply with them on the basis of the bona fides rule.

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8. May attorney-client privilege be claimed over findings of the internal investigation? What steps may be taken to ensure privilege protection?

The attorney-client privilege is established in the Code of Lawyers and is binding for all lawyers registered with the Bar, irrespective of their status as freelancers or in-house counsel. The privilege protection extends to documents, objects, data, or information obtained in the course of their representation of the client and applies to internal investigations.

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9. Can attorney-client privilege also apply to in-house counsel in your country?

The attorney-client privilege is binding for all lawyers registered with the Bar, including in-house counsel. Nonetheless, it is possible that, according to internal company policy, only specific employees of the company, e.g. the President, Vice President, or the members of the Board of Directors, are considered the "clients" of in-house counsel. Hence, not all employee communications with in-house counsel may be protected by this privilege.

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10. Are any early notifications required when starting an investigation?

a) To insurance companies (D&O insurance etc. to avoid losing insurance coverage)?

There is no general legal obligation to notify an insurance company with regard to the start of an investigation. Nonetheless, such an obligation might be provided by the insurance contract.

b) To business partners (e.g. banks and creditors)?

A company is not generally obliged to inform its business partners as soon as it starts an investigation. However, the relationship between the parties might give rise to a notification obligation.

c) To shareholders?

If a company's shares or other financial instruments are traded in the stock exchange, the company is generally obliged to inform the public about important issues, including an on-going investigation, if the internal investigation would be considered insider information under applicable capital market regulations. However, the company is not obliged to provide early notification of the start of an investigation.

d) To authorities?

Companies are not obliged to notify criminal authorities with regard to the initiation of internal investigations. Nonetheless, informing data protection authorities about such investigations might be required, as described above.

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11. Are there certain other immediate measures that have to be taken in your country or would be expected by the authorities in your country once an investigation is started, e.g. any particular immediate reaction to the alleged conduct?

Measures to eliminate or limit compliance violations should immediately be taken (e.g. giving the legal department control of production or finance, sanctioning of liable personnel, and rethinking the compliance structure of the company). Depending on the alleged conduct and the sensitivity of each case, company management is typically advised to contact the competent administrative authorities (e.g. the Capital Market Commission or the Competition Commission) or, if applicable, the prosecuting authorities, and declare the company's willingness to minimise damages and prevent new harms. The competent state authorities might call on the company to re-evaluate its compliance system or to impose sanctions on employees. The company's cooperation is a clear mitigating factor, should the authorities impose administrative fines.

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12. Will local prosecutor offices generally have concerns about internal investigations or do they ask for specific steps to be observed?

Greek prosecutor offices have little experience with internal investigations. The results of an internal investigation may lead prosecutors to officially open a criminal proceeding by ordering a pre-trial inquiry. Within this inquiry the company's officials are likely to be summoned either as witnesses or, more probably, as defendants. This has been the case in several recent criminal cases in the pharmaceuticals industry.

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13. Please describe the legal prerequisites for search warrants or dawn raids on companies in your country. In case the prerequisites are not fulfilled, may gathered evidence still be used against the company?

According to the Greek Criminal Procedure Code and the Greek Constitution, every search performed by law enforcement officers in the suspect's residence or the company's seat, requires the presence of a judge (including magistrate judges) or prosecutor (prosecutors in Greece are part of the judicial authority in the broad sense). Therefore, there is no procedure prescribed in Greek law concerning the issuing of a search warrant by the court. Dawn raids are similarly performed by prosecution (police) officers in the presence of a judge.

In practice, searches and dawn raids are usually performed at the stage of primary investigation of a felony. However, in cases of flagrant offences, or if there is imminent danger of losing important material evidence, law enforcement officers may directly proceed with a search or raid. They are then obliged to compose a written report (e.g. about the material they confiscated), which must be immediately submitted to the prosecutor.

Further serious investigative actions, such as surveiling the company's seat, can only be performed after approval by a Judicial Council. If the prerequisites for performing searches or dawn raids are not fulfilled, the evidence is, in most cases, considered illicit and cannot be used against the company.

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14. Are deals, non-prosecution agreements, or deferred prosecution agreements available and common for corporations in your jurisdiction?

In general, there are no legal provisions for non-prosecution agreements or deferred prosecution agreements in Greece. For certain crimes, however, the prosecutor may defer prosecution, if the offender has fully compensated the victim. In cases where the prosecutor has already pressed charges, the Judicial Council is able to drop them. In practice, the behaviour of the defendant during the procedure is evaluated by the court at the hearing stage.

With respect to white collar crimes against the Greek State (e.g. tax and economic crimes), there is also a growing trend that criminal authorities do not press charges or press only minimal charges against defendants who fully compensated the State.

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15. What types of penalties (e.g. fines, imprisonment, disgorgement, or debarment) may companies or its directors, officers, or employees face for misconduct of (other) individuals of the company?

There are no criminal sanctions for companies in Greece. There are, however, administrative sanctions, mainly fines, as well as exclusion from business with the Greek State or revocation of permission.

Directors may, in contrast, be held criminally liable for the misconduct of employees, but only when, according to their duties, they were appointed with the specific obligation to prevent the misconduct at issue. Hence, it is important for a company to preserve a clear corporate governance diagram.

Felonies are severely penalised with up to 20 years' imprisonment, though actual prison time differs from case to case. Misdemeanour incarceration sentences are usually suspended or converted to pecuniary penalties.

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16. Please briefly describe any investigations trends in your country (e.g. recent case law, upcoming legislative changes, or special public attention on certain topics)?

Financial crimes against the Greek State are severely punished and may result in lifetime incarceration. Greek prosecutors tend to press charges aggressively. In the last years, asset confiscation, which is provided for under criminal tax legislation, anti-money laundering legislation, and legislation for the combat of public and commercial bribery, has been frequently used.

An additional trend of claiming civil-law-based damages in criminal courts has also arisen. In several recent bribery cases in the public sector and the pharmaceuticals industry, the Greek State sought civil damages through the criminal process. These claims tended to be accepted by the court. Furthermore, in a few cases, the Greek State named corporate entities as defendants in civil actions within the criminal procedure. This new trend can perhaps be seen as an institutional substitute for the absence of genuine corporate criminal liability in Greece.

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Hungary

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Dr. András Multas

TABLE

	Corporate Liability	Public Bribery	Commercial Bribery	Extraterritorial Applicability of Criminal Laws	Adequate Procedures Defence
Yes	X	X	X	X	X
No					

QUESTION LIST

1. Do any specific procedures need to be considered in case a whistleblower report sets off an internal investigation (e.g. for whistleblower protection)?

Employers in Hungary are not obliged to create a whistleblowing system, but, if they choose to do so, the system is regulated by law. According to Act CLXV of 2013 on complaints and reports of public interest (the "**Whistleblowing Act**"), investigators (the employer or a third party engaged by the employer) are obliged to keep confidential the content of a whistleblower report and information concerning the persons involved, in particular the identity of the complainant, until the investigation is completed or prosecution is initiated. Investigators are not allowed to share information with other employees or employee representatives. However, information on the content of the report must be disclosed to the person or entity that is the subject of the report.

In the context of private whistleblowing systems, employees are protected by the Labour Code of Hungary, which provides that an employee may not be terminated for lawfully exercising a right. While this is not absolute protection, if a termination is explicitly or implicitly based on the employee's whistleblower status, it will be deemed unlawful.

In addition to internal investigations, the Whistleblowing Act also sets out provisions in relation to complaints and reports of public interest, which individuals may file directly with government bodies and the local government. In the context of such complaints and reports, the Whistleblowing Act establishes that any measures detrimental to the complainant must be avoided, even if, under different circumstances, such measures could be considered lawful.

Employers are required to investigate internal whistleblowing reports. Complaints and reports of public interest to authorities must also be investigated. On the basis of a well based complaint or report of public interest, the following must be done: a) restoring legality; b) stopping the causes of the errors discovered; c) remedies; and d) initiation of accountability procedures, if needed.

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2. Do the following persons/bodies have the right to be informed about an internal investigation before it is commenced and/or to participate in the investigation (e.g. the interviews)?

a) Employee representative bodies, such as a works council

b) Data protection officer or data privacy authority

c) Other local authorities

What are the consequences in case of non-compliance?

a) According to Section 262 of Act I of 2012 of the Labour Code, works councils monitor compliance with labour law provisions and employers are obliged to consult the works councils before adopting regulations – such as a whistleblowing reporting system – that affect a large number of employees. Section 15(2) of the Whistleblowing Act prohibits investigators from disclosing information to employee representatives until the investigation is completed or prosecution is initiated. However, if a whistleblower reporting system is operated by outside legal counsel, which is not yet common in Hungary, and a report is made, which concerns an act or omission of a company executive, outside legal counsel must immediately inform, among others, the supervisory board, which under Hungarian law can consist of employee representatives.

b) According to Act CXII of 2011 on the Right of Informational Self-Determination and Freedom of Information (the "**Data Protection Act**"), it is generally not mandatory to employ a data protection officer ("**DPO**"). The Whistleblowing Act does not contain any specific rules for notifying the DPO. However, the DPO can be a member of the investigation team, in which case he/she will be informed. There is no obligation under Hungarian law to notify the Hungarian data protection authority of the launch of an investigation.

c) Authorities have no right to be informed until the investigation is completed. After completion, the competent authorities may need to be informed, depending on the outcome of the investigation. If a criminal offence is confirmed, such an offence must be reported.

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3. Do employees have a duty to support the investigation, e.g. by participating in interviews? If so, may the company impose disciplinary measures if the employee refuses to cooperate?

The Labour Code provides that, as a general principle, employment relationships are governed by the principle of good faith and fair dealing. This may imply a duty to cooperate, as employees are not allowed to behave in a manner that violates the rights or legitimate interests of the employer.

An internal whistleblowing policy can establish a more concrete obligation for employees to cooperate. Breach of such an obligation can lead to disciplinary action if specified in the applicable collective bargaining agreement or in the employment contract. A disciplinary action can be a written warning, limited financial penalties, and/or the termination of the employment contract. Even if not specified in the collective bargaining agreement or employment contract, failure to comply with an internal policy can still result in the termination of the employment contract, depending on the seriousness of the breach.

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4. May any labour law deadlines be triggered or any rights to sanction employees be waived by investigative actions? How can this be avoided?

The employer's right to terminate an employee with immediate effect must be exercised within 15 days of discovery of the grounds for termination, but, in any case, must be exercised within one year after the misconduct occurred, or, in the case of a criminal offence, up to the expiration of the statute of limitations. Based on applicable case law, the 15-day deadline is triggered when the person or body entitled to issue the termination notice takes sufficient note of the facts to make the decision. In case of an on-going investigation, the 15-day deadline does not start until the investigation is completed or at least at an advanced stage. The Whistleblowing Act provides that an investigation must be completed within 30 days after receipt of a report, which may be extended in exceptional cases, but, in any case, may not take longer than three months.

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5. Are there any relevant data privacy laws, state secret laws, or blocking statutes in your country that have to be taken into account before

a) Conducting interviews?

When processing data concerning the interview, data privacy laws apply to the collection and processing of data.

b) Reviewing emails?

According to the Labour Code, an employer is obliged to inform employees in advance about possible access to, or monitoring of, their emails and devices. Moreover, pursuant to the Data Protection Act, the employer is obliged to inform employees about all processing of personal data. This is usually accomplished with an internal policy. Distribution of the policy must be documented by the employer.

According to the Data Protection Act, emails can only be accessed, stored, and monitored by the employer for a legally justified purpose, and access, storage, and monitoring must be limited to the review of necessary data. The Labour Code adds that monitoring must be limited to the employee's actions in relation to the employment relationship. Monitoring of private communications is prohibited. Hence, even where the employee uses office IT devices for private purposes, the employer cannot process private content and must delete it from backup copies. According to a decision of the Hungarian data protection authority in an individual case, if the employee is allowed to store private information on the office computer's hard drive and use the office email address for private purposes, the employer must provide the employee time to remove this information before the monitoring starts.

c) Collecting (electronic) documents and/or other information?

If the collection of documents and other information involves the monitoring of the employee's computer and/or other devices, the rules set out in sub-section 5b apply.

d) Analysing accounting and/or other mere business databases?

There are no rules under Hungarian law that would impede the use or review of accounting and business databases during an investigation.

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6. Before conducting employee interviews in your country, must the interviewee

a) Receive written instructions?

According to the Whistleblowing Act, on submission of his/her complaint to the employer, the whistleblower must be informed of procedural deadlines, the possibility that a personal interview may be necessary, the consequences of a report submitted in bad faith, and the possibility to submit anonymous reports. The subject of the report must be informed, in detail, of the report concerning them, their rights, and the rules of procedure at the beginning of the investigation. While the affected persons must be informed about their procedural rights, there is no obligation for the investigators to hand out written instructions to the whistleblower.

b) Be informed that he/she must not make statements that would mean any kind of self-incrimination?

In contrast to an individual's right to remain silent during interrogations by criminal authorities, there is no corresponding right for employee interviews as part of internal investigations.

c) Be informed that the lawyer attending the interview is the lawyer for the company and not the lawyer for the interviewee (so-called "Upjohn warning")?

There is no explicit legal obligation to provide an "Upjohn warning" under Hungarian law.

d) Be informed that he/she has the right that his/her lawyer attends?

According to section 15(3) of the Whistleblowing Act, investigators must ensure that the subject of the whistleblower report has the opportunity to seek legal representation before giving a statement regarding the report. This provision does not specify whether the legal representative may be present at the interview. However, section 15(3) appears to imply a right to have a lawyer present.

e) Be informed that he/she has the right of a representative from the works council (or other employee representative body) to attend?

According to section 15(2) of the Whistleblowing Act, investigators are not allowed to share information with employee representatives until the investigation is completed or criminal prosecution is initiated. The attendance of a member of the works council is therefore not be possible.

f) Be informed that data may be transferred cross-border (in particular to the United States)?

Employees should be informed of all details concerning the processing of their data, including the transfer of personal data within Hungary, within the European Union, or to a third country, such as the United States. It is advisable to explain this possibility in the whistleblowing policy, including all relevant details, such as the legal basis of the transfer (e.g. EU-U.S. Privacy Shield).

g) Sign a data privacy waiver?

Data privacy waivers do not exist under Hungarian law.

h) Be informed that the information gathered might be passed on to authorities?

According to the Data Protection Act, the data subject must be informed of all relevant details concerning data processing. This includes details of data transmission to authorities. It is advisable to explain this possibility in the whistleblowing policy.

i) Be informed that written notes will be taken?

According to Hungarian law, there is no explicit legal obligation to inform the employee that written notes will be taken.

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7. Are document hold notices or document retention notices allowed in your country? Are there any specifics to be observed (point in time/form/sender/addressees etc.)?

There is no specific law governing document holds or retention notices, but internal policies may regulate the relevant processes. IT policies may also entitle employers to scrutinise employee devices and retain information directly from such devices.

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8. May attorney-client privilege be claimed over findings of the internal investigation? What steps may be taken to ensure privilege protection?

If the documents containing the results of the investigation have been prepared by outside counsel or are in the custody of outside counsel, they fall under the confidentiality rules set out in Act LXXVIII of 2017 on the attorneys, and, therefore, are protected by attorney-client privilege.

According to section 16(1) of the Whistleblowing Act, an internal whistleblowing system may be operated by outside counsel. It is, therefore, advisable to engage outside counsel to operate the company's internal whistleblower system in order to have a stronger claim to attorney-client privilege. It may also be helpful to label privileged documents accordingly to prevent accidental access by investigators. However, labelling itself does not automatically guarantee privilege.

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9. Can attorney-client privilege also apply to in-house counsel in your country?

There are no specific rules for confidentiality applicable to in-house counsel under Hungarian law.

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10. Are any early notifications required when starting an investigation?

a) To insurance companies (D&O insurance etc. to avoid losing insurance coverage)?

Certain notification obligations may be found in the relevant insurance policies. However, notification cannot violate the law.

The investigators must keep the content of the notification and the information on the persons concerned in the case confidential until the investigation is completed or criminal prosecution is initiated. Investigators are not allowed to share information with third parties. Actions might be taken once the investigation is completed.

b) To business partners (e.g. banks and creditors)?

The investigators must keep the content of the notification and the information on the persons concerned in the case confidential until the investigation is completed or criminal prosecution is initiated. They are not allowed to share any information with third parties. Actions might be taken once the investigation is completed.

Certain reporting obligations can apply under the relevant agreement, which, however, may not violate the law.

c) To shareholders?

There are no specific rules under Hungarian law in this regard. However, according to sections 55 to 60 of Act CXX of 2001 on the Capital Market, issuers of securities that have been offered to the public must disclose to the public without delay any information that concerns, directly or indirectly, the value or yield of their securities issue, and which may have any bearing on the reputation of the issuer. Issuers must, at the same time, file that information with the Hungarian National Bank as well.

d) To authorities?

Authorities have no right to be informed until the investigation is completed.

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11. Are there certain other immediate measures that have to be taken in your country or would be expected by the authorities in your country once an investigation is started, e.g. any particular immediate reaction to the alleged conduct?

There are no explicit rules for immediate measures to be taken. However, an investigation should not disguise evidence or interfere with a public investigation. In the absence of any specific rules in this context, companies are obliged to act in accordance with the general principles of law and take measures in order to mitigate the damages caused by any potentially unlawful conduct and suspend any activity that could potentially qualify as a criminal offence. The nature of the actions to be performed by the affected company depends on the actual circumstances and should be assessed on a case-by-case basis.

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12. Will local prosecutor offices generally have concerns about internal investigations or do they ask for specific steps to be observed?

Since the Whistleblowing Act covers internal investigations, such concerns should not arise as long as the investigation complies with applicable laws.

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13. Please describe the legal prerequisites for search warrants or dawn raids on companies in your country. In case the prerequisites are not fulfilled, may gathered evidence still be used against the company?

Search warrants are used in criminal proceedings and must comply with the formal and material requirements of the law. They must be issued by a court, the prosecutor, or the investigating authority, such as the police or the National Tax Authority. A search warrant may be issued if it can be reasonably presumed to lead to finding a criminal suspect, evidence of a crime, or property/items subject to confiscation. A search warrant must be issued in writing and must describe what evidence or items are expected to be found. Evidence obtained improperly by a court, the public prosecutor, or the investigating authority may not be considered and used as evidence.

In addition to criminal proceedings, on the basis of authorisation by the court, the Hungarian Competition Authority in antitrust matters, and, on the basis of authorisation by the prosecutor, the Hungarian Tax Authority in tax matters, may carry out dawn raids.

The Hungarian Competition Authority is empowered to conduct "site searches" of any premise, vehicle, or data medium to find evidence connected to the infringement investigated. Investigators may enter premises without the consent of the owner or tenant and without anyone present. They may also open any sealed-off area, building, or premises during the search. The Hungarian Competition Authority is entitled to prepare forensic copies and seize

objects. It may request police assistance where deemed necessary for the successful and safe conduct of the site search. A site search may only be carried out in possession of a prior court order.

The Hungarian Tax Authority has similar authority to carry out dawn raids in tax matters.

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14. Are deals, non-prosecution agreements, or deferred prosecution agreements available and common for corporations in your jurisdiction?

According to Act XIX of 1998 on criminal procedure (the "**Criminal Procedure Code**"), the prosecutor is entitled to dismiss a criminal complaint or suspend an investigation if the person involved in the criminal offence cooperates in the investigation by providing evidence and if the interests of national security or law enforcement take priority over the interest of the state to prosecute. Under Hungarian law, corporations cannot benefit from these deals, since the criminal offence itself is always committed by individuals.

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15. What types of penalties (e.g. fines, imprisonment, disgorgement, or debarment) may companies or its directors, officers, or employees face for misconduct of (other) individuals of the company?

Act CIV of 2001 provides criminal sanctions against legal entities for wilful criminal offences committed by their directors, representatives, supervisory board members, employees, or contractors. Sanctions such as dissolution, limitation of activity, or fines may be imposed on the legal entity, if the legal entity benefited from the criminal conduct or was used a vehicle to carry out the offence.

The Criminal Procedure Code lays down specific rules for the criminal liability of executive officers and directors in relation to the misappropriation of company funds and passive corruption, i.e. the request, acceptance or receipt of an unlawful advantage. In both cases, the maximum term of imprisonment is three years. However, in the case of passive corruption, if the perpetrator breaches his official duty in exchange for unlawful advantage or commits the offence with accomplices or on a commercial scale, he could face up to eight years' imprisonment.

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16. Please briefly describe any investigations trends in your country (e.g. recent case law, upcoming legislative changes, or special public attention on certain topics)?

The implementation of internal whistleblowing systems is not mandatory under Hungarian law and, thus, such internal systems are not widespread in Hungary. Whistleblowing policies are mainly implemented in Hungary by U.S.-based companies based on their legal obligation to do so under U.S. law. To comply with the Hungarian Whistleblowing Act, these policies need to be adjusted accordingly. This is a challenge for many international corporations operating in Hungary, which are subject to other laws and may wish to implement their whistleblowing system in a standardised manner across all jurisdictions.

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TABLE

	Corporate Liability	Public Bribery	Commercial Bribery	Extraterritorial Applicability of Criminal Laws	Adequate Procedures Defence
Yes	X	X	X		
No				X Only where specifically provided for.	X Not available at present, but included in draft anti-corruption legislation.

QUESTION LIST

1. Do any specific procedures need to be considered in case a whistleblower report sets off an internal investigation (e.g. for whistleblower protection)?

Procedures must take account of the Protected Disclosures Act 2014, which provides protections for workers in Ireland who make "protected disclosures" of relevant information, which, in the worker's reasonable belief, tend to show one or more "relevant wrongdoings". A "relevant wrongdoing" is broadly defined and includes the commission of an offence, failure to comply with a legal obligation, miscarriage of justice, danger to the health and safety of any individual, damage to the environment, misuse of public funds or resources, gross mismanagement by a public official and destruction or concealment of information relating to any of the foregoing. Whistleblowers must be provided with protection from dismissal or penalisation and protection of their identity (subject to certain exceptions).

2. Do the following persons/bodies have the right to be informed about an internal investigation before it is commenced and/or to participate in the investigation (e.g. the interviews)?

a) Employee representative bodies, such as a works council

b) Data protection officer or data privacy authority

c) Other local authorities

What are the consequences in case of non-compliance?

a) There is no requirement for an employee representative body to be informed about an internal investigation before it commences.

b) There is no general requirement to notify the Data Protection Commissioner. However, this is likely to depend on the subject matter of the investigation.

c) If a criminal offence may potentially have been committed, then a mandatory reporting obligation to the Irish police could arise if the offence is included in a list of scheduled offences enshrined in legislation. This applies to a broad range of theft, fraud, company law, financial services law, and white collar type offences. A company (or members of its senior management) may also have mandatory reporting obligations to the company's regulator(s).

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3. Do employees have a duty to support the investigation, e.g. by participating in interviews? If so, may the company impose disciplinary measures if the employee refuses to cooperate?

A common law duty of mutual trust and confidence is generally implied in employment relationships. This would require the employee to answer questions in connection with their employment, honestly and truthfully. A duty to cooperate in such investigations often features in company policies. It would be usual for the disciplinary process to apply to employees who refuse to cooperate.

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4. May any labour law deadlines be triggered or any rights to sanction employees be waived by investigative actions? How can this be avoided?

No labour law deadlines are triggered by investigative actions. Similarly no rights to sanction employees are waived by investigative actions. However, where an investigation is being carried out without affording the employees involved the benefit of fair procedures, an employee could bring civil proceedings seeking injunctive relief, restraining the continuation of the investigation. Observing fair procedures is a crucial component of the investigative process in Ireland, and will reduce the likelihood of an employee obtaining injunctive relief.

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5. Are there any relevant data privacy laws, state secret laws, or blocking statutes in your country that have to be taken into account before

a) Conducting interviews?

Data protection legislation (the Data Protection Acts 1988 and 2003 as amended or replaced, including by Regulation (EU) 2016/679 – the General Data Protection Regulation "**GDPR**" and applicable national implementing legislation) applies to any processing of personal data.

The employer will be the data controller of personal data collected or used during interviews (whether it conducts the interview itself or delegates it to a third party). Thus it retains responsibility for the personal data and ensuring that it is processed in accordance with data privacy laws. The employer will therefore be responsible for ensuring that employees are adequately informed that their personal data may be processed for the purpose of these interviews; about the categories of personal data processed; and the legal basis which the employer is using to process such data. Employees must also be informed as to whom their personal data will be disclosed; how long it will be retained and processed; and what their rights are in respect to their data (e.g. right of access, right of rectification, and right of erasure).

The employer will also need a lawful basis for carrying out such processing. If reliance is placed on legitimate business interests as the legal ground for processing, the employer must specifically outline what that legitimate business interest actually is. Consent is also a lawful basis for processing. However, due to the perceived imbalance of power in the employer/employee relationship, together with the much higher compliance threshold for relying on consent under GDPR, it is not advisable to rely on employee consent alone as a lawful basis for processing employee personal data.

If the interviews involve the processing of any sensitive personal data, the employer will need to ensure that one of the more limited legal bases for processing such sensitive personal data can be relied upon. Employers should seek to resist collecting or processing sensitive personal data wherever possible.

b) Reviewing emails?

The same obligations in relation to fair and transparent processing, and having a lawful basis to carry out the processing outlined above, equally apply to reviewing emails. The employer should have an email monitoring policy in place with employees, which is brought to employees' attention so that employees are on notice that their communications are not private and are monitored. Employers should only monitor employee emails where it is reasonably necessary in the interests of the business and without prejudice to the fundamental rights, freedoms, or legitimate interests of employees.

c) Collecting (electronic) documents and/or other information?

If the collection of documents includes personal data, the employer will need to ensure it meets its fair processing obligations (i.e. provides the individuals whose personal data is collected with information as to why their data is being collected, and for what purpose, as detailed in 5a above). This may be covered in a privacy policy or employment manual. There must also be a lawful basis for collecting such data, such as if it is required to comply with a legal obligation or for the legitimate business interests of the employer and where such interests do not outweigh the rights or freedoms of the employee.

d) Analysing accounting and/or other mere business databases?

To the extent that business databases contain any personal data, the employer must ensure compliance with its fair processing obligations and have a lawful basis for collecting personal data as outlined above. Any investigation should take account of the Official Secrets Act 1963, which prevents disclosure, without authorisation, of "official information" of public office holders and confidential contractual information.

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6. Before conducting employee interviews in your country, must the interviewee

a) Receive written instructions?

Where possible it is generally considered best practice, in advance of any interview, to communicate in writing the investigation terms of reference to the employee. This should be done where the investigation could lead to findings, which may have an adverse impact on the employee in question**.** However, there is no legal requirement to state this in writing.

b) Be informed that he/she must not make statements that would mean any kind of self-incrimination?

Irish law recognises a "privilege against self-incrimination". There is no statutory obligation to advise an employee of this, though there is a requirement to ensure that fair procedures and natural justice are applied in the course of the investigation. If there is an allegation of criminal wrongdoing involving the employee, fair procedures and natural justice are interpreted as requiring the employee to be notified of their entitlement to seek independent legal advice from their own lawyer.

c) Be informed that the lawyer attending the interview is the lawyer for the company and not the lawyer for the interviewee (so-called "Upjohn warning")?

In accordance with fair procedures, it should be made clear to the interviewee that any lawyers present are acting for the company, and not the employee, who may in some cases have their own legal representation.

d) Be informed that he/she has the right that his/her lawyer attends?

This depends on the type of investigation. There is no right to (and therefore no right to be informed about) representation if the investigation is a fact-gathering exercise, prior to a separate disciplinary hearing that will decide if the allegations are proven or not. However, where the investigator appointed will reach formal findings, the principles of fair procedures and natural justice will apply, which include the right to legal representation and the right to cross examine one's accuser.

e) Be informed that he/she has the right of a representative from the works council (or other employee representative body) to attend?

As mentioned above with respect to the right to legal counsel, the right to representation depends on the type of investigation.

f) Be informed that data may be transferred cross-border (in particular to the United States)?

Employees must be informed of all processing activity carried out on their personal data, including where the data is to be transferred cross-border.

g) Sign a data privacy waiver?

Signing a data privacy waiver is not necessary and, in fact, it would not be advisable to rely on consent of employees for processing their personal data. As outlined above, there are alternative lawful grounds available to employers to process personal data.

h) Be informed that the information gathered might be passed on to authorities?

In order for the employer to meet its fair processing obligations, interviewees must be informed that their personal data may be passed on to authorities. The employer would need to have a lawful basis for sharing the data with the authorities (in particular where such sharing is on a voluntary basis), such as its legitimate business interests.

However, where the employer is subject to a legal compulsion to pass data to the authorities, these requirements for lawfully processing personal data may not be activated.

i) Be informed that written notes will be taken?

It is best practice to inform employees that notes will be taken. It is advisable to share draft notes with the employee following the interview and request that they agree to the content. However, this is not a requirement of Irish law.

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7. Are document hold notices or document retention notices allowed in your country? Are there any specifics to be observed (point in time/form/sender/addressees etc.)?

Such notices should generally be issued as a matter of good practice to "custodians" of material potentially relevant to the investigation in order to secure and ensure the safekeeping of the material.

It is also advisable to suspend routine/automatic document or data destruction processes for any records or materials which may be potentially relevant to the matters under investigation, to ensure that relevant material is not unwittingly destroyed.

There is no specific form such notices must follow. Typically they should be issued as soon as possible to persons (or "custodians") who are likely to hold potentially relevant records or materials, in order to make the recipient fully aware of their obligations to preserve all relevant records and materials.

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8. May attorney-client privilege be claimed over findings of the internal investigation? What steps may be taken to ensure privilege protection?

Attorney-client privilege may be claimed over the findings of the internal investigation, if it can be established that either "legal advice privilege" or "litigation privilege" applies. Legal advice privilege protects communications between lawyers and their clients, the dominant purpose of which is seeking or providing legal advice. Litigation privilege protects confidential communications between a client and their lawyers and third parties, where the dominant purpose is to prepare for actual or reasonably apprehended litigation. The Irish courts have held that litigation privilege can apply in relation to materials generated in contemplation of a regulatory or criminal investigation.

Protection of privilege in an internal investigation requires advance planning and regular review. In order to maximise a claim to privilege it is generally advisable (among other things) to: (1) involve external lawyers at an

early stage; (2) where appropriate, label documents created in relation to an investigation with an appropriate "privilege" tag; (3) limit the dissemination of legal advice, privileged work, and other sensitive documents to a small group and to what is strictly necessary in the circumstances; and (4) ensure that material relating to the investigation is stored separately.

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9. Can attorney-client privilege also apply to in-house counsel in your country?

In-house counsel are entitled to be treated in the same way as external legal counsel in respect of legal privilege in Ireland. The principal exception to this is in relation to European Commission competition investigations, where the European Court of Justice has held that communications with in-house lawyers are not legally privileged.

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10. Are any early notifications required when starting an investigation?

a) To insurance companies (D&O insurance etc. to avoid losing insurance coverage)?

It is generally advisable to check the insurance policy early on. Where required, a precautionary notification to insurance companies should be made as soon as possible, to avoid any subsequent refusal of cover on the basis that the matter was not notified on a timely basis.

b) To business partners (e.g. banks and creditors)?

Early notification to business partners will depend on the nature and subject matter of the investigation. Assessment on a case-by-case basis will be required.

c) To shareholders?

Directors typically owe duties to the company, rather than to shareholders. There may however be special circumstances, where a duty could be owed to the shareholders, such that disclosure is required. For publicly listed companies, the Rules of the Irish Stock Exchange ("**ISE**") require that companies must, without delay, provide to it any information considered appropriate to protect investors. The ISE may, at any time, require such information to be published to protect investors, or to ensure the smooth operation of the market.

d) To authorities?

This will depend on the nature of, and subject matter of, the investigation. The company (or its senior management, including, in particular, any persons in "Pre-Approved Controlled Functions") may have specific mandatory reporting obligations to relevant regulator(s), including for example, to the Central Bank of Ireland, the Director of Corporate Enforcement, the Data Protection Commissioner, and/or the Competition and Consumer Protection Commissioner.

Where the investigation relates to a matter potentially involving certain fraud, corruption and/or company law offences, a report to the Irish police under Section 19 of the Criminal Justice Act 2011 may be required.

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11. Are there certain other immediate measures that have to be taken in your country or would be expected by the authorities in your country once an investigation is started, e.g. any particular immediate reaction to the alleged conduct?

Consideration should be given to whether any mandatory reporting requirements arise and steps should be taken to ensure the preservation of all relevant materials. Consideration should also be given to taking appropriate mitigation steps while the investigation is on-going, including any necessary notification to any impacted third parties, e.g. to customers who are potentially impacted by an employee fraud.

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12. Will local prosecutor offices generally have concerns about internal investigations or do they ask for specific steps to be observed?

Where an internal investigation and regulatory investigation are operating in tandem, it is generally advisable to maintain regular contact with the regulator to ensure that they are on board with the approach being taken in the internal investigation.

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13. Please describe the legal prerequisites for search warrants or dawn raids on companies in your country. In case the prerequisites are not fulfilled, may gathered evidence still be used against the company?

In most cases, the Irish police will require a search warrant before searching premises, although there are statutory exceptions to this. Generally, search warrants are issued by District Court Judges.

The legal prerequisites which apply to regulators will depend on the statutory provisions under which they are appointed. Some regulators have statutory powers to conduct searches and "dawn raids" on business premises on foot of their warrant of appointment alone (without needing to apply to court for a specific permission to do so). However, a search warrant (granted by a court) may be required in certain circumstances, e.g. to search a private dwelling, seize original documents, and/or use reasonable force in connection with statutory search and seizure powers. A recent Irish Supreme Court decision held that the regulator must exercise its search powers in an appropriate and proportionate manner to ensure that, insofar as possible, only relevant material is seized for review and that where irrelevant material is seized, it should not be reviewed.

There is judicial discretion over whether to admit improperly gathered evidence. The Irish Supreme Court has recently held that evidence obtained unconstitutionally may still be admissible if the prosecution can establish that any breach of constitutional rights was due to inadvertence.

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14. Are deals, non-prosecution agreements, or deferred prosecution agreements available and common for corporations in your jurisdiction?

There is currently no general system for "non-prosecution agreements" or "deferred prosecution agreements" ("**DPAs**") in Ireland. A Cartel Immunity Programme operates under Irish competition law, which has some of the features of DPAs. There is also no formal plea or bargaining system in Ireland, although plea bargaining does operate informally in practice.

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15. What types of penalties (e.g. fines, imprisonment, disgorgement, or debarment) may companies or its directors, officers, or employees face for misconduct of (other) individuals of the company?

The range of penalties will depend on the specific conduct, but can potentially include fines and/or imprisonment following a successful criminal prosecution. Companies convicted of an offence may also be excluded from participating in public tenders. Compensation orders and adverse publicity orders can be made in some situations. Some regulators may also have civil enforcement powers, which they can deploy as an alternative to prosecution. Such powers may include requesting undertakings or issuing compliance notices.

In certain cases, where it is proved that an offence committed by a company has been committed with the "consent or connivance of", or was "attributable to any neglect" on the part of a director or officer of the company, the latter can also be found guilty, and subjected to the relevant applicable penalties. Directors can also potentially face "restriction" and/or "disqualification" for a set period of time and can be made personally liable for the debts of a company, in certain circumstances.

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16. Please briefly describe any investigations trends in your country (e.g. recent case law, upcoming legislative changes, or special public attention on certain topics)?

There is a general trend of increased regulatory activity and investigations in Ireland, which is, in turn, leading to an increase in internal investigations. An apparent trend includes some agencies conducting initial interviews "under caution", i.e. the interviewee is cautioned that anything he says may be used in evidence against him, even where his status – whether a witness, subject, or a suspect – remains unclear. It is also worth noting that, in 2018, Ireland is expected to pass into law new anti-corruption legislation, which will make it much easier for the authorities to prosecute and secure convictions for corruption offences. It is anticipated that this new legislation will assist in promoting a stronger climate of compliance amongst individuals and corporations.

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A&L Goodbody is a leading Irish corporate law firm with a dedicated and specialist Fraud and White Collar Crime team. We advise on managing relationships with regulators, corporate fraud & asset tracing, fraud investigations and the defence of criminal prosecutions. Our clients include Irish and international corporates, financial institutions and public bodies. We also represent boards, senior management and employees caught up in regulatory investigations. At all times, we strive to protect our clients from the reputational consequences that can flow from a criminal investigation.

We have extensive experience in dealing with regulators both in Ireland and abroad. In Ireland, we deal with all regulators including the Office of the Director of Corporate Enforcement (ODCE), the Data Protection Commissioner (DPC), the Environmental Protection Agency (EPA), the Garda National Economic Crime Bureau (GNECB), the Central Bank, the Competition Authority, the Revenue Commissioners and the Criminal Assets Bureau (CAB).

We regularly work with international law firms and other advisors in dealing with claims from regulators such as the Serious Fraud Office (SFO) in the United Kingdom, and in the United States, the Federal Bureau of Investigation (FBI), the Food & Drugs Administration (FDA) and the Department of Justice. We also have experience of dealing with various other regulatory authorities in a range of EU jurisdictions, Australia and Russia.

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Italy

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TABLE

	Corporate Liability	Public Bribery	Commercial Bribery	Extraterritorial Applicability of Criminal Laws	Adequate Procedures Defence
Yes	X Administrative liability of companies.	X	X	X	X
No					

QUESTION LIST

1. Do any specific procedures need to be considered in case a whistleblower report sets off an internal investigation (e.g. for whistleblower protection)?

Italian law offers whistleblower protection both for individuals employed by public entities and private companies, providing that retaliatory and discriminatory measures against the whistleblower, including employment termination, are null and void.

Under the whistleblowing law (Law No. 179/2017), private companies' compliance plans, provided by Legislative Decree No. 231/2001 on corporate administrative liability ("**Decree 231**"), must include one or more channels enabling the detailed reporting of misconduct learned by employees at the workplace. These channels must shield the whistleblower's identity. Although there is no legal duty to follow-up on the whistleblower report with an internal audit, it is advisable to consider starting an investigation, especially in cases of serious misconduct.

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2. Do the following persons/bodies have the right to be informed about an internal investigation before it is commenced and/or to participate in the investigation (e.g. the interviews)?

a) Employee representative bodies, such as a works council

b) Data protection officer or data privacy authority

c) Other local authorities

What are the consequences in case of non-compliance?

a) Employee representative bodies, such as a works council

Under Italian law, there is no obligation to inform and/or involve employee representative bodies before an internal investigation is initiated. In other words, the employer is free to launch an audit and investigation process at its discretion and within limits set by law.

b) Data protection officer or data privacy authority

When a Data Protection Officer ("**DPO**") is appointed, he/she must be involved, properly and in a timely manner, in all issues which relate to the protection of personal data. Therefore, the DPO must be involved in internal investigations entailing data processing activity.

In principle, internal investigations do not have to be reported to the Italian Data Protection Authority ("**DPA**").

c) Other local authorities

There is no obligation to inform and/or involve government authorities at the start of an internal investigation.

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3. Do employees have a duty to support the investigation, e.g. by participating in interviews? If so, may the company impose disciplinary measures if the employee refuses to cooperate?

There is no specific obligation for employees to participate in interviews. However, due to the general duties of diligence, obedience, and loyalty that apply to the employment relationship, the employee is expected to cooperate as part of his/her job duties. If the employee refuses to participate in the investigation, his/her refusal may be considered a breach of his/her obligations, which may justify the beginning of disciplinary procedures (which must end with a disciplinary sanction if the relevant requirements are met).

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4. May any labour law deadlines be triggered or any rights to sanction employees be waived by investigative actions? How can this be avoided?

Employers should initiate an investigation as soon as they become aware of any potential misconduct and/or wrongdoing. If an employee's misconduct emerges from the internal investigation, the employer must immediately start disciplinary procedures in compliance with the so-called promptness principle for disciplinary actions. The timing may vary depending on, among other factors, the severity of the conduct and the number of people involved. At the end of the disciplinary procedure, the employer may impose sanctions up to and including dismissal for just cause.

Italian law does not provide any specific guidance with regard to the upper limit of the promptness principle. What it is crucial is that the disciplinary action is started as soon as the employer has been made aware of the employee's misconduct and has collected sufficient evidence to start a disciplinary procedure. In some cases, disciplinary proceedings started six months after the start of an investigation were held by courts to comply with the promptness principle, as the time was deemed necessary to investigate and ascertain the employee's misconduct.

If the employer does not act promptly, there is a concrete risk – where the employee challenges the sanction – that a judge might identify such delay as tacit acceptance of the employee's conduct and declare the sanction unlawful.

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5. Are there any relevant data privacy laws, state secret laws, or blocking statutes in your country that have to be taken into account before

a) Conducting interviews?

The Privacy Laws (Legislative Decree No. 196 of 30 June 2003, "**Privacy Code**", as repealed by the General Data Protection Regulation starting from 25 May 2018) apply to any processing of personal data. If the interview requires the collection of and/or any other processing of personal data, such as the preparation of reports and/or notes, it is advisable to assess how these activities are carried out in this respect.

b) Reviewing emails?

Private communication is protected by the Italian Constitution. The unauthorised and unlawful review of private communication constitutes a criminal offence punishable by up to four years' imprisonment (up to five years' for offences committed against a public authority system).

In the employment relationship, however, the review of emails is allowed under Article 4 of Law 300 of 20 May 1970, provided that the email use is related to the employment relationship. According to the DPA, it is therefore advisable to explicitly mention the lack of confidentiality of communications within internal policies. If there are no specific policies in this context, the employee and/or third parties may reasonably expect certain types of communication to be treated as confidential.

Review of emails must, in any case, be carried out without being excessive. The process must be proportionate, in accordance with data protection requirements. In addition, employees may exercise their rights under the Privacy Laws, including, for example, the right of access, rectification, and, subject to specific conditions, the right to object and erasure. In specific circumstances set forth by the Privacy Laws, the abovementioned rights may be limited.

c) Collecting (electronic) documents and/or other information?

The collection of documents and other information related to the employment relationship, whether for legal or organisational reasons, is not subject to any particular restriction. The collection, however, cannot exceed the purposes related to the employment relationship and must comply with an obligation imposed by law or regulation. Such information shall be gathered and treated in compliance with the provisions of the Privacy Laws.

Also, the Privacy Laws apply to any document containing personal data of the employee. With respect to the processing of such documents, employees may exercise the rights granted by the Privacy Laws, as mentioned above in 5b.

d) Analysing accounting and/or other mere business databases?

If such accounting and/or business database include personal data, the Privacy Laws shall apply.

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6. Before conducting employee interviews in your country, must the interviewee

a) Receive written instructions?

As long as the interview is conducted in compliance with applicable employment and privacy law provisions (e.g. the employee has received a privacy notice illustrating his/her rights under the Privacy Laws), there is no legal obligation to inform the employee about the legal circumstances. However, providing information on the subject matter and a brief description of the investigation may be ethically necessary and advisable. For documentation purposes, it is advisable to provide these instructions in writing to be signed by the interviewee.

b) Be informed that he/she must not make statements that would mean any kind of self-incrimination?

This is not mandatory under Italian law. If the interview is designed to collect facts and not to challenge wrongdoings (meaning that the purpose of the interview is merely gathering facts and not accusing the interviewee), the employee is free to make any statements that he/she deems relevant for this purpose. If the employer learns of any misconduct during the interview, this must be dealt with by way of a dedicated disciplinary procedure.

c) Be informed that the lawyer attending the interview is the lawyer for the company and not the lawyer for the interviewee (so-called "Upjohn warning")?

If the interview is conducted and/or attended by a third party (e.g. a lawyer), the employer should explain to the employee the role of that third party, in compliance with the general principle of good faith and fairness. Therefore, if a lawyer takes part in the interview, the company should disclose his/her role.

d) Be informed that he/she has the right that his/her lawyer attends?

As mentioned above, the purpose of the interview is to collect facts. The employee's participation in the interview thus falls within his/her job duties. Accordingly, there is no strict obligation to allow the employee to be accompanied by a lawyer. However, if the company is assisted by a lawyer, and the employee asks for the same right to be granted, the company could evaluate whether such participation would allow for a fair set-up and avoid an unbalanced situation.

e) Be informed that he/she has the right of a representative from the works council (or other employee representative body) to attend?

Similarly, there is no provision for the employee to be accompanied by a representative of the works council or another representative body. Representatives of works councils or trade unions can only assist employees in disciplinary proceedings.

f) Be informed that data may be transferred cross-border (in particular to the United States)?

According to the Privacy Laws, the interviewee needs to be informed about any transfer of personal data as well as the legal basis for such transfers. Consent to a cross-border transfer is not required if the transfer is legally covered. In particular, the Privacy Laws allow the transfer of personal data outside the European Union if the transfer is necessary to defend a legal claim or if the company has taken appropriate security precautions to protect the transferred data, e.g. Binding Corporate Rules, Standard Contractual Clauses, Privacy Shield (for the United States only), or an adequacy decision issued by the European Commission for a specific country.

g) Sign a data privacy waiver?

Data subjects must be informed about the methods and purposes of the data processing, including their rights. In certain cases, employees must give informed, voluntarily, and specific consent.

h) Be informed that the information gathered might be passed on to authorities?

According to the Privacy Laws, data subjects (i.e. employees) should be provided in the privacy notice with information regarding potential recipients or categories of recipients of their personal data.

i) Be informed that written notes will be taken?

For reasons of transparency, it is advisable to inform the employee that written notes will be taken. Furthermore, if such written notes involve the processing of personal data (e.g. the notes mention the names of interviewed employees), the Privacy Laws and all related principles apply to these notes (e.g. the data retention period, which is determined by the company in light of the purposes for which such data was originally collected).

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7. Are document hold notices or document retention notices allowed in your country? Are there any specifics to be observed (point in time/form/sender/addressees etc.)?

Document hold notices and retention policies are allowed in Italy, although there is no specific rule that must be observed.

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8. May attorney-client privilege be claimed over findings of the internal investigation? What steps may be taken to ensure privilege protection?

There is no general concept of legal privilege in Italy. However, according to civil and criminal law and the code of conduct of the Italian Bar, lawyers who are members of the Bar are obliged to maintain professional secrecy about any information they receive during their work for their clients. If criminal proceedings are pending, greater privilege protection can be achieved by appointing legal counsel in accordance with the rules of the Criminal Procedure Code.

In these cases, to ensure the highest privilege protection and avoid the Prosecutor acquiring relevant documentation, investigation reports and legal memos should be prepared by the appointed outside legal counsel, kept at his/her office, and labelled as "*Legally privileged and confidential*". Investigation reports and documents collected during an internal investigation, if kept at the company's premises, could be seized by enforcement authorities (e.g. the public prosecutor), as in-house counsel cannot assert legal privilege.

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9. Can attorney-client privilege also apply to in-house counsel in your country?

In-house counsel does not benefit from the attorney-client privilege.

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10. Are any early notifications required when starting an investigation?

a) To insurance companies (D&O insurance etc. to avoid losing insurance coverage)?

There are no legal provisions requiring early notification to insurance companies. This should, however, be assessed in accordance with the provisions of the insurance contract. Notification may be appropriate under certain circumstances, for instance, if the D&O policy covers internal investigations.

b) To business partners (e.g. banks and creditors)?

There is no explicit requirement to inform business partners about internal investigations. However, there is a general obligation under Italian law to perform contracts in good faith. The initiation of an internal investigation could constitute relevant information for the other party with regard to the purpose of the contract. Therefore, the possibility of notifying business partners should be assessed on a case-by-case basis.

c) To shareholders?

Although there is no legal duty to inform shareholders that an internal investigation is starting, the decision to provide early notification should be assessed on a case-by-case basis and depends on the seriousness of the alleged misconduct.

d) To authorities?

There is no general obligation to inform public authorities.

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11. Are there certain other immediate measures that have to be taken in your country or would be expected by the authorities in your country once an investigation is started, e.g. any particular immediate reaction to the alleged conduct?

A company should minimise the damage and try to avoid committing other offences similar to those committed by its employees. Accordingly, when significant misconduct is discovered, the company should also consider reviewing and amending its compliance plan and taking all necessary and specific measures.

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12. Will local prosecutor offices generally have concerns about internal investigations or do they ask for specific steps to be observed?

Prosecutors are, generally, not informed about internal investigations and, therefore, do not ask for specific steps to be observed.

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13. Please describe the legal prerequisites for search warrants or dawn raids on companies in your country. In case the prerequisites are not fulfilled, may gathered evidence still be used against the company?

Both search warrants and dawn raids in criminal proceedings must comply with the formal and material requirements of the Italian Criminal Procedure Code. They can only be carried out if there is a concrete reason to believe that specific things relevant to the alleged criminal offence can be retrieved.

Search warrants can only be executed by order of the Public Prosecutor and in accordance with the conditions of the Italian Criminal Code. In exceptional cases, where it is necessary and urgent, the police can take provisional measures to seize items, which are sent to the judge for confirmation within 48 hours. If this confirmation is not given within 48 hours, the provisional measures shall be revoked and considered null and void.

Evidence gathered in violation of relevant rules set forth by the Italian Criminal Code may not be used in the criminal trial, except when such evidence amounts to the *corpus delicti*.

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14. Are deals, non-prosecution agreements, or deferred prosecution agreements available and common for corporations in your jurisdiction?

Italian law does not provide for non-prosecution or deferred prosecution agreements for individuals or corporations. Under Italian law, however, the prosecutor and the defendant (including corporations) can enter into a plea bargain, even during preliminary investigations.

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15. What types of penalties (e.g. fines, imprisonment, disgorgement, or debarment) may companies or its directors, officers, or employees face for misconduct of (other) individuals of the company?

Decree 231 introduced corporate administrative liability for offences listed in Decree 231 and committed by leadership in the interest, or for the benefit, of the company. A company is exempted from liability if it has implemented a compliance plan under Decree 231 ("**231 Plan**") which includes, among other things, the appointment of an *ad hoc* Surveillance Body ("**SB**"). The SB is an autonomous, independent body that oversees the implementation and updating of the 231 Plan.

If a company is held liable under Decree 231, it may be fined according to the seriousness of the offence (up to around €1.5 million) and/or be subject to interdictory sanctions (such as debarment from exercising activity and disqualification from contracting with the public administration), confiscation, and publication of the court's decision.

The penalties for individuals vary depending on the type of offence committed and can include imprisonment, monetary fines, and interdictory sanctions.

Furthermore, both companies and their employees can be held liable for damages under civil law by those who have been injured by the misconduct.

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16. Please briefly describe any investigations trends in your country (e.g. recent case law, upcoming legislative changes, or special public attention on certain topics)?

Since December 2017 the law on whistleblowing, which applies both to public and private sector employees, has been in effect in Italy. Focusing on anti-corruption (and, more generally, white collar crime prevention), private companies, which do not already have internal whistleblowing policies, must be prepared to manage whistleblower complaints and the potential ensuing impacts.

In 2016 the Italian Government instructed an *ad hoc* legislative commission to study and propose reforms to Decree 231. This process is still pending.

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Francesca Rolla is a Partner at Hogan Lovells and leads the Italian Litigation, Arbitration and Investigations practice. She is the Italian representative of the firm's global Investigations, White Collar Crimes and Fraud team. With over 25 years of practice as a litigator, Francesca represents international and Italian clients in product liability and tort disputes and advises on product safety and compliance issues, as well as on internal investigations. In respect of Investigations and White Collar Crime, she leads a team specifically dedicated to advising clients on how to avoid the legal, commercial and reputational risks posed by investigations and prosecutions. Francesca assists in handling internal investigations and investigations by criminal or other public authorities, coordinating the work of criminal counsels and external experts.

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Alessandro Borrello is an associate in the Italian Litigation, Arbitration and Investigations practice at Hogan Lovells. He joined Hogan Lovells in 2011 after graduating at Milan's prestigious Bocconi University and getting an international experience at the University of Texas at Austin School of Law. Since his arrival at the Firm he has been honing his skills as a litigator, focusing his practice on investigations and white collar crimes, product liability, commercial litigation.

With regard to investigations and white collar crimes, Alessandro assists clients in the context of internal investigations as well as in those conducted by criminal or other public authorities and also advises clients on how to reduce their exposure to investigations and prosecutions.

Latvia

Ellex Klavins

 Irina Kostina

 Edvijs Zandars

TABLE

	Corporate Liability	Public Bribery	Commercial Bribery	Extraterritorial Applicability of Criminal Laws	Adequate Procedures Defence
Yes		X	X	X	X
No	X No criminal liability of legal persons, but "coercive measures" (e.g. liquidation) possible in case of criminal conduct by employees. Administrative liability of corporations is possible.				

QUESTION LIST

1. Do any specific procedures need to be considered in case a whistleblower report sets off an internal investigation (e.g. for whistleblower protection)?

Since March 2017 a draft Whistleblower Protection Law is pending before the Parliament (Saeima) of Latvia. As a result, there is currently no comprehensive legal framework governing the conduct of employers confronting an internal whistleblower report. The only relevant provision in the Labour Law prohibits employers from punishing or otherwise, directly or indirectly, subjecting employees to negative consequences, should employees report suspicions about criminal offences or administrative violations at the workplace to competent authorities or officials. Employees are entitled to turn directly to authorities. Aside from this restriction, employers are free to decide how to respond to whistleblower reports. However, it is advisable for employers to have internal whistleblowing policies or procedures in place.

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2. Do the following persons/bodies have the right to be informed about an internal investigation before it is commenced and/or to participate in the investigation (e.g. the interviews)?

a) Employee representative bodies, such as a works council

b) Data protection officer or data privacy authority

c) Other local authorities

What are the consequences in case of non-compliance?

a) Employee representative bodies do not have a legal right to be informed about or participate in internal investigations. However, the employer may, in its discretion, choose to inform such bodies. In practice, if

there is a works council in a company, it is often times recommended to inform it about an investigation, although there is no formal process for this.

b) Although a data protection officer should be well informed about personal data processing in the company, there is no statutory requirement to appoint an internal data protection officer or involve him/her in the data protection operations of the company.

c) There is no legal requirement to inform local authorities about the start of an internal investigation. However, if, in accordance with the law, a serious (e.g. intentional serious bodily injury) or especially serious crime (e.g. death following such injury) had to be reported to the competent authorities, but a person has failed to do so, the Criminal Law provides for liability for failure to comply with this duty. There are also special provisions that provide a duty to report certain conduct to authorities (e.g. environmental pollution).

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3. Do employees have a duty to support the investigation, e.g. by participating in interviews? If so, may the company impose disciplinary measures if the employee refuses to cooperate?

Employees do not have a duty to support an investigation and, therefore, cannot be disciplined for failure to cooperate. However, there is a duty of an employee to perform his/her employment duties. An employee is required, if asked, to provide the employer with information regarding the performance of job duties. Nevertheless, it is not possible to force the employee to provide information about other employees.

The employer may impose disciplinary measures on the employee if the employee has failed to perform his/her duties or has not provided complete information about performance of the job duties.

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4. May any labour law deadlines be triggered or any rights to sanction employees be waived by investigative actions? How can this be avoided?

No labour law deadlines are initiated or employee sanctioning rights waived by investigation actions. The draft Whistleblower Protection Law does not address this matter.

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5. Are there any relevant data privacy laws, state secret laws, or blocking statutes in your country that have to be taken into account before

a) Conducting interviews?

General data protection rules should be taken into account before conducting interviews, including the obligation of the data controller (i.e. the person who organises the investigation, most commonly the employer) to ensure that personal data of all parties are processed strictly for the purpose of the investigation, are proportional and that only duly authorised persons have access to such personal data. Information must also be provided to employees concerning the purpose of the data processing.

b) Reviewing emails?

General data protection rules should be taken into account before reviewing emails.

c) Collecting (electronic) documents and/or other information?

General data protection rules apply to the collection of any documents that may contain personal data. In addition, please note that Latvia does not have a blocking statute regime.

d) Analysing accounting and/or other mere business databases?

Although data protection rules normally apply to the collection of data, if there is no personal data involved, the data processing rules do not apply.

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6. Before conducting employee interviews in your country, must the interviewee

a) Receive written instructions?

There is no legal obligation to provide the employee with written instructions and the draft Whistleblower Protection Law is silent on this matter. However, a company's internal whistleblowing policy could provide such an obligation.

b) Be informed that he/she must not make statements that would mean any kind of self-incrimination?

Employees do not have an obligation to answer questions during an internal interview. It is advisable to remind the employee that he/she has no obligation to give any information that could be self-incriminating.

c) Be informed that the lawyer attending the interview is the lawyer for the company and not the lawyer for the interviewee (so-called "Upjohn warning")?

There is no legal obligation to provide the employee with such a warning and the draft Whistleblower Protection Law is silent on this matter. However, the employer should inform the employee who will participate in the interview and the basis for their participation.

d) Be informed that he/she has the right that his/her lawyer attends?

There is no legal obligation to inform the employee of the right to counsel and the draft Whistleblower Protection Law is silent on this matter. However, it is advisable to inform the employee of his/her right to legal assistance.

e) Be informed that he/she has the right of a representative from the works council (or other employee representative body) to attend?

There is no legal obligation to inform the employee of the right to have an employee representative attend the interview and the draft Whistleblower Protection Law is silent on this matter. However, as the employee has the right to ask an employee representative to attend the interview, it is advisable to inform the employee accordingly.

Labour Law provides general rights for employee representatives to obtain information and consult with the employer before the employer takes decisions which may affect the interests of employees. Consequently, the employee representative would, in general, be entitled to participate at such meetings.

f) Be informed that data may be transferred cross-border (in particular to the United States)?

Article 8 of the Personal Data Protection Law provides that, when acquiring data from a data subject, the data subject must be informed about the identity of the data controller, the purpose of the data processing, and, upon request, the potential recipients of the personal data. This obligation will be strengthened with the General Data Protection Regulation (EU) 2016/679, which enters into force on 25 May 2018.

g) Sign a data privacy waiver?

Data privacy waivers are not legally valid in Latvia. However, according to the Personal Data Protection Law, in certain cases, the consent of the data subject for processing of personal data may be required and legally obtained. Namely, the data subject could be requested to freely give express and specific consent to processing of personal data that is not based on other legal grounds, e.g. to comply with legal obligations or necessary for the legitimate business interests of the employer. However, it is difficult to ensure that consent is freely given in an employment relationship.

h) Be informed that the information gathered might be passed on to authorities?

Except when disclosure is requested by authorities according to law, individuals can request to be informed if information could be passed on to authorities. According to Article 13 of the Personal Data Protection Law, personal data may be disclosed to the authorities on the basis of a written application or agreement, stating the purpose for using the data, if not prescribed otherwise by law.

i) Be informed that written notes will be taken?

There is no legal obligation to specifically inform the employee that written notes will be taken during the interview (as long as the employee is informed of the data processing itself) and the draft Whistleblower

Protection Law is silent on this matter. However, notes or minutes of an interview may only serve as valid evidence if all participants sign the notes or minutes, confirming the accuracy of the information contained therein.

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7. Are document hold notices or document retention notices allowed in your country? Are there any specifics to be observed (point in time/form/sender/addressees etc.)?

There is no law establishing the admissibility of document hold or retention notices in Latvia. Therefore, document hold notices in private relations are admissible and are regulated by the company's internal policies.

The Law on Accounting, the Archives Law, and other laws set mandatory maximum retention periods for certain types of documents, while the Personal Data Protection Law only requires that personal data be retained no longer than necessary for the specific purpose. Since there are no specific retention periods indicated for information collected during an investigation, such information must be retained no longer than necessary for the purpose for which it was collected.

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8. May attorney-client privilege be claimed over findings of the internal investigation? What steps may be taken to ensure privilege protection?

Attorney-client privilege applies exclusively to information provided by the client to the attorney. The attorney may not disclose the secrets of his/her client, even after the case is closed or the attorney has been released from handling the case. A report prepared by an attorney for the client in connection with an internal investigation led by the attorney would be protected from disclosure by the attorney-client privilege. Nevertheless, the client may be obliged to inform the authorities of potential criminal conduct uncovered by the report, without disclosing the report itself. It is generally advisable to involve outside counsel in internal investigations to ensure investigation findings are protected by the attorney-client privilege.

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9. Can attorney-client privilege also apply to in-house counsel in your country?

The attorney-client privilege does not apply to in-house counsel. An attorney is understood to be a person who is a sworn advocate and admitted to the Latvian Collegium of Sworn Advocates or who has a right to practice in Latvia in accordance with EU laws.

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10. Are any early notifications required when starting an investigation?

a) To insurance companies (D&O insurance etc. to avoid losing insurance coverage)?

Only if required by the insurance policy is early notification to the insurance company necessary when starting an investigation.

b) To business partners (e.g. banks and creditors)?

There is no statutory obligation to inform business partners about the start of an investigation. However, credit and financial institutions have an obligation to report unusual and suspicious transactions in accordance with the requirements of the Law on Prevention of Legalisation of Proceeds from Crime and Terrorism Financing.

c) To shareholders?

There is no legal obligation to inform shareholders about the start of an investigation, but the company's internal policies may provide such an obligation. Article 194 of the Commercial Law provides shareholders the right to be informed regarding the activities of the company and to become acquainted with all of the company's documents.

d) To authorities?

There is no legal obligation to inform the authorities of the start of an investigation. In certain cases, everyone has a duty to report criminal offences.

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11. Are there certain other immediate measures that have to be taken in your country or would be expected by the authorities in your country once an investigation is started, e.g. any particular immediate reaction to the alleged conduct?

As there is no law governing the conduct of internal investigations, there are no specific measures that legally must be taken once an investigation has started, other than the observance of data protection laws. Moreover, if a breach of law is detected, the company must take measures to stop the misconduct and to either prevent or minimise potential liability.

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12. Will local prosecutor offices generally have concerns about internal investigations or do they ask for specific steps to be observed?

Internal investigations are outside the scope of competence of prosecutors, who are only concerned with criminal matters in the context of criminal investigations. However, it is crucial that the company does not destroy any potential evidence during the course of its internal investigation. Furthermore, if a serious or especially serious crime is detected, the company should report it.

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13. Please describe the legal prerequisites for search warrants or dawn raids on companies in your country. In case the prerequisites are not fulfilled, may gathered evidence still be used against the company?

Typically, a valid criminal search warrant requires initiation of a criminal procedure and court approval. In emergency cases where, due to a delay, objects or documents may be destroyed, hidden, or damaged, a search may be performed with the decision of the person directing the proceedings or, in case the decision is taken by the investigator, with the consent of a public prosecutor. If the prerequisites are not fulfilled (in criminal liability matters) the gathered evidence may not be admissible.

As regards to administrative liability, "dawn raids" may be initiated by various authorities with slightly different prerequisites. For example, in order to carry out a dawn raid, the Competition Council must obtain a court order where the subject and purpose of the inspection; the assets, information, and documents to be searched for; and the timeframe for performing procedural actions are specified.

By contrast, the police and similar authorities must initiate an administrative violation procedure and either obtain the consent of the property owner or a court order (or the consent of the prosecutor) in order to perform an on-site inspection. The presence of the property owner (or its representative) or a representative of the municipality is required. If the prerequisites are not fulfilled (in administrative liability matters) the gathered evidence may not be admissible, unless the deviation from the requirements was minor.

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14. Are deals, non-prosecution agreements, or deferred prosecution agreements available and common for corporations in your jurisdiction?

Although a corporation may face so-called "coercive measures" when its employees have engaged in criminal conduct, legal persons are not subject to criminal liability under the Criminal Procedure Law. Legal persons may, however, be liable for violations of the Latvian Administrative Violations Code. Settlements with regulators in administrative cases are common for corporations.

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15. What types of penalties (e.g. fines, imprisonment, disgorgement, or debarment) may companies or its directors, officers, or employees face for misconduct of (other) individuals of the company?

The Criminal Law provides for the following "coercive measures", which can be taken against a legal entity when its employees have engaged in criminal conduct: liquidation, limitation of rights, confiscation of property, and levy. Penalties under the Criminal Law for natural persons depend on the crime committed. For instance, an employee acting as an intermediary for bribery could face up to five years' imprisonment, community service or a fine. Certain criminal offences, e.g. engagement in a prohibited business, may lead to a prohibition of business activity and a ban on holding certain offices.

The most common type of penalty for administrative violations is a fine. For example, members of the management board of a legal entity may be fined for tax debts to the company. Members of the management board of a legal entity may also be held criminally liable, for instance, for evasion of tax payments. Pursuant to the Criminal Law, in such cases fine or even imprisonment could be applied.

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16. Please briefly describe any investigations trends in your country (e.g. recent case law, upcoming legislative changes, or special public attention on certain topics)?

In March 2017 the draft Whistleblower Protection Law was submitted to the Saeima (Parliament) of the Republic of Latvia for adoption. The draft law provides, *inter alia*, that employers with more than 50 employees must develop an internal whistleblowing mechanism. Faced with many objections to the law, the Parliament decided on 6 December 2017 to postpone consideration of this draft law until it received additional information.

The draft law has many supporters and opponents in Latvia. Opponents of the law argue that there already exist sufficient legal norms and that imposing an obligation on employers to develop a whistleblowing mechanism is too great a burden. Supporters of the law, in turn, note that existing laws fail to define whistleblowing, outline whistleblower protections, or provide guidance on how to establish an internal whistleblowing mechanism. They believe it is necessary to introduce a clear and uniform legal framework.

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Irina Kostina is the Head of Employment Law Practice. She has more than 12 years of legal experience, specializing in all aspects of dispute resolution. Irina's experience includes representation of numerous clients in civil and administrative cases in local courts and in arbitration. She also advises and represents clients in relation to recognition and enforcement of foreign court rulings and arbitral awards, assists in collection of evidence and cooperates with state bailiffs in the execution stage. In cooperation with the firm's Industry & Regulatory practice group's team Irina also successfully represents clients in competition and pharma cases. Her other areas of competence include reorganisation & insolvency, liquidation of companies, and labour & employment law.

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Edvijs Zandars regularly consults clients on import and sales of different types of goods (cosmetic products, chemicals, food and textiles, electronics etc.) and provides legal advice on enforcement of intellectual property rights and licensing. He is proficient in data protection matters and can provide assistance to data controllers and processors in fulfilment of requirements by the Latvian and EU Law. Edvijs has also gained a broad practical experience in competition law while working in the Civil Law modernisation group, during his internships at the Civil Law Department of the Ministry of Justice, and at the Competition Council of the Republic of Latvia.

Liechtenstein

Gasser Partner Rechtsanwälte

 M.A. HSG Thomas Nigg

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TABLE

	Corporate Liability	Public Bribery	Commercial Bribery	Extraterritorial Applicability of Criminal Laws	Adequate Procedures Defence
Yes	X	X	X	X See § 63 *et seq*. of the StGB.	X
No					

QUESTION LIST

1. Do any specific procedures need to be considered in case a whistleblower report sets off an internal investigation (e.g. for whistleblower protection)?

Although there is still no specific whistleblower protection law in Liechtenstein, the Financial Market Authority ("**FMA**") recently created an external platform based on Articles 4 and 5 of the Financial Market Authority Act with some provisions of protection for whistleblowers, who report potential or actual violations, in order to effectively combat abuse and better protect clients of Liechtenstein's financial centre (cf. also Article 28a of the Due Diligence Act, the "**DDA**"). The change was made in order to bring Liechtenstein in compliance with European financial market regulations.

These reports can be either made to the FMA online or via post and may be anonymous. After reviewing the report, the FMA may contact the whistleblower, if necessary and if the identity is known, to obtain additional information. Reports that do not fall within the scope of the FMA's responsibilities are forwarded to the competent authority (e.g. allegations of criminal conduct are sent to the prosecutor's office).

With respect to internal whistleblowing, Article 28a(3) of the DDA states, for instance, that companies subject to the DDA with more than 100 employees must establish an internal, anonymous reporting procedure for whistleblower complaints. However, the law does not provide guidance on the content of the internal process. A duty to investigate such internal reports will usually be included in internal compliance guidelines and is incumbent upon the management of a company. However, a whistleblower does not have to be informed of the outcome of the investigation.

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2. Do the following persons/bodies have the right to be informed about an internal investigation before it is commenced and/or to participate in the investigation (e.g. the interviews)?

a) Employee representative bodies, such as a works council

b) Data protection officer or data privacy authority

c) Other local authorities

What are the consequences in case of non-compliance?

First of all, one must clarify that the (legal) concept of internal investigations, which may perhaps exist in other countries, does not exist in Liechtenstein. Potential internal wrongdoing is investigated based on internal guidelines.

a) In public and private labour law, employee representatives do exist but mainly deal, *inter alia*, with abusive wage payments, health protection issues, or mass redundancies (see Article 45 of the Labour Law). Regarding internal investigations, no information has to be given to any employee representative body.

b) According to Article 13a of the Data Protection Ordinance ("**DSV**"), the data protection officer ("**DPO**") must have access to all information necessary to fulfil his/her duties, which include monitoring the use of personal data and remedying data privacy violations. The DPO must, moreover, maintain a data collection list and provide it to the data protection authority or persons concerned upon request. Therefore, the company, in general, has to inform the DPO about all data privacy related procedures and processes of an internal investigation.

c) With respect to internal investigations, local authorities do not have a specific right to be informed. However, in some cases it might be useful to involve them on a voluntary basis.

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3. Do employees have a duty to support the investigation, e.g. by participating in interviews? If so, may the company impose disciplinary measures if the employee refuses to cooperate?

There are no explicit provisions concerning the participation of employees in such internal interviews. However, according to labour laws, employees have to protect the employer's interests. Therefore, they are obligated to cooperate in internal investigations to the extent it concerns their profession and/or task area. If the employee refuses to participate in the investigation, his/her behaviour might be considered misconduct, which can eventually lead to his/her dismissal.

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4. May any labour law deadlines be triggered or any rights to sanction employees be waived by investigative actions? How can this be avoided?

If an employer receives knowledge of relevant facts, which could lead to an immediate dismissal, the employer must immediately dismiss the employee without notice or forfeit the right to do so. There is no specific deadline, but principally, the termination must be declared by the terminating party as soon as the reason for termination has come to his knowledge. An appropriate period for consideration is usually two to three working days and, in exceptional cases, one week. A "serious" suspicion of misconduct satisfies the knowledge prerequisite. Therefore, it is critical to know at which point during an investigation a suspicion becomes "serious." Except for cases of immediate dismissal, no other labour law deadlines are triggered or rights waived by investigative actions.

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5. Are there any relevant data privacy laws, state secret laws, or blocking statutes in your country that have to be taken into account before

a) Conducting interviews?

Current data privacy laws apply to any processing of data concerning natural persons and corporate entities. This involves collecting, securing, and sharing data, as well as creating work-related documents, such as interview notes. Therefore, it is recommended to review the relevant and applicable data privacy laws, including the Data Privacy Act ("**DSG**") and the DSV, before taking any further steps. However, the General Data Protection Regulation ("**GDPR**") will harmonise the substantive data protection law within the European Union and will come into force on 25 May 2018. After it is adopted into the European Economic Area body of law, the GDPR will be directly applicable in Liechtenstein.

b) Reviewing emails?

Regarding Internet and email surveillance, the Department of Economics (*Amt für Volkswirtschaft*) released a guideline for administrations and the private sector. This guideline, however, refers to the Data

Protection Service's guideline, which deals in detail with the issue of email surveillance at work in the public and private sectors. Briefly, in order to initiate personal monitoring, if necessary, the employer shall inform the employee in advance, by issuing an internal monitory guideline and identify any abuse or suspected abuse. During a later internal investigation, the same internal rules apply.

c) Collecting (electronic) documents and/or other information?

When it comes to collecting data (electronic documents and/or other information) data protection laws will be applicable and have to be reviewed case-by-case in advance. With respect to the personal data of natural persons, the GDPR will have to be considered in the future.

d) Analysing accounting and/or other mere business databases?

Analysing accounting and business databases may be regarded as "processing" under the current Liechtenstein DSG. However, the GDPR only protects personal data of natural persons. Analysing accounting and business databases are, therefore, not covered by the GDPR regime.

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6. Before conducting employee interviews in your country, must the interviewee

a) Receive written instructions?

There is no legal obligation to give written instructions to employees before internal interviews.

b) Be informed that he/she must not make statements that would mean any kind of self-incrimination?

Under the Criminal Procedure Act of Liechtenstein, a suspect has the right to remain silent during interrogations by criminal authorities and in criminal proceedings in general. However, there is no corresponding "right" or "duty" with regard to employee interviews as part of an internal investigation.

c) Be informed that the lawyer attending the interview is the lawyer for the company and not the lawyer for the interviewee (so-called "Upjohn warning")?

In Liechtenstein, there is no legal obligation to give an employee an Upjohn warning. However, the warning is, in practice, commonly given. According to the Liechtenstein Bar Association, lawyers are not allowed to represent more than one client in the same matter. Although they are not obliged to inform the employees of this fact, it is also good practice to do so.

d) Be informed that he/she has the right that his/her lawyer attends?

There are no explicit provisions concerning the duty to inform an employee of his/her right to have a lawyer present during an internal interview.

e) Be informed that he/she has the right of a representative from the works council (or other employee representative body) to attend?

As already mentioned, there is no law in Liechtenstein regarding internal investigations. Such internal investigations are subject to and follow internal guidelines. Hence, internal guidelines must be checked to see if the employee has a right to have a works council representative attend the interview.

f) Be informed that data may be transferred cross-border (in particular to the United States)?

According to the current Article 8 of the DSG, personal data may not be transferred cross-border if there is a risk of violating an individual's personality rights due to poor safeguarding provisions. If the proposed data recipient does not have proper safeguards, certain prerequisites set forth in the DSG must be met before the data may be transferred. In the absence of legislation that ensures adequate protection, personal data can only be disclosed if, for example, safeguards are contractually agreed to, the data subject has consented to the disclosure, or there is an overriding public interest in disclosure.

In the future, the GDPR will have to be considered.

g) Sign a data privacy waiver?

According to Article 4 of the DSG, personal data may only be processed in good faith and the processing must be proportionate (i.e. personal data may only be processed for the purpose indicated at the time of

acquisition or as required by law). If a person's consent is required for the processing of personal data, only informed consent that is voluntarily given is valid. Under certain circumstances, explicit consent is required. If the personal data gathered as part of an internal investigation will later be used for other purposes, obtaining a data privacy waiver or at least the informed consent of the interviewee is advisable.

h) Be informed that the information gathered might be passed on to authorities?

There is no legal obligation to inform the interviewee that the information gathered might be passed on to authorities. However, it is advisable to inform about the possibility.

i) Be informed that written notes will be taken?

There is no legal obligation to inform employees that written notes will be taken.

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7. Are document hold notices or document retention notices allowed in your country? Are there any specifics to be observed (point in time/form/sender/addressees etc.)?

With respect to this matter, there are no statutory provisions concerning document hold notices or document retention notices in Liechtenstein nor is there any published case law in this regard.

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8. May attorney-client privilege be claimed over findings of the internal investigation? What steps may be taken to ensure privilege protection?

According to Article 15 of the Lawyers Act ("**RAG**"), attorneys-at-law are bound to secrecy concerning all issues related to their profession that are of interest for their clients. The right of an attorney-at-law to secrecy may not be circumvented by judicial or other official measures and attorney-client privilege is not waived, even if a privileged correspondence is found outside of the attorney-at-law's custody (Article 15 paragraphs 2 and 3 of the RAG).

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9. Can attorney-client privilege also apply to in-house counsel in your country?

Provisions regarding attorney-client privilege are only applicable to attorneys-at-law. Correspondence and documents of in-house counsel are not included in the scope of the RAG. Nonetheless, in-house counsel bears a duty of confidentiality, resulting from the general duty of trust and loyalty to an employer. According to case law, the seizure of records of attorneys-at-law is forbidden, but not documents created by in-house counsel. In order to ensure privilege protection, it is therefore recommended to involve outside counsel (attorneys-at-law).

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10. Are any early notifications required when starting an investigation?

a) To insurance companies (D&O insurance etc. to avoid losing insurance coverage)?

Possible reporting obligations may only arise from the insurance policy itself or general contractual duties of care and loyalty.

b) To business partners (e.g. banks and creditors)?

Information duties may only arise from contractual obligations between the company and the business partner.

c) To shareholders?

Internal investigations, depending on their subject matter and scope, may relate to insider information that could possibly influence stock prices. According to Article 5a of the Market Abuse Act, an issuer of financial instruments has to disclose to the public as soon as possible insider information that directly affects it. Therefore, it is important to evaluate on a case-by-case basis if there is an obligation to report to the shareholders.

d) To authorities?

There is no general legal obligation to inform authorities about an internal investigation. However, taking into account one's own potential liability (e.g. omission or assistance), certain criminal offences should be reported to the public prosecutor and other statues require that government/supervisory authorities be notified of certain circumstances.

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11. Are there certain other immediate measures that have to be taken in your country or would be expected by the authorities in your country once an investigation is started, e.g. any particular immediate reaction to the alleged conduct?

Although there are no statutory obligations on companies with respect to internal investigations, a company should stop any criminal conduct of employees as soon as it becomes aware of the conduct and take steps to minimise damages. If employees are affected, this will be of the utmost importance for the company.

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12. Will local prosecutor offices generally have concerns about internal investigations or do they ask for specific steps to be observed?

Local prosecutors do not generally play a role in internal investigations. However, it is important that a company does not destroy any relevant information or evidence during an internal investigation. This could become relevant if certain criminal offences are later reported to the public prosecutor.

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13. Please describe the legal prerequisites for search warrants or dawn raids on companies in your country. In case the prerequisites are not fulfilled, may gathered evidence still be used against the company?

There are formal and material prerequisites set forth in the Criminal Procedure Act ("**StPO**"), which have to be met in order to have a valid search warrant or to conduct a legitimate dawn raid.

A search warrant is usually initiated upon motion of the public prosecutor and ordered by a court. A search warrant must be based on exigent circumstances or a reasonable suspicion that a person suspected of a crime, or an item used for committing a crime, can be found (see Sections 91a and 98 *et seq*. of the StPO).
Competent supervisory authorities may carry out extraordinary on-site visits within the framework of the DDA (see Article 28 paragraph 1 lit. c).

According to the judgment of the Austrian Supreme Court, illegally gathered evidence may still be used in court proceedings, unless expressly prohibited by law. According to the Liechtenstein State Court, the same applies in Liechtenstein.

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14. Are deals, non-prosecution agreements, or deferred prosecution agreements available and common for corporations in your jurisdiction?

Only under certain circumstances set forth in the StPO may deals and non-prosecution agreements between the court or the public prosecutor's office and a corporation be reached in association criminal proceedings (*Verbandsstrafverfahren*).

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15. What types of penalties (e.g. fines, imprisonment, disgorgement, or debarment) may companies or its directors, officers, or employees face for misconduct of (other) individuals of the company?

The liability of legal entities is regulated under Section 74a *et seq*. of the Criminal Code. Legal entities are responsible for the offences and crimes committed by managers and directors, which are culpably committed in the performance of business activities. However, a legal person should only be responsible for the offences of regular (i.e. non-managerial) employees, even if the offence was not culpably committed, where the commission of the

offence was made possible or substantially facilitated by the failure of the managers to take necessary and reasonable measures to prevent such offences.

Typical criminal penalties that result from misconduct of individuals are fines, disgorgement of proceeds or, in the case of leaders, imprisonment. Depending on the nature of the business or profession, individuals may be further punished during disciplinary proceeding with disbarment from their profession or fines.

If a legal entity is held responsible for an offence, it shall be subject to a "corporate monetary penalty" (*Verbandsgeldstrafe*). The corporate monetary penalty is to be calculated in daily rates (*Tagessätze*) and can be conditionally suspended in whole or in part. The daily rate shall be assessed in accordance with the income situation of the legal person, taking account of its economic ability apart from the income situation, as well as the seriousness of the offence and any remedial measures taken by the entity after the offence. The daily rate typically corresponds to 1/360 of annual corporate revenue, but must be at least 100 Swiss francs and at most 15,000 Swiss francs.

Where the corporate monetary penalty imposed on a legal person is conditionally suspended in whole or in part, the court may issue instructions imposing technical, organisational, or personnel measures on the legal person to deter the commission of further offences for which the legal person is liable. The legal person shall, in any event, be instructed to rectify the damage arising from the act to the best of its ability, to the extent that this has not already occurred.

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16. Please briefly describe any investigations trends in your country (e.g. recent case law, upcoming legislative changes, or special public attention on certain topics)?

The recent creation of the FMA mechanism for handling whistleblower complaints is the most noteworthy trend. The topic is very relevant and areas of conflict with various elements of criminal law, data protection, professional secrecy, and fiduciary duties must be considered.

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Lithuania

COBALT

Dr. Dalia Foigt-Norvaišienė

TABLE

	Corporate Liability	Public Bribery	Commercial Bribery	Extraterritorial Applicability of Criminal Laws	Adequate Procedures Defence
Yes	X	X			X
No			X	X	

QUESTION LIST

1. Do any specific procedures need to be considered in case a whistleblower report sets off an internal investigation (e.g. for whistleblower protection)?

We are not aware of any Lithuanian laws regulating the procedures of whistleblower protection in general. However, according to paragraph 1 of Article 39 of the Labour Code of the Republic of Lithuania (hereinafter – the "**Labour Code**") an employee cannot be held liable for a breach of the confidentiality agreement if an employee informs the authorities about illegal behaviour in order to fulfil his/her legal obligations. There are no specific rules how the company must behave in this situation due to the fact that it should be regulated under the internal rules of the company.

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2. Do the following persons/bodies have the right to be informed about an internal investigation before it is commenced and/or to participate in the investigation (e.g. the interviews)?

a) Employee representative bodies, such as a works council

b) Data protection officer or data privacy authority

c) Other local authorities

What are the consequences in case of non-compliance?

a) The Labour Code and/or other Lithuanian legislation do not provide for an obligation to inform any employee representatives about an internal investigation.

b) According to Lithuanian laws, there is no obligation to inform a data privacy officer or a data privacy authority about an internal investigation.

c) Lithuanian legislation does not oblige the employer to inform the prosecution authorities about an internal investigation. However, the authorities need to be informed immediately if during an internal investigation the employer discovers signs of a current or future potential breach of criminal law.

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3. Do employees have a duty to support the investigation, e.g. by participating in interviews? If so, may the company impose disciplinary measures if the employee refuses to cooperate?

The Labour Code does not specify the duty of the employee to support the investigation. However, according to paragraph 1 of Article 24 of the Labour Code, employers and employees must act honestly, cooperatively and must not abuse the law in performance of their labour law rights and duties. This means that the employee has to participate in the investigation by answering questions related to his/her employment duties truthfully and completely.

In case the employee is required to participate in the investigation, the employee's refusal may be regarded as misconduct. Such misconduct may justify a dismissal if the employee had already received a formal warning for the same or similar misconduct before.

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4. May any labour law deadlines be triggered or any rights to sanction employees be waived by investigative actions? How can this be avoided?

According to paragraph 3 of Article 49 of the Labour Code, the employer can remove the employee from his/her work for up to 30 calendar days during the investigation of circumstances on the possible breach of employment duties by the employee. During this time the employer has to pay the employee him/her average salary.

Further, under Article 58 paragraph 6 of the Labour Code, an employer shall take the decision to terminate the employment contract for its violation within one month from the disclosure of the violation and no later than within six months from the date of the violation. The latter period might be extended to two years if the violation committed by an employee results from an audit, inventory or inspection of an activity.

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5. Are there any relevant data privacy laws, state secret laws, or blocking statutes in your country that have to be taken into account before

a) Conducting interviews?

The Personal Data Protection Law (hereinafter – the "**PDPL**") governs general procedures that the employer must perform before conducting an interview. It further stipulates what an employer can and cannot do with the information gathered during the interview. In particular, the employer can only gather the following information before conducting an interview: name, surname, education (if necessary for the specific position), and work experience (if required because of the type of work).

b) Reviewing emails?

According to Articles 23 and 24 of the PDPL, an employee has the right to be informed for which purpose his personal data is being monitored. Therefore, emails sent or received by the employee may only be reviewed if the email account belongs to the company and in case if the employee was informed in advance about the scale, time period, the amount of the data and which specific data will be reviewed. In order to properly inform the employee, it is recommended to inform the employee in line with the internal policies of the company governing the monitoring of electronic communication at the workplace.

c) Collecting (electronic) documents and/or other information?

All documents and data both in written and electronic form are the employer's property which means that there is no prohibition to collect and/or review this information.

d) Analysing accounting and/or other mere business databases?

Analysing of accounting and/or other mere business databases according to the PDPL is considered as a part of the internal administration which means that the employer is not restricted from gathering this information.

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6. Before conducting employee interviews in your country, must the interviewee

a) Receive written instructions?

There is no general and statutory obligation to instruct an employee about the legal circumstances and his/her rights before the interview.

b) Be informed that he/she must not make statements that would mean any kind of self-incrimination?

The right to remain silent to prevent self-accusation only applies if a person is interrogated by local authorities under the suspicion that the person may have committed a crime. This right is in no way connected to interviewing an employee during an internal investigation.

c) Be informed that the lawyer attending the interview is the lawyer for the company and not the lawyer for the interviewee (so-called "Upjohn warning")?

There is no explicit obligation to inform the employee that the lawyer attending the interview is the lawyer of the company and not the lawyer of the interviewee.

d) Be informed that he/she has the right that his/her lawyer attends?

The employee's general right to have a lawyer present during the interview is not governed by any Lithuanian law. However, companies often allow this kind of legal attendance in order to have a fair set-up or if the employee is suspected of having committed an offence.

e) Be informed that he/she has the right of a representative from the works council (or other employee representative body) to attend?

According to Lithuanian legislation, the employee does not have a strict legal right to be attended by a representative of the work council.

f) Be informed that data may be transferred cross-border (in particular to the United States)?

According to paragraph 2 of Article 35 of the PDPL an employee's personal information may only be transferred cross-border with the approval of the State Data Protection Inspectorate of the Republic of Lithuania. However, in accordance with paragraph 5 of Article 35 of the PDPL, there is a list of circumstances under which the approval of the state data protection inspection is not needed. One of these circumstances is when the employee himself/herself gives permission to transfer the data cross-border.

g) Sign a data privacy waiver?

In case the personal data of the interviewee might be used for other purposes in the future, e.g. in later court proceedings, a data privacy waiver of the interviewee can be very useful.

According to the PDPL, the employee needs to give approval where personal data is concerned and where this is subject to permission. Please note that from 25 May 2018 the new provisions under the European General Data Protection Regulation, Regulation (EU) 2016/679 ("**GDPR**") apply.

h) Be informed that the information gathered might be passed on to authorities?

In accordance with the PDPL, an employee must be informed about all potential recipients to whom the employee's personal data may be transferred to.

i) Be informed that written notes will be taken?

According to paragraph 1 of Article 23 and Article 24 of the PDPL, an employee has the right to be informed that there are notes taken during the interview and to have access to the notes after the interview.

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7. Are document hold notices or document retention notices allowed in your country? Are there any specifics to be observed (point in time/form/sender/addressees etc.)?

There is no specific law governing this question, however, issuing of such notices is a common procedure.

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8. May attorney-client privilege be claimed over findings of the internal investigation? What steps may be taken to ensure privilege protection?

The results of the internal investigation may not be revealed due to client secrecy. By the mentioned way, attorney-client confidentiality may be applied.

In accordance with the Law of the Bar Association of the Republic of Lithuania, an attorney at law cannot be summoned as a witness or provide explanations about circumstances, which he gained knowledge about by providing legal service. This is because of his professional duties. It is also generally prohibited to inspect, check or withdraw attorney at law's documents (in any form) related to his activity. Therefore, the search or examination of the attorney at law in his work place, living place, vehicle, etc. can be performed only with the participation of the member of the Executive Board of the Bar Association.

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9. Can attorney-client privilege also apply to in-house counsel in your country?

The Labour Code does not specifically regulate attorney-client privilege in case of in-house counsel. Documents in the custody of in-house counsel can therefore in general be seized by the authorities.

However, under Lithuanian case law in-house counsel have to inform authorities in case they become aware of a potentially committed crime within their company.

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10. Are any early notifications required when starting an investigation?

a) To insurance companies (D&O insurance etc. to avoid losing insurance coverage)?

As far as circumstances arise which could cause claims against the insurance company, the policy holder should make a notification of circumstances to the insurer. However, there are no Lithuanian legal statutes which govern such explicit obligation.

b) To business partners (e.g. banks and creditors)?

Lithuanian legislation does not govern such an obligation. However, the duty to inform a business partner may arise from contractual obligations between the parties. It depends on the individual case whether and when the business partner needs to be notified.

c) To shareholders?

Lithuanian laws do not govern explicit obligations to inform shareholders about the internal investigation.

d) To authorities?

There is no duty to inform the prosecutor about the internal investigation or potential misconduct within the company. There may only be exceptions for very significant crimes, for instance, murder, serious health impairment, etc. However, a cooperative approach with the local prosecutor may prevent adverse and unexpected measures by the authorities, such as dawn raids.

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11. Are there certain other immediate measures that have to be taken in your country or would be expected by the authorities in your country once an investigation is started, e.g. any particular immediate reaction to the alleged conduct?

In accordance with paragraph 2 of Article 205 of the Labour Code, the employer has the duty to inform and to consult employees about all questions of particular importance. Starting an internal investigation may be considered as such an event.

Further, if the company becomes aware of on-going criminal conduct within the company, it may be advisable to conduct disciplinary measures to stop such misconduct. There are two ways to make sure that an individual's behaviour is stopped:

- In accordance with paragraph 3 of Article 49 of the Labour Code, an employer may, while examining the circumstances in which an employee may be subjected to the breach of his duties, waive the employee until 30 calendar days paying him his average salary.
- Under Article 58 paragraph 2, subparagraphs 5 and 6 of the Labour Code there is a possibility to terminate the employment contract with the employee in regards with following circumstances:
    - Material damage done deliberately to the employer or an attempt to intentionally cause him material (property) damage;
    - A criminal offence was committed during the work time or at the work place.

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12. Will local prosecutor offices generally have concerns about internal investigations or do they ask for specific steps to be observed?

Local prosecutor offices generally appreciate internal investigations through external investigators, such as law firms. Early involvement, communication and coordination may be helpful for a good cooperation with local prosecutors. With regard to this, it is crucial that the company does not destroy any potential evidence or convey the impression that evidence is or will be destroyed. Therefore, data retention orders should be communicated at the earliest stage possible.

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13. Please describe the legal prerequisites for search warrants or dawn raids on companies in your country. In case the prerequisites are not fulfilled, may gathered evidence still be used against the company?

Under Article 145 of the Code of Criminal Procedure of the Republic of Lithuania, in cases where there are grounds for assuming that there are, in some premises or in any other place or in the possession of some person, instruments of a crime, tangible objects and valuables that were obtained or acquired in a criminal offence, a pre-trial investigation officer or a prosecutor may conduct a search for the purposes of discovering and seizing them.

The search is carried out on the basis of a reasoned judgment issued by the pre-trial investigation judge. This judgment must specify the objects to be searched for (possession of a person, instruments of a crime, tangible objects and valuables that were obtained or acquired in a criminal way, or certain items or documents which might be relevant to the investigation of the criminal offence). In cases of utmost urgency, the search may be carried out pursuant to the resolution of a pre-trial investigation officer or a prosecutor. However, in such cases a pre-trial investigation judge has to confirm the legitimacy of such a search within three days after the search was conducted. If such confirmation of a pre-trial judge is not received within the specified period, all objects, valuables and documents seized during the search must be returned to the persons from whom these objects, valuables or documents had been taken. Further, the results of such a search may not be used as evidence in further proceedings. The latter also applies if other requirements for the search are not met.

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14. Are deals, non-prosecution agreements, or deferred prosecution agreements available and common for corporations in your jurisdiction?

Deals and non-prosecution agreements are not provided for corporations under Lithuanian law.

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15. What types of penalties (e.g. fines, imprisonment, disgorgement, or debarment) may companies or its directors, officers, or employees face for misconduct of (other) individuals of the company?

In accordance with the Penal Code of the Republic of Lithuania (hereinafter – the "**Penal Code**"), there is no special provision which includes misconduct between companies or their directors, officers or employees. However, if one of the mentioned subjects commits a crime against another subject, penalties can generally include fines, public work, arrests or even imprisonment. The type of penalty depends on the committed crime.

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16. Please briefly describe any investigations trends in your country (e.g. recent case law, upcoming legislative changes, or special public attention on certain topics)?

According to the European General Data Protection Regulation, Regulation (EU) 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, which will come into force in May 2018, every company will have to have a data protection officer. One of the data protection officer's duties will be to consult the employees concerning their data privacy rights. Further, the data protection officer will have data protection monitoring duties. Therefore, the company will generally have to inform the data protection officer about all data privacy related procedures and processes of an investigation.

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Dr. Dalia Foigt-Norvaišienė chairs the Employment, Immigration and Labour Law Pratice Group at COBALT Lithuania. She has an extensive over 24 years of experience in advising clients on Employment, Corporate Law issues and is a recognised expert on international and domestic arbitration. She provides both day-to-day counselling, as well as assists clients in more extensive projects and cross-border transactions. She has assisted numerous local and international clients upon choosing the best solution for establishing a business in Lithuania and upon setting up and operating these businesses including but not limited to employment matters. Dalia is frequently invited to share her experience and knowledge in international publications, conferences, seminars and trainings.

Before starting a private practice Dalia gained her PhD in the area of Environment law and continued her career as Senior Researcher and Associated Professor of Vilnius University. Dalia has also taken part in legislative work in Lithuania in the areas of Environment and Litigation.

Dalia is active member of business community and maintains good contacts with municipal and central government institutions while representing business community and seeking to improve business environment. Dalia is Chairperson of Business Women Association, Member of European Business Network, Member of France-Lithuanian Chamber of Commerce, Member of the Board of Lithuanian Lawyers Association, Member of International Bar Association, Member of Lithuanian Bar.

Luxembourg

Lutgen + Associés

 André Lutgen

 Pierre Hurt

TABLE

	Corporate Liability	Public Bribery	Commercial Bribery	Extraterritorial Applicability of Criminal Laws	Adequate Procedures Defence
Yes	X	X	X	X	X
No					

QUESTION LIST

1. Do any specific procedures need to be considered in case a whistleblower report sets off an internal investigation (e.g. for whistleblower protection)?

Whistleblowers are protected against retaliation from their employer by labour law, where acts of bribery, trading in influence, taking illegal advantage, or sexual harassment are reported. Although no procedure expressly protects a whistleblower's identity during an internal investigation (except in cases of market abuse), it is nevertheless recommended to provide such protection to avoid the risk of a whistleblower suffering any negative consequences as a result of the report. If a whistleblower experiences negative consequences, the employer may be liable for mishandling the whistleblower's identity.

The only legal obligation to investigate relates to anti-money laundering ("**AML**") matters. This is inferred from the obligation to report any suspicious information about a client, which may include internal whistleblower complaints.

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2. Do the following persons/bodies have the right to be informed about an internal investigation before it is commenced and/or to participate in the investigation (e.g. the interviews)?

a) Employee representative bodies, such as a works council

b) Data protection officer or data privacy authority

c) Other local authorities

What are the consequences in case of non-compliance?

a) Except for sexual harassment investigations, there is no law concerning the notification or participation of employee representative bodies in internal investigations. This may, however, be required by certain industry collective agreements.

b) An employee's right to privacy in the workplace is protected under Luxembourg law and infringement thereof may constitute a criminal offence. Under the General Data Protection Regulation ("**GDPR**"), companies operating in Luxembourg may need to appoint data protection officers ("**DPO**") by 25 May 2018. If an investigation requires the processing of sensitive personal data, the DPO must be consulted in order to assess the impact of such processing.

Under the GDPR, if the DPO determined that the processing involves a high risk, the Commission Nationale de la Protection des Données ("**CNPD**") must be consulted. If the investigation relates to a data breach, the CNPD must be notified.

c) Given that Luxembourg is an important financial centre, the necessity to inform a supervisory body, namely the Commission de Surveillance du Secteur Financier ("**CSSF**") or the Commissariat Aux Assurances ("**CAA**"), should be carefully taken into consideration. Notification is mandatory in market abuse and AML matters.

On-going criminal behaviour revealed in the course of an investigation should be reported to the public prosecutor. In cases relating to AML, the public prosecutor's financial intelligence unit – Cellule de Renseignement Financier ("**CRF**") – must be notified.

Entities, board members, or employees with ties to the public sector have an obligation to report any misdemeanour or crime to the public prosecutor's office.

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3. Do employees have a duty to support the investigation, e.g. by participating in interviews? If so, may the company impose disciplinary measures if the employee refuses to cooperate?

An employee's duty to support an internal investigation is inferred from the employee's general duty of loyalty to his employer, i.e. the duty to act in the employer's best interests. Disciplinary measures, including dismissal, can be taken against an uncooperative employee, where the lack of cooperation constitutes misconduct and has a negative impact on the employer. Employers should be careful in assessing the gravity of an employee's uncooperative behaviour, as sanctions must be proportionate.

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4. May any labour law deadlines be triggered or any rights to sanction employees be waived by investigative actions? How can this be avoided?

From the moment an employer has knowledge of severe misconduct, which could justify immediate dismissal, the employer has one month to proceed with the dismissal. The employer is presumed to have knowledge of severe misconduct, when the employee with the authority to dismiss has sufficient knowledge of the misconduct. Such knowledge may be obtained through the investigation.

If the employer decides to simply sanction an employee for misconduct, the same misconduct cannot be used at a later stage as grounds for dismissal.

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5. Are there any relevant data privacy laws, state secret laws, or blocking statutes in your country that have to be taken into account before

a) Conducting interviews?

Data privacy laws apply to any processing of data. This includes securing, collecting, and reviewing data, as well as the creation of work products, such as interview file notes and final reports. Therefore, it is very important to perform an early assessment of the applicable data privacy laws with the DPO, where applicable, and to document the steps taken.

b) Reviewing emails?

Private communication is highly protected under Luxembourg law. Reviewing private emails may even constitute a criminal offence if data privacy laws are not observed. Therefore, a thorough analysis of legal exposure should always be performed before email review is initiated.

c) Collecting (electronic) documents and/or other information?

Luxembourg's current data protection law mirrors the EU Data Protection Directive (Directive 95/46/EC). The GDPR goes into effect on 25 May 2018 and supersedes the current law.

The request of a legal authority or a legal obligation will often be a sufficient justification for gathering and using data, although mere communication with authorities can, in some instances, trigger the applicability of data protection laws. In critical cases, it may be advisable not to produce data on a voluntary basis, but to await a written formal request from the authority.

d) Analysing accounting and/or other mere business databases?

No law in Luxembourg restricts the analysis of accounting and/or other mere business databases.

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6. Before conducting employee interviews in your country, must the interviewee

a) Receive written instructions?

There is no legal obligation to provide written instructions to employees. It is nevertheless recommended that employees be informed of the general context of the investigation and of the rights of the employee during the investigation. Such information should be provided in writing, with a copy to be signed by the employee.

b) Be informed that he/she must not make statements that would mean any kind of self-incrimination?

Although an individual has the right to remain silent during interrogations by criminal authorities, there is no corresponding right with regard to employee interviews as part of internal investigations. However, per the ethical rules of the Luxembourg Bar Association, an interviewer should avoid pressuring an interviewee to make a self-incriminating statement.

c) Be informed that the lawyer attending the interview is the lawyer for the company and not the lawyer for the interviewee (so-called "Upjohn warning")?

A so-called Upjohn warning must be provided to the interviewee under the ethical rules of the Luxembourg Bar Association.

d) Be informed that he/she has the right that his/her lawyer attends?

It is unclear from the case law whether an employee has a right to have personal counsel attend the interview. However, companies often allow such attendance to have a fair set-up or if the employee is suspected of having committed criminal offences.

e) Be informed that he/she has the right of a representative from the works council (or other employee representative body) to attend?

The right to be assisted by a representative from the works council or from a nationally representative union is only provided for by labour law in case of a preliminary interview for dismissal in companies with at least 150 employees. Prior notice of the possibility of dismissal must be provided.

If there are any concerns that an interview could lead to a dismissal, and hence amount to a preliminary interview for dismissal, it is advised that the interview be treated as such.

Even when not legally required, a company may choose to allow a representative to assist the employee, especially if the company is itself assisted by a lawyer, so as to preserve "equality of arms". As this is not based on any legal obligation, a company should assess if the presence of such a representative is compatible with the preservation of confidentiality and/or professional secrecy obligations.

f) Be informed that data may be transferred cross-border (in particular to the United States)?

The employee should be informed that data may be transferred and processed outside of the European Union. The basis for the transfer must satisfy the provisions of the GDPR, be it consent, model clauses, binding corporate rules, or the like. If the only basis for transfer is the consent of the employee, such consent must be specific, unambiguous, and freely given.

g) Sign a data privacy waiver?

It is advisable to offer the employee a data privacy waiver to sign. The employer should, however, still independently assess the legitimacy and proportionality of the subsequent use of the data, as the courts may

review the adequacy of the employer's data privacy assessment, even in instances when an employee signed a waiver.

h) Be informed that the information gathered might be passed on to authorities?

Even though there is no legal obligation in Luxembourg to inform the employee that information may be passed on to authorities, it is common practice to add this caution to the interview instructions. An interviewee should, in particular, be informed if the data may be transferred to non-EU authorities.

i) Be informed that written notes will be taken?

There is no legal obligation under Luxembourg law to inform the interviewee that notes will be taken. However, in the interest of transparency, the potential future use of information provided by the employee (e.g. for reports and potentially for disclosure) should be explained.

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7. Are document hold notices or document retention notices allowed in your country? Are there any specifics to be observed (point in time/form/sender/addressees etc.)?

There is no specific law or practice governing this question in Luxembourg.

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8. May attorney-client privilege be claimed over findings of the internal investigation? What steps may be taken to ensure privilege protection?

The only findings covered by privilege are those made by experts retained by counsel (an *avocat*). For the findings of the internal investigation to be covered by attorney-client privilege, the employer has to mandate a lawyer to proceed with the investigation. Said lawyer can then require the assistance of experts if necessary (e.g. the forensic department of a consulting or accounting firm), whose work, by being integrated in the lawyer's investigation, would be covered by attorney-client privilege.

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9. Can attorney-client privilege also apply to in-house counsel in your country?

Attorney-client privilege does not apply to in-house counsel in Luxembourg. However, any exchange with a law firm, including one between in-house and outside counsel, is protected by the attorney-client privilege, even if the communication is in the custody of in-house counsel.

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10. Are any early notifications required when starting an investigation?

a) To insurance companies (D&O insurance etc. to avoid losing insurance coverage)?

Notification to insurance companies when starting an investigation is highly advisable. In this regard, the relevant insurance contracts should be checked.

b) To business partners (e.g. banks and creditors)?

Information duties may arise from contractual obligations between the company and the business partner. Even if there is no explicit provision in the contract, there may nonetheless be an obligation in cases where the internal investigation concerns information that is highly important for the other party and relevant to the purpose of the agreement. These interests of the business partner need to be evaluated against the legitimate interests of the company. Therefore, it depends on the individual case whether and when the business partner needs to be notified. In any circumstance, the situation in regard to legal privilege must be carefully examined.

c) To shareholders?

Duties to inform shareholders only exist for publicly listed companies and may be at odds with the desire to maintain confidentiality or professional secrecy duties. The company must evaluate on a case-by-case basis if there is an *ad hoc* duty to report to shareholders.

Under current market abuse legislation, knowledge of an internal investigation may be seen as insider information that could influence stock prices. An obligation to disclose may arise if the internal investigation may affect stock prices significantly and fulfils different criteria (e.g. risk of the internal investigation, scope, involved suspects). In case of a violation of the reporting duties, the company may be liable for damages and may eventually be exposed to criminal and administrative sanctions.

d) To authorities?

Depending on the area of activity of the company or on the type of incident that is investigated, various authorities and supervising bodies may need to be notified:

- The CSSF, in relation to market abuse, AML, and fraud;
- The CAA, in particular in relation to AML matters; and
- The CRF, in relation to AML matters.

Moreover, on-going criminal behaviour revealed in the course of an investigation should be reported to the public prosecutor and to the supervisory authority.

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11. Are there certain other immediate measures that have to be taken in your country or would be expected by the authorities in your country once an investigation is started, e.g. any particular immediate reaction to the alleged conduct?

A company is expected to show diligence in identifying the damage caused by the alleged misconduct, mitigating its effects, and preventing further damage (e.g. by strengthening processes or reinforcing its compliance system). It is also recommended that a company proportionately sanction misconduct to discourage further cases.

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12. Will local prosecutor offices generally have concerns about internal investigations or do they ask for specific steps to be observed?

The need to report the facts leading to an internal investigation or the results of such an investigation to the public prosecutor's office is to be evaluated by the company (except where there is a legal obligation to report). Should the prosecutor's office open its own criminal investigation, the authorities will typically take complete control of the investigation and any parallel internal investigation will have to be coordinated with them.

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13. Please describe the legal prerequisites for search warrants or dawn raids on companies in your country. In case the prerequisites are not fulfilled, may gathered evidence still be used against the company?

A search of company premises may only take place by order of a judge and cannot begin before 6.30 a.m. or after midnight. Furthermore, a search of company premises cannot devolve into a so-called "fishing expedition" to discover infringements. The search can only be used for the purpose of finding evidence to strengthen an existing investigation of identified infringements. Searches executed in breach of the legal prerequisites can be annulled, rendering seized evidence unusable, but companies should be mindful of the short statute of limitations to lodge an annulment claim.

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14. Are deals, non-prosecution agreements, or deferred prosecution agreements available and common for corporations in your jurisdiction?

Deals may be struck with the public prosecutor's office by corporations in cases of offences with a fixed sentence of up to five years of imprisonment and/or a fine of a minimum of €500. The maximum fine depends on the nature of the offence and could reach millions of euros. Such deals are mainly used in cases of minor offences and tax fraud. A deal may be struck as long as the trial judge has not yet decided on the guilt of the defendant or whether the offence

is still prosecutable. It is, therefore, recommended to begin negotiations with the prosecutor's office as early as possible, if this step is considered an option.

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15. What types of penalties (e.g. fines, imprisonment, disgorgement, or debarment) may companies or its directors, officers, or employees face for misconduct of (other) individuals of the company?

The prosecution of a company does not preclude the prosecution of the individual(s) involved in the commission of the offence.

Four types of penalties are applicable to companies: fines (ranging from €500 to €2.5 million, depending on the offence); asset seizure; exclusion of participation in public procurement; and winding up.

As to natural persons, the main applicable sanctions are fines (ranging from €250 to €1.25 million, depending on the offence); imprisonment; and asset seizure. For some regulated professions, a criminal sentence may cause an individual to be barred from that profession.

Although prison sentences for the most common offences can reach up to 10 years, infringements committed in the context of the company, meaning where an employee/manager/director has used his position and function within the company to defraud, are generally sanctioned with a fine and sentence of several months on probation, if any.

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16. Please briefly describe any investigations trends in your country (e.g. recent case law, upcoming legislative changes, or special public attention on certain topics)?

The Luxleaks case has gained major public attention and media coverage. The case involved a journalist and two former employees of PwC, who handed a large number of documents belonging to PwC to the press. While the journalist was exonerated, the two former PwC employees have been sentenced to imprisonment and fined by the Court of Appeal for theft and laundering by detention, even as the court acknowledged that they acted as whistleblowers. Upon appeal before the Court of Cassation (the highest court in Luxembourg on civil, commercial, and criminal matters), the decision of the Court of Appeal has been overturned with regard to one of the two employees – Antoine Deltour. The Court of Cassation confirmed his status as a whistleblower and held that he could not be sentenced for the theft of documents because of this status.

The European Directive on the European Investigation Order ("**EIO**") in criminal matters (Directive 2014/41/EU) will be implemented in Luxembourg in the near future. The draft law is currently pending in the Luxembourg Parliament. Aimed at strengthening European cooperation in criminal matters, the Directive creates a single investigation order on the European level to facilitate the gathering of evidence. In this respect, while one may still be able to challenge the EIO, the grounds for such challenges are limited.

Foreign supervisory authorities have been performing on-site controls at banks in Luxembourg, to verify the proper application of AML rules imposed on foreign parent companies of Luxembourg subsidiaries.

The CSSF has set up a complex independent whistleblowing entity for the financial sector. Moreover, a July 2015 law granted the CSSF the power to impose administrative sanctions of up to 10 percent of a company's annual revenue and up to €5 million on natural persons. The CSSF has imposed sanctions of more than €3 million and €8.9 million on two banks for non-compliance with AML rules. Very recently, sanctions of €2.2 million have been imposed on eight entities for non-compliance with AML procedures.

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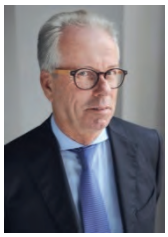

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During my long experience in defending company directors in criminal proceedings, I have found that behind each business manager there is an individual with his own feelings and awareness. We need to accompany him, acting as a legal professional throughout proceedings, which are often much too long, while supporting him during the personal upheaval that marks this period, which is often perceived as a life-changing experience.

In business litigation, listening is the only means of understanding what is the real problem confronting us, which enables the identification of the appropriate remedy. The solution of the problem, as envisaged by the client, is frequently inappropriate, and my professional ethics forbid me from acting as a "procedures merchant".

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Following my doctorate thesis and after several years teaching at the Universities of Paris 1 Panthéon Sorbonne and Paris 5 René Descartes, I continued my academic activities at the University of Luxembourg, whist at the same time becoming a lawyer. I am convinced that a demanding professional practice does not in any way preclude a high level of theoretical competence – just the opposite. After having specialised in civil law and civil proceedings during my years at university, and my initial years at the bar, I have progressively built up a fund of knowledge in criminal law and criminal proceedings since joining Lutgen + Associés .

Malta

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 Henri Mizzi

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TABLE

	Corporate Liability	Public Bribery	Commercial Bribery	Extraterritorial Applicability of Criminal Laws	Adequate Procedures Defence
Yes		X	X		X
No	X No criminal liability of companies, but administrative fines in specific cases.			X	

QUESTION LIST

1. Do any specific procedures need to be considered in case a whistleblower report sets off an internal investigation (e.g. for whistleblower protection)?

The Protection of the Whistleblower Act (Chapter 527 of the Laws of Malta), provides procedures, which allow employees in both the private and public sectors to disclose information regarding the improper conduct of their employers or colleagues. In addition, it ensures the protection of such employees from detrimental actions. Prior to the promulgation of this Act, the Employment and Industrial Relations Act (Chapter 452 of the Laws of Malta) also protected whistleblowers prohibiting the victimisation of any person for having made a complaint to the lawful authorities or for having disclosed information to a public regulating body regarding any alleged illegal or corrupt activities. Further, both the Public Administration Act (Chapter 497 of the Laws of Malta) and the Public Service Management Code oblige public employees and officers respectively, to report any unethical behaviour or wrongdoing by another employee or officer to a senior employee or officer.

Under the Protection of the Whistleblower Act, a disclosure is deemed to constitute a "protected disclosure" if:

- It is made in good faith; and
- At the time of making the disclosure, the whistleblower reasonably believes that the information disclosed and any allegation contained in it are substantially true and that the information disclosed tends to show an improper practice being committed by his/her employer, another employee of his/her employer or by persons acting in the employer's name and interests, based on the information he/she has at that moment.

With regard to internal whistleblowing procedures, the Protection of the Whistleblower Act provides that every employer, including the public administration, must have in force internal whistleblowing procedures. These shall allow for the collection of such information, the notification of the whistleblower of the status of the improper practice so disclosed and any other related matters. The law does not specify the content of such internal procedures. Thus, each employer may establish appropriate procedures for internal investigation of whistleblower reports at its own discretion.

2. Do the following persons/bodies have the right to be informed about an internal investigation before it is commenced and/or to participate in the investigation (e.g. the interviews)?

a) Employee representative bodies, such as a works council

b) Data protection officer or data privacy authority

c) Other local authorities

What are the consequences in case of non-compliance?

a) There is no reference to trade unions in the Protection of the Whistleblower Act. However, in practice the employer would inform the employee of his right to consult the union which he is a member of.

b) The Maltese legal framework does neither impose an obligation to inform the data protection officer or data privacy authority, nor does it provide for their participation in an internal investigation. However, it may be advisable to inform the data protection officer about all data privacy related procedures, including those related to an employee investigation according to the Data Protection Act (Chapter 440 of the Laws of Malta), as well as the forthcoming European General Data Protection Regulation, Regulation (EU) 2016/679, ("**GDPR**"), since the data protection officer must, *inter alia*, safeguard employees' data privacy rights and fulfil his data protection monitoring duties more generally. In particular, the data protection officer would be consulted upon whether consent and/or notices would be required in relation to such an investigation and whether the balance between an employee's right to privacy at work and other legitimate rights and interests of the employer would be violated as a result of this investigation.

c) The Protection of the Whistleblower Act defines a 'whistleblowing reporting officer' as the person identified within an organisation to whom a protected disclosure may be made. Where the disclosure leads to the detection of a crime or contravention under any applicable law, the said officer may refer the report to the police for investigation. An authority to whom a protected disclosure is made may disclose such information to another authority within 30 days where it feels that the matter can be better investigated by another authority.

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3. Do employees have a duty to support the investigation, e.g. by participating in interviews? If so, may the company impose disciplinary measures if the employee refuses to cooperate?

Maltese law does not make any reference to the necessary procedure to be adopted in such investigations. Thus, investigations are to be carried out in accordance with the internal procedure adopted by the employer subject to other applicable laws (the Data Protection Act, Chapter 440 of the laws of Malta). Additional obligations may be expected in case the employee has management responsibility due to potential supervisory duties.

The Protection of the Whistleblower Act further provides that the existence of the internal procedures and adequate information on how to use the procedures must be published widely within the organisation. Generally speaking, such procedures would provide that all employees should cooperate with any external or internal investigations carried out. With particular reference to external investigations, where the company in question is a regulated entity or is otherwise subject to anti-money laundering laws, all employees are required by law to be fully cooperative and transparent in any investigations or enquiries conducted by competent authorities.

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4. May any labour law deadlines be triggered or any rights to sanction employees be waived by investigative actions? How can this be avoided?

There are generally no formal deadlines linked to investigative actions. In particular, there is no formal deadline within which an employer must terminate the employment of an employee found to be in breach of the employment contract. The applicable law specifies that an employer may dismiss the employee without notice and without liability when there is good and sufficient cause to do so. Moreover, accepted practice dictates that an employer, prior to dismissing an employee, should explain the grounds of dismissal and give the employee the opportunity to

make a statement or defend himself/herself. To not prejudice its rights, it would always be advisable for an employer to dismiss the employee as soon as a conclusion on the proper cause for a dismissal is reached.

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5. Are there any relevant data privacy laws, state secret laws, or blocking statutes in your country that have to be taken into account before

a) Conducting interviews?

The Data Protection Act defines "personal data" as any information which can render a natural person identifiable. Personal data must be processed in accordance with the requirements of the Data Protection Act, which *inter alia* includes that the processing has to be fair and lawful as well as be conducted in accordance with good practice. Furthermore, "processing of personal data" is attributed a very broad definition, which covers any operation that is taken with regard to personal data. Accordingly, interviews conducted in pursuance of an on-going investigation must comply with the requirements of the Data Protection Act.

b) Reviewing emails?

Emails generally contain personal data and as a result generally fall within the scope of the requirements of the Data Protection Act for processing of personal data. Further, it should be noted that the Processing of Personal Data (Electronic Communications Sector) Regulations provide that no person other than the user, may listen, tap, store or undertake any other form of interception of any electronic communication, inclusive of emails, without the consent of the user concerned.

c) Collecting (electronic) documents and/or other information?

The collection of documents, including electronic documents, or other information, which contain personal data, may be undertaken if said collection is legitimate under the Data Protection Act criteria for processing of personal data.

d) Analysing accounting and/or other mere business databases?

Accounting and business databases fall within the remit of the Data Protection Act only if and to the extent that such databases contain personal data. Generally speaking, these databases would typically contain data that relates to the activities of the employer and its business rather than personal data.

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6. Before conducting employee interviews in your country, must the interviewee

a) Receive written instructions?

Maltese law does not specifically place any obligations on the employer to instruct the employee about his rights in relation to the investigation or any specifications on the conducting of the investigation itself.

b) Be informed that he/she must not make statements that would mean any kind of self-incrimination?

Both Maltese and European Union law provide an individual's right to remain silent in case of self-incrimination. Maltese criminal courts have interpreted this right to mean that a suspect does not need to reply to questions during his interrogation and during his testimony. Although not expressly mentioned in the Protection of the Whistleblower Act, it would still be good practice to caution against self-incrimination as this may prejudice the investigation in due course.

c) Be informed that the lawyer attending the interview is the lawyer for the company and not the lawyer for the interviewee (so-called "Upjohn warning")?

The Upjohn warning does currently not feature in Maltese law. In fact, there is no law providing guidelines on the procedure to follow when the lawyer in attendance is the lawyer of the company or an independent lawyer appointed by the interviewee.

d) Be informed that he/she has the right that his/her lawyer attends?

Prior to recent legislative amendments one had a right to speak to a lawyer only before an interrogation. However, the lawyer did not have the right to be present during the interrogation, notwithstanding numerous rulings from the European Court of Human Rights pointing toward the need to strengthen the right to legal assistant during such interrogation.

Recent legislative amendments now generally grant the right to access a lawyer. These amendments were *inter alia* enacted to transpose the European Directive 2013/48/EU, which deals with "*the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings*", amongst other correlated rights.

However, these legislative amendments apply only to official proceedings of investigating authorities and do not extend to internal investigations of a company operating in the private sector.

e) Be informed that he/she has the right of a representative from the works council (or other employee representative body) to attend?

In practice, the interviewee may indeed seek advice from a trade union in relation to a potential or on-going investigation and to consult with the trade union as to an interview request. However, there is no legal obligation to inform the employee accordingly. However, despite being completely absent from Maltese law, it is typical for employers to inform employees of such right before doing an interview.

f) Be informed that data may be transferred cross-border (in particular to the United States)?

According to the Data Protection Act the transferring of any personal data which is undergoing processing or is intended to be processed to a third country is also subject to the requirements and protection afforded by the Maltese Act. Further, the data may only be transferred to a third country which ensures an adequate level of protection in terms of the Data Protection Act. The United States are not considered to be such a country. So any transfer to the United States would make additional justifications necessary which have to be assessed in the individual case.

g) Sign a data privacy waiver?

The Data Protection Act provides, as a general rule, that personal data may only be processed if the data subject i.e. a natural person to whom the personal data relates has unambiguously given his consent. However, if the processing of the data is necessary for the performance of a contract to which the data subject is a party, or if the processing of data is necessary to take steps at the request of the data subject prior to entering into a contract, then the consent of the data subject is not required.

A practical example of this is an employment contract. During the pendency of an employment agreement the employer is able to process the data of the respective employee in order to carry out certain tasks, such as performing payments. This would also apply prior to the signing of an employment agreement by both parties.

h) Be informed that the information gathered might be passed on to authorities?

The employee must be informed and his/her consent should be requested.

i) Be informed that written notes will be taken?

There is currently no obligation under Maltese law to inform the interviewee that written notes will be taken during the interview which is largely unregulated by Maltese law. However, in case written notes contain personal data of the interviewee, which might be used for other purposes in the future, it would be recommendable to obtain a consent/waiver from the interviewee.

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7. Are document hold notices or document retention notices allowed in your country? Are there any specifics to be observed (point in time/form/sender/addressees etc.)?

There is no specific law governing this question. Much would depend on the internal procedures established by the employer pursuant to the requirement of the Protection of the Whistleblower Act. In practice, issuing such notices is a common procedure.

8. May attorney-client privilege be claimed over findings of the internal investigation? What steps may be taken to ensure privilege protection?

In Malta, the legal professional privilege predominantly exists in the context of civil and criminal litigation as well as in criminal proceedings and any investigations by the competition authority. The law does not explicitly go beyond such sectors, however all lawyers are granted certain duties with regards to confidentiality by the Code of Ethics, issued by the Maltese Chamber of Advocates.

In order to ensure privilege protection, external legal counsel would typically be involved. Further, claims of privilege are more likely to be upheld where the company can demonstrate that the advice provided by members of the legal professional was given in relation to a potential investigation by the authorities or otherwise where litigation is reasonably in prospect.

9. Can attorney-client privilege also apply to in-house counsel in your country?

Maltese law on legal professional privilege fails to distinguish between independent lawyers and in-house counsel. Therefore it is safe to assume that the obligation of professional secrecy and confidentiality applies equally to both independent lawyers and in-house counsel. However, it may be more difficult to ascertain privilege on documents prepared by in-house counsel.

10. Are any early notifications required when starting an investigation?

a) To insurance companies (D&O insurance etc. to avoid losing insurance coverage)?

The law does not specifically list any obligation of the employer. However, certain obligations with regards to precarious potential and on-going investigations may arise from the terms and conditions of the insurance policy.

b) To business partners (e.g. banks and creditors)?

Certain notification duties may arise from any contracts or agreements entered into by the employer and any third parties where a potential or on-going investigation may prejudice the position of any creditors with regards to the collection of any outstanding debts. Therefore any obligations in this respect are to be considered under the agreement itself and possibly any statutory law governing the relationship between the said partners.

c) To shareholders?

The directors of a company are responsible for the day-to-day running of the affairs of the company and thus act as the fiduciaries of the company. The directors of a company have certain reporting obligations to the shareholders especially where a potentially precarious situations risks diminishing the value of their shares.

d) To authorities?

Generally speaking, there is no obligation on the part of the company to inform the authorities about any internal investigation whether it is on-going or not. However, this depends on the gravity of the wrongdoing and whether it affects public interest. Further, where the company is a regulated entity, the applicable laws may, in certain instances, require the company to inform the competent authorities with immediate effect of any significant events affecting their business, including any significant internal investigations.

11. Are there certain other immediate measures that have to be taken in your country or would be expected by the authorities in your country once an investigation is started, e.g. any particular immediate reaction to the alleged conduct?

There are no general legal provisions in this respect although, with reference to regulated entities, these are required to take all reasonable measures in order to remediate any misconduct at the earliest whilst also establishing internal systems and controls to mitigate and manage the risk of such misconduct happening again in the future.

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12. Will local prosecutor offices generally have concerns about internal investigations or do they ask for specific steps to be observed?

The Protection of the Whistleblower Act requires every employer to have internal procedures in force, as described above. However, the Act fails to specify what exactly these internal procedures should cover and therefore it is safe to assume that it very much remains within the discretion of the employer. Wherever the disclosure involves an improper practice which constitutes a crime or contravention under any law, the whistleblowing reporting officer may pass on the report to the police for investigation thereof. The Protection of the Whistleblower Act is a relatively new introduction to the local legislative framework and, as such, there is little evidence, if any, on how local prosecutors are likely to react to internal investigations. There are no official or formal procedures which employers are expected to follow when conducting internal investigations (other than their own internal procedures which are required to be established pursuant to the Act). Consequently, the approach to be taken by local prosecutors, including their treatment of the conclusions arising from internal investigations and the procedure that has been followed is likely to depend on the facts of the case at hand.

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13. Please describe the legal prerequisites for search warrants or dawn raids on companies in your country. In case the prerequisites are not fulfilled, may gathered evidence still be used against the company?

Except in certain delineated cases expressly stated in the Criminal Code (Chapter 9 of the Laws of Malta), a police officer may not enter any private premises for the purpose of affecting a search within the said premises unless he is in possession of a warrant issued by a Magistrate. The search cannot, however, extend to legal privilege for e.g. any communication between the suspect and his legal representative or to any excluded material. The search warrant shall always be applied within the parameters for which it was issued. However, if other offences are discovered during the course of the search the search may be extended to this offence. Once on premises, the police officer carrying out the search may seize anything if he/she has reasonable cause to believe that the object has been obtained in consequence of an offence or if it is evidence in relation to an offence. Under Maltese law, illegally obtained evidence may still be admissible.

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14. Are deals, non-prosecution agreements, or deferred prosecution agreements available and common for corporations in your jurisdiction?

As from 2002 Maltese criminal law provides the option of sentence bargaining which means that the Attorney General, appearing on behalf of the prosecution and the accused through his legal counsel, can discuss and predetermine what punishment and consequences arising from the finding of the guilt can be imposed by the court, in case of a guilty plea. The Maltese Criminal Code does not specifically mention whether corporations can avail of this provision.

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15. What types of penalties (e.g. fines, imprisonment, disgorgement, or debarment) may companies or its directors, officers, or employees face for misconduct of (other) individuals of the company?

The liability of the company falls on the directors of the company, as under Maltese law companies are not subject to criminal responsibility. However, the company may be subject to certain administrative fines and penalties in

certain specified cases. The nature and amount of the penalties vary depending on the industry or sector in question and the laws applicable thereto.

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16. Please briefly describe any investigations trends in your country (e.g. recent case law, upcoming legislative changes, or special public attention on certain topics)?

The Malta Financial Services Authority ("**MFSA**") and the Financial Intelligence Analysis Unit ("**FIAU**") have been particularly active in the financial services space in the recent months. More specifically, they have upped their on-site inspections and have also levied numerous penalties for breach of the relevant rules and regulations. Any such penalties or other regulatory measures taken by regulators are made public on the respective website.

Over the last two years the Office for Competition ("**OC**") has made a concerted effort to concentrate its resources on decreasing the number of pending cases and has closed a relatively high number of cases. The sectors involved covered the carriage of passengers, food services, fuel sales, car parking rates and yacht marinas.

The authorities are expected to maintain their momentum insofar as on-site inspections and investigations are concerned, although no legislative changes are expected.

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Diane is a Senior Associate in the Corporate Finance Practice Group at Camilleri Preziosi. She practices primarily in financial services law, financial regulation and anti-money laundering regulation, providing advice to local and overseas clients on the impact of the current and forthcoming regulatory regime on their business models. Diane also advises clients on the regulatory aspects of a wide range of transactions, including licensing-related matters, capital markets initiatives and on-going liaison with regulatory authorities more broadly. Prior to joining the firm, Diane was a risk and regulatory consultant at a Big Four audit firm, working in Malta and in London, and subsequently joined the enforcement departments of the UK and Maltese financial services regulators.

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Hogan Lovells International LLP

 Manon Cordewener

 Bas Keizers

TABLE

	Corporate Liability	Public Bribery	Commercial Bribery	Extraterritorial Applicability of Criminal Laws	Adequate Procedures Defence
Yes	X	X	X		X
No				X	

QUESTION LIST

1. Do any specific procedures need to be considered in case a whistleblower report sets off an internal investigation (e.g. for whistleblower protection)?

As of 2016 the House for Whistleblowers Act (the "**Whistleblowers Act**") requires employers with at least 50 employees to draft and implement an internal whistleblowers regulation. An internal whistleblowers regulation should outline the following:

a) How and to whom to report abuses;

b) Types of abuse which can be reported;

c) The obligation of the employer to deal with reports confidentially, should the employee request confidentially; and

d) The possibility for an employee to seek counsel to discuss the suspicion of abuse.

In addition, the employer must explain to the employee under what circumstances abuse may be reported externally and the legal protections afforded to whistleblowers. The employee is generally only allowed to report the abuse externally after a reasonable time has passed and the company has failed to eliminate the abuse.

An employee may file a request with the House of Whistleblowers in order to initiate an external investigation. The House of Whistleblowers is an independent governmental institution responsible for investigating abuses reported by employees. The House of Whistleblowers assesses reports on a case-by-case basis to determine whether it will initiate an external investigation.

If an internal report is made, the company should do everything to eliminate the suspicion of abuse. If the company fails to do so within a reasonable time and the employee makes an external report to the Investigation Department of the House of Whistleblowers, the employer and employee will be obliged to appear before the Department. The Investigation Department will issue a research report, which will contain recommendations to eliminate the abuse or to prevent a recurrence of the abuse. The report is not binding for any of the parties, but the employer has the duty to inform the House about the way it has addressed and/or implemented the recommendations. If the employer does not comply with the recommendations, it is obliged to give the reason for the non-compliance.

2. Do the following persons/bodies have the right to be informed about an internal investigation before it is commenced and/or to participate in the investigation (e.g. the interviews)?

a) Employee representative bodies, such as a works council

b) Data protection officer or data privacy authority

c) Other local authorities

What are the consequences in case of non-compliance?

a) The works council has no right to be informed about an internal investigation, although it must consent to the internal whistleblowers regulation proposed by the employer.

b) The Dutch Data Protection Act does not require notifying a data protection officer ("**DPO**") about an internal investigation. However, according to the Guidelines for Data Protection Officers, issued by the Dutch Data Protection Authority ("**DDPA**"), it is advisable to inform the DPO.

Since 6 November 2017 it is no longer required to inform the DDPA before data processing in connection with an internal investigation because this obligation will cease to exist when the General Data Protection Regulation (EU) 2016/679 (the "**GDPR**") comes into force in May 2018.

c) There is no statutory obligation to inform local authorities. However, a company's internal whistleblowers regulation could provide this obligation.

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3. Do employees have a duty to support the investigation, e.g. by participating in interviews? If so, may the company impose disciplinary measures if the employee refuses to cooperate?

Employees are obliged to cooperate with investigators of the House of Whistleblowers (i.e. to provide complete and truthful responses to requests). However, non-compliance is not sanctioned in the Whistleblowers Act. The House of Whistleblowers is not legally obliged to continue the investigation if the employee requesting the investigation does not cooperate adequately.

If an investigation is not conducted by the House of Whistleblowers, there is no specific rule that requires an employee to cooperate. However, on the basis of the general principle that employees should act as "good employees", it is expected that an employee will support and cooperate with an internal investigation. If an employee refuses to cooperate, an assessment could be made to determine what disciplinary measures, if any, should be imposed. Circumstances to consider include, but are not limited to, the personal circumstances of the employee, the length of the employment, and the seriousness of the suspected misconduct.

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4. May any labour law deadlines be triggered or any rights to sanction employees be waived by investigative actions? How can this be avoided?

There are no specific rules that provide that a labour law deadline will be triggered or a right will be waived by an investigative action.

However, employers should be aware of the following:

a) It is only possible to dismiss an employee with immediate effect if the dismissal is prompt *(onverwijld)*. This means that an investigation (after a suspicion has been raised) should be carried out with minimum delay and the employer should dismiss the employee immediately once the culpability has been sufficiently established. Whether a dismissal was carried out quickly enough to be valid depends on the circumstances of the case.

b) The employer has a duty to act as a good employer. This means that an investigation should be conducted in a fair and reasonable way. If an employee was, for example, pressured or threated during the investigation, this might hinder the employer's ability to take disciplinary measures. Moreover, if the employer engages in serious misconduct during an investigation, employees might try to claim damages or high severance payments.

5. Are there any relevant data privacy laws, state secret laws, or blocking statutes in your country that have to be taken into account before

a) Conducting interviews?

Under Dutch data protection law, a legal basis for the processing of personal data is required. A legal basis cannot be found in consent given by the employee, as employee consent is not considered freely given in an employment relationship. Generally, a legal basis for conducting an internal investigation, including an employee interview, exists when the controller (in this case, the employer) has a legitimate business interest to investigate suspicions of misconduct, provided that the data subject has no overriding interest in the protection of their private life, and (i) the interview is relevant to the investigation; (ii) the same purpose cannot be achieved using less intrusive means (e.g. only document review); and (iii) the controller has implemented measures to protect the rights of the data subject (e.g. restricting access to interview data). In case of an investigation by the DDPA, the controller will be required to demonstrate to the DDPA that it has taken into account the conditions above in a so-called Privacy Impact Assessment before conducting the internal investigation.

Data subjects should be informed about the purposes and means of the processing prior to the commencement of processing. An employee should be informed before the interview is conducted. An exception to this rule applies where there is a substantial risk that such notification would jeopardise the ability of the controller to investigate a matter properly or gather the necessary evidence or where notification may lead to destruction of data. In such cases, the notification to the data subjects may be delayed as long as such a risk exists, which should be determined on a case-by-case basis.

b) Reviewing emails?

As with conducting interviews, there must be a legal basis for the email review. The legal basis is typically derived from the legitimate business interest of the controller provided that (i) the email review is relevant to the investigation (e.g. non-relevant, private emails are excluded); (ii) the same purpose cannot be achieved using less intrusive means; and (iii) the controller has implemented measures to protect the rights of the data subject, including the right to privacy in the workplace (e.g. by engaging a third party to conduct the review, using an algorithm to search for emails, and restricting access to emails to a dedicated team subject to confidentiality obligations).

c) Collecting (electronic) documents and/or other information?

As with conducting interviews and reviewing emails, a legal basis for collecting documents must exist, which is assessed using the factors' described above.

d) Analysing accounting and/or other mere business databases?

Dutch data protection laws do not protect the processing of non-personal data, e.g. statistics or accounting information.

6. Before conducting employee interviews in your country, must the interviewee

a) Receive written instructions?

There is no statutory obligation to provide an interviewee with written instructions; however, a company's internal whistleblowers regulation could provide this obligation.

b) Be informed that he/she must not make statements that would mean any kind of self-incrimination?

There is no statutory obligation to inform the interviewee about the right to be free from self-incrimination; however, a company's internal whistleblowers regulation could provide this obligation.

c) Be informed that the lawyer attending the interview is the lawyer for the company and not the lawyer for the interviewee (so-called "Upjohn warning")?

There is no statutory obligation to provide an Upjohn warning; however, a company's internal whistleblowers regulation could provide this obligation.

d) Be informed that he/she has the right that his/her lawyer attends?

If the interview is conducted by the police, where the employee is a suspect in a criminal investigation, then the interviewee should be informed that he/she has the right that his/her lawyer attends. If the interview is not conducted by the police, there is no such right or corresponding information obligation. However, a company's internal whistleblowers regulation could provide this obligation.

e) Be informed that he/she has the right of a representative from the works council (or other employee representative body) to attend?

The employee has no right to have a works council representative attend the interview; however, a company's internal whistleblowers regulation could provide this right and corresponding information obligation.

f) Be informed that data may be transferred cross-border (in particular to the United States)?

As a rule of thumb, personal data may not be transferred to countries outside of the European Economic Area, unless the data recipient offers an adequate level of protection. Data subjects must be informed about the recipients or categories of recipients of their personal data and the transfer of data to a third country or international organisation. Moreover, the GDPR requires that the data subject be informed of the safeguards implemented to legitimise the international transfer, for instance by reference to the Privacy Shield (U.S.) or model clauses approved by the European Commission.

g) Sign a data privacy waiver?

Under Dutch data protection law, employee consent does not qualify as valid consent. As a result, a signed data privacy waiver has no legal effect.

h) Be informed that the information gathered might be passed on to authorities?

There is no statutory obligation to inform the interviewee that information might be passed on to authorities; however, the internal whistleblowers regulation could provide this obligation.

i) Be informed that written notes will be taken?

There is no statutory obligation to inform the interviewee that written notes will be taken; however, the internal whistleblowers regulation could provide this obligation.

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7. Are document hold notices or document retention notices allowed in your country? Are there any specifics to be observed (point in time/form/sender/addressees etc.)?

Pursuant to the Personal Data Protection Act, personal data may not be kept longer than required for the purpose for which the data has been collected. After the storage period has passed and the company no longer needs the data, the company must destroy the data. An exception to the disposal of documents after the maximum retention period has lapsed can be established by issuing a document hold notice, which suspends the retention policy. Such a legal or tax hold notice prevents the disposal of relevant documents in case of any expected litigation or investigations.

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8. May attorney-client privilege be claimed over findings of the internal investigation? What steps may be taken to ensure privilege protection?

In the Netherlands, the scope and extent of the attorney-client privilege (*verschoningsrecht*) is currently a topic of discussion.

In principle, the attorney-client privilege applies to the oral and written information received, drafted, and sent by the attorney in relation to his client or case. This privilege protection applies to legal advice and the documents used as the basis for such legal advice.

However, in 2015, a Dutch District Court ruled that the attorney-client privilege does not apply to a report composed by an attorney entailing merely factual findings of an internal investigation. The District Court held that the attorney-client privilege did not apply due to the absence of any legal findings, legal qualifications, or legal conclusions. In addition, the District Court noted that the investigation conducted by the law firm was to be called "independent". For this reason, the District Court did not consider the report to be internal, advisory, or confidential in relation to the client's legal position. This judgment has been extensively criticised.

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9. Can attorney-client privilege also apply to in-house counsel in your country?

Attorney-client privilege (*verschoningsrecht*) applies to attorneys-at-law registered with the Dutch bar (*Nederlandse orde van Advocaten*). Hence, an attorney-at-law working for a company, who is registered with the Dutch bar, may benefit from privilege protection. The Supreme Court confirmed in 2013 that the attorney-client privilege also applies to attorneys-at-law employed by a company (*cohen advocaten*).

In-house counsels not registered with the Dutch bar do not have the attorney-client privilege. Depending on their education, in-house counsel can be admitted to the Bar, provided they meet all requirements to become an attorney-at-law. In that case, the attorney and its company must enter into an agreement that safeguards the independent professional practice of the attorney.

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10. Are any early notifications required when starting an investigation?

a) To insurance companies (D&O insurance etc. to avoid losing insurance coverage)?

The requirement to notify an insurance company of the start of an investigation depends on the terms and conditions of the individual insurance policy.

b) To business partners (e.g. banks and creditors)?

In general, there is no requirement to notify business partners of the start of an investigation. However, certain finance and similar agreements may stipulate an obligation to notify the bank.

c) To shareholders?

The obligation to notify shareholders of the start of an investigation may arise from the articles of association, internal whistleblowers regulation, and/or shareholders' agreement. In general, according to the Dutch Civil Code, the board has to provide shareholders with information they require, absent a weighty interest of the company. The board may only reject the request for information in exceptional cases, e.g. if a competitive position will be harmed.

Publicly traded companies have to substantiate the weighty reason(s) for not providing the shareholders with the required information on the basis of the Dutch Corporate Governance Code. In addition, publicly traded companies have to immediately disclose any price-sensitive information to the public, unless the company has a legitimate interest to not disclose.

d) To authorities?

In general, there is no duty to inform the prosecutor about an internal investigation or potential misconduct within the company.

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11. Are there certain other immediate measures that have to be taken in your country or would be expected by the authorities in your country once an investigation is started, e.g. any particular immediate reaction to the alleged conduct?

There is no statutory provision that prescribes immediate measures that have to be taken upon the start of an investigation. However, the company must stop potential, on-going breaches of the law as soon as possible. Failure to do so may be attributed to the company in the context of civil, administrative, or criminal proceedings.

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12. Will local prosecutor offices generally have concerns about internal investigations or do they ask for specific steps to be observed?

Whether a local prosecutor has concerns about an internal investigation depends on the specifics of the case.

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13. Please describe the legal prerequisites for search warrants or dawn raids on companies in your country. In case the prerequisites are not fulfilled, may gathered evidence still be used against the company?

Generally speaking, a search warrant or dawn raid can only be exercised upon approval by the relevant authorities, such as the Netherlands Authority for Consumers & Markets or the Public Prosecution Service.

In administrative proceedings, supervisory officers are allowed to search all locations, except homes, when needed to fulfil their supervisory duties. No warrant or court order is needed. Houses may only be entered after a court order from the investigative judge. During a dawn raid, the authorities gather evidence. The authorities are obliged to inform the company of the purpose and scope of the investigation at the start of a dawn raid. In general, a written description of the purpose is provided to the company. Fishing expeditions, where the authorities excessively search for evidence without defining the purpose and scope of the investigation, are not permitted.

In administrative proceedings – in principle – unlawfully obtained evidence does not have to be disregarded.

In criminal investigations, the public prosecutor is allowed to enter and search the premises of a company suspected of a crime. In that case, no court order is required. If the company is not a suspect the search or seizure can only be conducted by the investigative judge. The search can be requested by the public prosecutor. This request must be detailed and show that all the legal requirements are met. The investigative judge and the (assistant) public prosecutor are also required to be present during the search or dawn raid.

In the event evidence has been unlawfully obtained in criminal proceedings, the court has the discretion to exclude the evidence.

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14. Are deals, non-prosecution agreements, or deferred prosecution agreements available and common for corporations in your jurisdiction?

It is possible to enter into a deal with the public prosecutor. Such a deal could consist of a penal order that is accepted by the accused corporation. Therefore, the case will not be presented to the court. It is also possible to agree to the confidentiality of such deals. However, third parties may request a (redacted) version of the non-prosecution agreement on the basis of the Government Information (Public Access) Act.

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15. What types of penalties (e.g. fines, imprisonment, disgorgement, or debarment) may companies or its directors, officers, or employees face for misconduct of (other) individuals of the company?

A company can be held criminally liable for the misconduct of its employees. The public prosecutor or specific supervisory authorities are able to impose fines on the company for breaches of statutory provisions. A fine of up to 10 percent of the annual revenue of the company in the prior financial year may be imposed.

Employees may also be held individually criminally liable. This could lead to a fine or even imprisonment. An individual convicted of public bribery, for example, may face up to six years in prison or a fine of up to €82,000.

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16. Please briefly describe any investigations trends in your country (e.g. recent case law, upcoming legislative changes, or special public attention on certain topics)?

The Whistleblowers Act entered into effect on 1 July 2016. Critics argue that the House of Whistleblowers' authority in relation to private companies is too limited. The House of Whistleblowers is currently dependent upon the cooperation of a private company with the investigation. Critics urge that the Act should be amended to allow the House to obtain documents and conduct interviews more easily. Parliament will, in the normal course, revise the law in five years, but critics are urging that the revision occur sooner.

The scope and extent of the attorney-client privilege is currently debated in the media. Thus far, no legislative restrictions on the currently applicable attorney-client privilege have been announced.

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Norway

Hjort Law Office DA

Henrik Boehlke

TABLE

	Corporate Liability	Public Bribery	Commercial Bribery	Extraterritorial Applicability of Criminal Laws	Adequate Procedures Defence
Yes	X	X	X	X	X
No					

QUESTION LIST

1. Do any specific procedures need to be considered in case a whistleblower report sets off an internal investigation (e.g. for whistleblower protection)?

By amendment of the Employment Protection Act on 1 July 2017, all business enterprises employing more than five employees are obliged to draw up and incorporate written guidelines for internal whistleblowing. The guidelines, which shall be drawn up in cooperation between the employer and representatives of the employees, shall, as a minimum

- Encourage employees to report on blameworthy behaviour or conditions;
- Describe how reports shall be made; and
- Indicate how reports shall be handled and followed up.

Employees filing reports according to these guidelines are protected against sanctions from the employer, and reports shall be handled according to these guidelines.

2. Do the following persons/bodies have the right to be informed about an internal investigation before it is commenced and/or to participate in the investigation (e.g. the interviews)?

a) Employee representative bodies, such as a works council

b) Data protection officer or data privacy authority

c) Other local authorities

What are the consequences in case of non-compliance?

a) In general, internal investigations shall be conducted in accordance with the written guidelines described under question 1. According to the Data Protection Act, employees shall, as far as possible, be informed and have the opportunity to give a statement before the employer reviews emails in the employee's mailbox made available for the employee by the employer.

b) Before reviewing emails as described under 2a, the Data Protection Officer shall be informed and have the opportunity to provide a statement. Before such review is conducted, it is advisable, and in some situations required, to inform the Data Inspectorate.

c) The prosecution authorities do not have the right to be informed, but a voluntary involvement can be advisable. If the internal investigation reveals criminal offences, and the prosecuting authority is made aware of the facts at a late stage, the company can be criticised for not having informed the authority at an earlier stage. This can have impact on a possible criminal sanction.

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3. Do employees have a duty to support the investigation, e.g. by participating in interviews? If so, may the company impose disciplinary measures if the employee refuses to cooperate?

In general, employees have the labour law duty to cooperate as far as the facts to be investigated relate to activities conducted or perceptions made as part of their work life. They must answer work-related questions truthfully and completely. If unrelated to work, a balancing of interests test is required to determine if a duty to cooperate exists. A relevant factor may for example be the employee's position in the company. A supervisory function may lead to greater cooperation duties. A balancing of interests also has to be performed in case the employee would be subject to self-incrimination. However, even then, the duty to cooperate generally applies. Thus, refusal may be regarded as violation of obligations under the employment contract. Such misconduct may justify sanctions according to the Employment Protection Act against the employee.

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4. May any labour law deadlines be triggered or any rights to sanction employees be waived by investigative actions? How can this be avoided?

There is no Norwegian legislation directly initiating deadlines or waiving employee sanction rights by investigative actions. As mentioned under question 1, internal whistleblower reports shall be handled in accordance with the written guidelines. These guidelines might have regulations limiting the employer's right of actions as long as the investigation is on-going. Whistleblowing itself shall not be a reason for sanctions against an employee.

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5. Are there any relevant data privacy laws, state secret laws, or blocking statutes in your country that have to be taken into account before

a) Conducting interviews?

Data privacy laws do apply to any processing of data. This includes securing, collecting and reviewing data, as well as the creation of work products such as interview file notes and final reports. Therefore, it is very important to perform an early assessment of the applicable data privacy laws and to document the steps taken.

b) Reviewing emails?

Private communication is highly protected under Norwegian law. Reviewing emails may even constitute a criminal offence if data privacy requirements are not observed. Therefore, before conducting such a review a thorough analysis of legal exposure should always be performed.

c) Collecting (electronic) documents and/or other information?

Norwegian legislation does not have a blocking statute regime. Its data protection statutes are based on the European data protection directive.

Although communication with authorities can trigger applicability of data protection laws, the request of the authority will often be a sufficient justification for gathering and using data.

d) Analysing accounting and/or other mere business databases?

The rules for protection of private communication and private information in the Data Protection Act will normally not apply when analysing accounting and/or other mere business databases.

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6. Before conducting employee interviews in your country, must the interviewee

a) Receive written instructions?

There is no general and statutory obligation to instruct an employee about the legal circumstances and his rights. Nevertheless, it should normally be considered advisable and an ethical duty either to inform an employee about his legal rights, or to offer him free legal assistance before and under the interview. As a minimum, the employee should have a brief description on the background of the investigation and the subject matter. For documentation purposes, it is advisable to provide these instructions in written form and to have them countersigned by the interviewee.

b) Be informed that he/she must not make statements that would mean any kind of self-incrimination?

In contrast to an individual's right to remain silent in case of self-accusation during interrogations of criminal authorities, there is no corresponding right with regard to employee interviews as part of internal investigations. However, there are non-binding provisions of the Norwegian Bar Association recommending private investigators to be aware of the risk and the consequences of any self-incrimination during the investigation process.

c) Be informed that the lawyer attending the interview is the lawyer for the company and not the lawyer for the interviewee (so-called "Upjohn warning")?

An Upjohn warning should be conducted if relations to U.S. law exist. Besides, giving an Upjohn warning is an accepted best practice in Norway, too. However, there is no explicit legal obligation to do so under Norwegian law.

d) Be informed that he/she has the right that his/her lawyer attends?

There is no specific Norwegian law granting an employee a right to attendance of an own counsel during interviews under an internal investigation. However, it is considered to be best practice to allow such attendance to have a fair set-up or if the employee is suspected of having committed criminal offences. At least under the comprehensive internal investigations conducted by some of the biggest companies in Norway during the recent years, the companies have offered to pay for independent legal assistance to employees being interviewed as a part of the investigation.

e) Be informed that he/she has the right of a representative from the works council (or other employee representative body) to attend?

The employee does not have a strict legal right to be attended by a representative of the works council. However, to reduce risks of escalation with the works council and to ensure "equality of arms", companies can allow such attendance.

f) Be informed that data may be transferred cross-border (in particular to the United States)?

According to the main rule in the Data Protection Act section 29, data can only be transferred out of Norway if the country receiving the data has incorporated adequate safeguards and procedures for handling data. Countries having incorporated EU directive 95/46/EF are considered having the necessary level of protection. The United States is no such country.

With the consent of the employee, data may be transferred abroad regardless of the above-mentioned rules.

Even without the consent of the employee, data may be transferred abroad, *inter alia*, if such transfer is necessary in order to ensure a legal claim.

g) Sign a data privacy waiver?

According to the Data Protection Act section 8, the employee needs to approve all handling of personal data, as far as no permitting exception of the Act applies. In case that personal data of the interviewee might be used for other purposes in the future, such as in later court proceedings, a data privacy waiver of the interviewee can be very helpful.

h) Be informed that the information gathered might be passed on to authorities?

If relations to U.S. law exist, the interviewee should be informed in this regard. But also if not, even though there is no legal obligation in Norway, this is a frequent practice and should be added to the interview instructions.

i) Be informed that written notes will be taken?

For reasons of transparency, the documentation of the provided information (e.g. for reports and potentially for disclosure) should be explained. However, there is no respective legal obligation under Norwegian law.

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7. Are document hold notices or document retention notices allowed in your country? Are there any specifics to be observed (point in time/form/sender/addressees etc.)?

There is no specific law governing this question, but issuing such notices is a common procedure. Such notices should be clear, be sent to all potentially relevant addressees and be issued as early as possible.

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8. May attorney-client privilege be claimed over findings of the internal investigation? What steps may be taken to ensure privilege protection?

In Norway, attorney-client privilege rules are more liberal than in many other European countries. Privilege protection can be invoked both in relations with external lawyers and in relations with in-house lawyers.

Privilege protection only applies for regular legal work and advice done and given by lawyers. Thus, when initiating an internal investigation, it is advisable to ensure that the purpose of the investigation is confirmed in an engagement letter, and that the purpose is not limited only to fact finding, but also to give legal advice based on the facts found.

Norwegian attorney-client privilege rules do not only apply for documents in the possession of the lawyer, but among other, also for documents prepared by the client or third party to be used by the lawyer, and advice given by the lawyer to the client.

Even though the Norwegian privilege rules can be considered liberal, several Norwegian companies have found it difficult not to reveal the findings and the basis for the findings of an internal investigation to the authorities if it is public known that an internal investigation has been conducted.

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9. Can attorney-client privilege also apply to in-house counsel in your country?

Privilege protection applies to legal advice of in-house lawyers.

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10. Are any early notifications required when starting an investigation?

a) To insurance companies (D&O insurance etc. to avoid losing insurance coverage)?

As far as circumstances arise which could give reason to a claim against the insurance company, the policy holder should make a notification of circumstances to the insurer.

b) To business partners (e.g. banks and creditors)?

Information duties may arise from contractual obligations between the company and the business partner. Even if there is no explicit provision in the contract, there may be an obligation in case of starting an internal investigation if it is highly important information for the other party and relevant with regard to the purpose of the agreement. These interests of the business partner need to be evaluated against the legitimate interests of the company. Therefore, it depends on the individual case whether and when a business partner needs to be notified.

c) To shareholders?

Potential reporting duties towards shareholders compete with the company's intention to maintain (business) confidentiality. Internal investigations are highly important aspects and could be seen as insider information that may possibly influence the stock price. The corporation has to evaluate case by case if there is an *ad hoc* duty to report to the shareholders. If the internal investigation affects the market price significantly and fulfils different criteria (e.g. risk of the internal investigation, scope, involved suspects) an obligation to disclose exits. In case of a violation of the reporting duties, the company may be held liable to corporate penalty and to pay damages for economic losses.

d) To authorities?

In general, there is no duty to inform the prosecutor about an internal investigation or potential misconduct within the company. There may only be exceptions for very significant crimes. However, a cooperative approach with the local prosecutor may prevent adverse and unexpected measures by the authorities, such as dawn raids.

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11. Are there certain other immediate measures that have to be taken in your country or would be expected by the authorities in your country once an investigation is started, e.g. any particular immediate reaction to the alleged conduct?

The company has to minimise damages and try to prevent new ones to fulfil its supervisory duties. In addition, the company has a duty to stop any on-going breach of law. Additionally, the company may have to re-evaluate its compliance system in order to eliminate potential deficits and to improve its existing system. Further, the company may impose sanctions on the concerned employees to show that misconduct is not tolerated inside the company.

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12. Will local prosecutor offices generally have concerns about internal investigations or do they ask for specific steps to be observed?

Local prosecutor offices generally appreciate internal investigations through external investigators e.g. law firms. Early involvement, communication and coordination may be helpful for a good cooperation with local prosecutors. In this regard, it is crucial that the company does not destroy any potential evidence or convey the impression that evidence is or will be destroyed. Therefore, data retention orders should be communicated at the earliest stage possible.

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13. Please describe the legal prerequisites for search warrants or dawn raids on companies in your country. In case the prerequisites are not fulfilled, may gathered evidence still be used against the company?

Both search warrants and dawn raids must fulfil formal and material requirements stipulated by law.

The search warrant in general has to be issued by a district court, or – in case of imminent danger – by the prosecutor. As a main rule, the search warrant should be written and signed. Further, it has to describe the alleged facts and the offence that the individual is being accused of. To issue a search warrant, there must be a reasonable suspicion that an offence was committed. In addition, the search warrant, but also the dawn raid itself, has to be based on reasonable balancing of interests decisions.

When computers and other data carriers are seized, the relevant persons are under obligation to give information about passwords etc. necessary to access the data carriers. The police may also force a person to open data carriers protected by biometric authentication (such as fingerprints).

As a main rule, the involved persons and companies have the right to be informed when a search warrant is executed. If the reason for a search warrant is suspicion of gross crime, including gross corruption, the police can, by approval of the court, execute the search warrant without prior information to the involved persons and companies.

In case these legal requirements are not fulfilled, generally, the seized evidence may still be used in court proceedings. Only in severe cases of illegally obtained evidence, the evidence may not be used in court. This may be the case if there was no reasonable suspicion of a criminal offence or if the decision was made without balancing the interests of the searched person/company with the state's interest to prosecute. Formal legal requirements, such as a missing signature, will generally not lead to a prohibition of use of the seized evidence.

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14. Are deals, non-prosecution agreements, or deferred prosecution agreements available and common for corporations in your jurisdiction?

In Norway, there are no statutory rules for plea-bargaining or non-prosecution agreements. Anyway, it is well known that the prosecuting authority, including the National Authority for Investigation and Prosecution of Economic and Environmental Crime ("**ØKOKRIM**"), in a numerous of cases has been in dialogue with the accused companies before the final indictments have been made. Such dialogue can be established to evaluate whether the case can be settled by a fine accepted by the company or if the case has to be brought to court.

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15. What types of penalties (e.g. fines, imprisonment, disgorgement, or debarment) may companies or its directors, officers, or employees face for misconduct of (other) individuals of the company?

In Norway, companies may be subject to criminal liability based on legal offences made by the company's employee(s), or by other persons acting on behalf of the company. For a company, the penalty will always be a fine. Natural persons will never be subject to criminal liability solely based on legal offences made by other persons. To be subject to criminal liability for legal offences committed by others, it is a prerequisite that the individual can be held liability as a consenting party. To be held criminal liable as a consenting party, it is normally a prerequisite that the individual physically or psychically supported the principal in his criminal offence and that he/she was aware of the principal's criminal intentions.

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16. Please briefly describe any investigations trends in your country (e.g. recent case law, upcoming legislative changes, or special public attention on certain topics)?

By amendment of the Employment Protection Act in force since 1 July 2017, new regulations have made it easier for employees to report on possible misconduct, not only to the company itself, but also to the relevant public authority. As a part of the new regulations, most companies shall draw up and incorporate written guidelines for internal whistleblowing. It is still to see if this will lead to an increased number of reports to the police.

When it comes to criminal investigation, the public prosecutor, including ØKOKRIM, still keep high focus on corruption, not only in Norway, but also in other countries, if Norwegian companies are in any way involved.

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TABLE

	Corporate Liability	Public Bribery	Commercial Bribery	Extraterritorial Applicability of Criminal Laws	Adequate Procedures Defence
Yes	X	X	X	X	X
No					

QUESTION LIST

1. Do any specific procedures need to be considered in case a whistleblower report sets off an internal investigation (e.g. for whistleblower protection)?

In Poland, there are no specific procedures that need to be considered when a case is reported by a whistleblower, with the exception of financial institutions such as banks and investments firms operating in Poland.

Banks and investments firms are legally required to adopt procedures for anonymous reporting of infringements of law, internal procedures, and ethical standards. The reporting must take place through independent and anonymous communication channels that enable the message to reach a designated board member, or a supervisory board member.

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2. Do the following persons/bodies have the right to be informed about an internal investigation before it is commenced and/or to participate in the investigation (e.g. the interviews)?

a) Employee representative bodies, such as a works council

Under Polish law there is no legal obligation to notify any specific persons or bodies about an internal investigation that a company is about to, or is performing. There is also no statutory obligation to ensure participation of employee representative bodies in the investigation.

Nevertheless, if an individual employee demands that union or work council representatives take part in the interview, the employer might want to consider allowing their presence. Moreover, employee representative bodies have to be consulted in connection with certain post-investigation actions involving employees that are members of trade unions, e.g. in case of termination of an employment contract (consultations with company trade union organisations) or changes of organisational nature (consultations with work councils) as a result of the investigation.

b) Data protection officer or data privacy authority

There is no statutory obligation to notify the data protection officer about an investigation. Under Polish law, the Data Protection Officer's ("**DPO**") general obligation is to verify compliance of personal data processing with the law and internal data processing rules. However, in practice, the Data Protection Authority ("**DPA**") does not have the right to be informed about or participate in any particular investigations. It should, however, be informed about an investigation and have the right to supervise the data privacy processes that are held at the company. This is particularly true in cases where the data filing system created as a result of an

investigation contains the personal data of data subjects other than the company's employees or contractors. This data filing system then has to be notified and registered with the DPA, or shown in the DPO's own publicly available register.

c) Other local authorities

There is no obligation to inform any other local authorities or officials about a pending investigation. Although, a parallel cooperation with the prosecution authorities can, under certain conditions, be advantageous.

What are the consequences in case of non-compliance?

Concerning data filing system registration with the DPA for which the obligation to register exists, a failure to observe this duty can be subject to criminal liability penalised by a fine, limitation of liberty, or imprisonment of up to one year.

Concerning the DPO's right to access personal data processed for the purposes of an investigation, the DPA cannot impose any sanctions on the inspected entities if, at the time of the inspection, there is no breach, even if there was one before. Even if the DPA finds any breaches, the DPA is only entitled to issue a decision imposing an obligation to comply with the law, e.g. by introducing a procedure to inform the DPO about any investigations, or by registering the data filing system with the DPA. A fine can only be imposed in the case of persistent non-compliance. This fine may be up to 50,000 Polish zloty for each instance of non-compliance. However, the aggregate fines cannot exceed more than 200,000 Polish zloty.

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3. Do employees have a duty to support the investigation, e.g. by participating in interviews? If so, may the company impose disciplinary measures if the employee refuses to cooperate?

Under Polish employment law, an employee is obliged to care for his/her employer's interests. There is no other explicit duty for employees to support an investigation. However, as long as an employee's support for an investigation aims at safeguarding the company's interest, the employer can legitimately expect its employees to cooperate within the limits of their employment relationship. Therefore, a refusal to cooperate can, under certain circumstances, be treated as a material breach of the employee's fundamental duties. This would then justify disciplinary measures. The expectation to cooperate should not breach the employee's fundamental rights, including their right to privacy, their right to a defence, or their right to a fair trial.

The question of whether or not the scope of support corresponds to the employee's tasks must be assessed on a case-by-case basis.

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4. May any labour law deadlines be triggered or any rights to sanction employees be waived by investigative actions? How can this be avoided?

As a rule, the termination of an employment contract without notice due to the fault of the employee (disciplinary dismissal) cannot come into effect later than one month after the employer learned about the circumstance justifying the termination.

The disciplinary dismissal must be based on credible grounds. According to one of the Supreme Court's recent judgments, the beginning of the above described time-limit can be calculated from the moment the employer learned of the comprehensive grounds for dismissal after the completion of the internal investigation.

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5. Are there any relevant data privacy laws, state secret laws, or blocking statutes in your country that have to be taken into account before

a) Conducting interviews?

b) Reviewing emails?

c) Collecting (electronic) documents and/or other information?

d) Analysing accounting and/or other mere business databases?

There are no specific legal boundaries under Polish law that would limit the way an interview is conducted. However, it is advisable that the interview is carried out with an awareness of the employee's fundamental rights, which include, in particular, human dignity, the right to defence, the right to privacy, and the right to a fair trial.

In addition, it would be legitimately expected that an employee will not bear any negative consequences in connection with their participation in the interview. This includes, but is not limited to:

- Confidentiality of their involvement to protect the employee from any social disadvantage in their workplace;
- No extension of working hours by the hours spent in the interview; or
- No requirement to answer questions in a foreign language that the employee does not usually speak during his/her normal conduct of work.

The interview can also be subject to limitations based on the Act on Personal Data Protection of 1997 ("**PDP**"), or the Act on Classified Information Protection ("**CIP**") if it has been established that the entity where the investigation is taking place, or the relevant persons involved, are authorised to access classified information.

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6. Before conducting employee interviews in your country, must the interviewee

a) Receive written instructions?

There is no general or legal obligation to provide the interviewees with any written or oral instructions, or inform them about their legal position. It is, however, advisable to, at least, briefly inform the employee about the nature, purpose of, and reason for the interview, as well as to instruct the employee that the interview is confidential. If the employee is expected to cooperate during an investigation, it should be made clear that participation in the interview will not exceed the scope of their employment duties or their knowledge acquired during their employment. In particular, it should be communicated that the employee would not be expected to share any information from the employee's, or another person's private life.

b) Be informed that he/she must not make statements that would mean any kind of self-incrimination?

There is no general or statutory duty to inform the interviewee about their rights, corresponding in nature to a warning by authorities during a criminal investigation in Poland. It is, however, advisable to explain the role of the employee during the interview and that he/she has the right to avoid answering questions that could incriminate them. The employee will usually feel under pressure to tell the truth to their superiors, although it could, to some extent, cause serious implications for himself/herself.

c) Be informed that the lawyer attending the interview is the lawyer for the company and not the lawyer for the interviewee (so-called "Upjohn warning")?

The company will usually be represented at interviews by lawyers whose role should, for the avoidance of any unnecessary doubt or confusion, be explained to the employee. The company is not required to provide an Upjohn warning, however, maintaining clarity during the interview is highly recommended.

d) Be informed that he/she has the right that his/her lawyer attends?

There is no obligation to inform an employee of his/her right to have a lawyer attend the meeting. Whether or not a lawyer can even attend is controversial and should be assessed in each individual case.

e) Be informed that he/she has the right of a representative from the works council (or other employee representative body) to attend?

As an employee cannot effectively expect the attendance of such bodies, there is also no obligation to inform the employee of this right.

f) Be informed that data may be transferred cross-border (in particular to the United States)?

Under Polish law, an employee must be informed that data could be transferred cross-border. This derives from the obligation to inform the employee about the recipients of his/her data.

g) Sign a data privacy waiver?

Under Polish privacy laws, the interviewee is not required to sign a data privacy waiver. However, under Articles 24 and 25 of the PDP, the interviewee has to be informed that the data shared or imaged will be processed.

For evidentiary purposes, it is advisable to obtain a signed confirmation that the interviewee received the relevant information.

h) Be informed that the information gathered might be passed on to authorities?

There is no legal obligation to inform the interviewee that the data might be passed on to authorities. However, it is advisable to warn the employee of this possibility.

i) Be informed that written notes will be taken?

If one of the people attending the interview is taking notes, it is advisable to explain the role of this person, along with the purpose for which the notes are being taken.

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7. Are document hold notices or document retention notices allowed in your country? Are there any specifics to be observed (point in time/form/sender/addressees etc.)?

There is no formal requirement for issuing document hold notices, or no specifics to be observed under Polish law. However, these documents are allowed and recommended.

The above rule does not apply to public and local government institutions that, in connection with their activity, become aware of an offence to be prosecuted *ex officio*. These entities are not only obliged to immediately report an offence to the authorities and undertake the necessary actions, but also to prevent the loss of traces or evidence.

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8. May attorney-client privilege be claimed over findings of the internal investigation? What steps may be taken to ensure privilege protection?

The attorney-client privilege can be claimed over findings of an internal investigation if these have been elaborated by the attorneys and/or communicated to the client within the scope of the legal assistance that they provide to the company.

In order to ensure privilege protection, communication with attorneys and attorney-client work products should be labelled as privileged and confidenti*al (Polish: Objęte tajemnicą adwokacką/radcowską*). It is recommended that all documents or advice are communicated to the company via external servers where documents are uploaded and accessible only to designated persons.

During dawn raids, the company's employees or outside counsel should inform the enforcement authorities which documents and data are privileged, making sure that they are left unread and that the investigators place them in sealed packages. Information about the seizure of privileged documents should be documented in the dawn raid protocol. Privileged documents or data can be used as evidence only if it is indispensable for justice, and if a particular fact cannot be established otherwise. Using privileged documents as evidence is only possible on the basis of a court decision. However, documents which cover circumstances related to the performance of a defence counsel's function can never be used as evidence in criminal proceedings. If an external advisor (e.g. forensic services) is involved, sub-contracting should take place through an outside legal counsel in order to safeguard legal privilege.

9. Can attorney-client privilege also apply to in-house counsel in your country?

Yes, as long as the in-house counsel acts in its capacity as an attorney (Polish: *radca prawny*) and provides legal assistance to the company.

10. Are any early notifications required when starting an investigation?

a) To insurance companies (D&O insurance etc. to avoid losing insurance coverage)?

Although the commencement of an investigation does not necessarily mean that any irregularity in fact existed, there may be a company's obligation to notify the insurance company. This will usually depend on the terms of the insurance agreement.

b) To business partners (e.g. banks and creditors)?

This will usually not be required unless the agreements between the parties expressly state so.

c) To shareholders?

There is generally no formal requirement to notify the shareholders of an investigation, unless the investigation or the underlying facts have the potential to have significant influence on the financial situation of the company. In practice the decision should be made on a case-by-case basis depending on the shareholder structure and the effect of the case upon the business

d) To authorities?

Under Polish law, there are no specific notifications required when starting an investigation. Only the findings of an investigation or the irregularities that triggered the investigation, in certain cases, need to be notified to the relevant authorities.

As a rule, anyone who becomes aware of an offence that is prosecuted *ex officio* has a social duty, rather than a legal obligation, to notify the public prosecutor.

This does not apply to public and local government institutions, which are obliged to immediately report offences to the authorities if they became aware of an offence prosecuted *ex officio* in connection with their activity.

A legal obligation to notify the authorities rests upon anyone who has reliable information about certain most serious criminal offences (e.g. terrorist offences, offences against humanity, or homicide).

Depending on the type of irregularity revealed in connection with an investigation, certain other notification requirements might apply. This includes, but is not limited to product safety issues, which need to be notified to the product surveillance authorities together with the information as to which actions have been taken to prevent possible threats posed to consumers.

11. Are there certain other immediate measures that have to be taken in your country or would be expected by the authorities in your country once an investigation is started, e.g. any particular immediate reaction to the alleged conduct?

There are no specific measures that a company would be expected to undertake. However, it is advisable to consider the potentially required actions at every milestone of the investigation, and to seek advice from an external counsel.

12. Will local prosecutor offices generally have concerns about internal investigations or do they ask for specific steps to be observed?

It is very rare that the criminal authorities become involved in an internal investigation of a company in any way. However, it can occur that, at the same time, a related investigation is pending at the prosecutor's office. In this

case, it is highly advisable to cooperate with the authorities. However, every interaction should be undertaken in close cooperation with an external counsel.

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13. Please describe the legal prerequisites for search warrants or dawn raids on companies in your country. In case the prerequisites are not fulfilled, may gathered evidence still be used against the company?

A dawn raid can be conducted by the public prosecutor, by the police, or another authorised agency (e.g. the Central Anti-Corruption Bureau, or the Internal Security Agency) acting upon an order from the court or the public prosecutor. Prior to the actual searching process, the person or entity must be summoned to voluntarily hand over the requested documents/devices. As a rule, a person whose premises are to be searched should be provided with a search warrant issued by the court or the public prosecutor. The documents to be seized should be covered by the scope of the search warrant. However, in urgent cases, the search can take place upon an order from the head of its unit, or even upon the official identity card of the official. The court or public prosecutor's decision approving the search must be requested in the search protocol and delivered within seven days from the day of searching.

Specific rules apply to documents containing classified information, information constituting professional secret, other legally protected secret, or containing private information. If any of these documents are seized, the company should alert the investigators about the potential breach of secrecy. The investigators should then refrain from reading them and refer the documents to the prosecutor or court in a sealed package. Subsequently, to use the documents containing classified information or information constituting a professional secret as evidence, the court or the prosecutor has to issue a decision in this respect. Attorney documents which relate to criminal defence can never be used as evidence in criminal proceedings.

Using evidence gathered by public officials (e.g. police officers, or prosecutors) in breach of these rules is inadmissible.

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14. Are deals, non-prosecution agreements, or deferred prosecution agreements available and common for corporations in your jurisdiction?

Deals, non-prosecution agreements, or deferred prosecution agreements are not available for corporations under Polish law.

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15. What types of penalties (e.g. fines, imprisonment, disgorgement, or debarment) may companies or its directors, officers, or employees face for misconduct of (other) individuals of the company?

a) Under the Polish Corporate Liability Act, a company can be found criminally liable and sanctioned for misconduct of individuals of the company. The company can be fined with a financial penalty of up to three percent of their revenue earned in the business year in which the offence was committed, forfeiture, various prohibitions or loss of benefits, as well as publication of the judgment which can be severely detrimental to the company's reputation.

b) Polish criminal law does generally not stipulate criminal liability of individuals for the acts or omissions of third parties. Under limited circumstances, directors, officers, or employees can be subject to fines because of acts or omission of others if, for example, they failed to observe supervisory or monitoring duties and therefore allowing misconduct by a person or body.

The above offences create the individual criminal liability of individuals for their own failure to observe their duties, and do not create liability for offences committed by someone else.

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16. Please briefly describe any investigations trends in your country (e.g. recent case law, upcoming legislative changes, or special public attention on certain topics)?

A draft of a new Act on the Transparency of Public Life, which provides for multiple new obligations and restrictions on the companies and their management, was published recently. Among others, the bill introduces an obligation upon at least medium-sized entrepreneurs to adopt internal anti-bribery procedures to effectively prevent criminal offences qualified as corruption. The project introduces also the institution of whistleblowers and their protection.

The Ministry of Justice announced a planned revision of the Act on the Liability of Collective Entities for Acts Prohibited under Punishment. According to this announcement, prior valid and bounding conviction of an individual will no longer be required to initiate and conduct criminal proceedings against a company. A maximum penalty for criminal liability of companies is planned to be increased up to 30 million Polish zloty (currently the maximum penalty is five million Polish zloty).

In addition to this, in its recent decision, the Polish Court of Consumer and Competition Protection stated that the competition authorities are not authorised to review hard drives or their copies without the entrepreneurs being present at the review due to the risk of breaching the trade secrets of the company.

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Agnieszka is a legal advisor with experience in dispute resolution, products law and compliance. She advises and represents her clients in court and in arbitration in both domestic and cross-border commercial disputes and product liability matters. She focuses her practice at Hogan Lovells on the life science and healthcare industry, as well as consumer and industrial goods.

Agnieszka is the person responsible within the Warsaw office for handling matters related to internal investigations, as well as bribery, white collar and fraud related matters. She has assisted several international clients in internal investigations, as well as advised in connection with compliance and ethics policies, Board Member's liability and criminal investigations related to fraud and white-collar.

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Celina is a trainee legal advisor, and a member of the Dispute Resolution Practice.

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Celina supports clients in white collar and fraud matters, conducts internal investigations including forensic activities, and advises on compliance and anti-bribery policies, board members' liability, and criminal investigations.

Portugal

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TABLE

	Corporate Liability	Public Bribery	Commercial Bribery	Extraterritorial Applicability of Criminal Laws	Adequate Procedures Defence
Yes	X	X	X	X	X
No					

QUESTION LIST

1. Do any specific procedures need to be considered in case a whistleblower report sets off an internal investigation (e.g. for whistleblower protection)?

The treatment of whistleblowers and their according reports is laid down in various specific laws in Portugal.

(i) Corruption and Economic and Financial Crime Law ("**Law No. 19/2008**")

Pursuant to Law No. 19/2008, a whistleblower who reports any infraction, the knowledge of which results from the performance of their professional duties, must not, by any means, be hampered. Also, the imposition of any disciplinary penalties upon the whistleblower within the period of one year as from the communication of the infraction is presumed to be unfair.

Additionally, whistleblowers are entitled:

- To anonymity until the pressing of charges;
- To be transferred following the pressing of charges; and
- To benefit from the witness protection programme within criminal proceedings. Under this programme, the whistleblower's will remain anonymous upon the verification of certain circumstances.

(ii) Money Laundering and Terrorism Financing Law ("**Law No. 83/2017**")

Law No. 83/2017 sets forth the legal framework to prevent, detect and effectively combat money laundering and terrorism financing. It is applicable to financial entities and natural or legal persons acting in the exercise of their professional activities (e.g. auditors and lawyers) (together, "**Obliged Entities**").

Pursuant to Article 20 of Law No. 83/2017, the persons who, in virtue of their professional duties, learn of any breach, must report them to the supervisory or management bodies of the company. In consequence, the Obliged Entities must refrain from threatening or taking hostile action against the whistleblower and, in particular, from any unfair treatment within the workplace. In particular, the communication cannot be used as a ground for disciplinary, civil or criminal action against the whistleblower (unless the communication is deliberately and manifestly unjustified).

Article 108 of Law No. 83/2017 also sets forth the right to report any breaches or evidence of breaches to the relevant authority for the sector.

(iii) Legal Framework of Credit Institutions and Financial Companies ("**RGICSF**")

Under Portuguese law credit institutions shall implement internal reporting mechanisms, which must guarantee the confidentiality of the information received and the protection of the personal data of the persons who reported the breaches and the persons charged. Pursuant to Article 116-AA of RGICSF, the persons who, due to the duties performed in a credit institution, become aware of

- Any serious irregularities in the management and accounting procedures, or internal control of the credit institution; or
- Evidence of breach of the duties set out in the RGICSF

must communicate those circumstances to the company's supervisory body. These communications cannot, *per se*, be used as grounds for disciplinary, criminal or civil liability brought by the credit institution against the whistleblower.

Moreover, Article 116-AB of RGICSF sets out that any person who is aware of strong evidence of breach of the duties set out in this legal framework may report it to the Bank of Portugal. Such communications cannot, *per se*, be used as grounds for disciplinary, criminal or civil liability brought by the credit institution against the whistleblower, except if the report is clearly unfounded.

The Bank of Portugal must ensure adequate protection for the person who has reported the breach and for the person accused of breaching the applicable duties. It must also guarantee the confidentiality on the identity of the persons who have reported breaches at any given time.

(iv) Portuguese Securities Code ("**CVM**")

Article 382 paragraph 2 of the CVM sets forth that financial intermediaries, having their registered office, head office or branches in Portugal that, within the performance of, and due to, their activity or function, become aware of facts that qualify as crimes against the securities market or against the market of other financial instruments, should immediately inform the board of directors of the Portuguese Securities Market Commission ("**CMVM**").

Additionally, pursuant to Article 368-A of CVM, any person aware of facts, evidence or information regarding administrative offences set out in the Portuguese Securities Code and its supplementary regulations, may report them to the CMVM either anonymously or including the identification of the whistleblower. The disclosure of the identity of the whistleblower, as well as of the identity of his/her employer, is optional. If the identities are to be disclosed, they cannot be revealed, unless specifically authorised by an express provision of law or by the determination of a court.

While the CVM allows for the possibility of presenting an anonymous communication, this orientation is not supported by the Portuguese Data Privacy Authority ("**CNPD**"). The CNPD supports a more conservative understanding, according to which anonymity should be rejected in order to prevent false accusations.

In any case, such communications may not, *per se*, be used as grounds for disciplinary, civil or criminal liability brought against the whistleblower. Additionally, they cannot be used as a means to downgrade the employee.

Pursuant to Article 368-E of CVM, the CMVM must cooperate with other authorities within the scope of administrative or judicial proceedings in order to protect the employees against employer discrimination, retaliation or any other form of unfair treatment by the employer, which may be connected to the communication to the CMVM. The whistleblower must benefit from the witness protection programme in the event of participation in criminal or administrative offence proceedings related to the communication to the CMVM.

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2. Do the following persons/bodies have the right to be informed about an internal investigation before it is commenced and/or to participate in the investigation (e.g. the interviews)?

a) Employee representative bodies, such as a works council

b) Data protection officer or data privacy authority

c) Other local authorities

What are the consequences in case of non-compliance?

a) Employee representative bodies are not entitled to either be informed about and/or to participate in the investigation before an internal investigation has started. The works council is entitled to participate in disciplinary proceedings only after a formal accusation of an employee.

b) The data protection officer is not featured in Law 67/98, of 28 October ("**Data Protection Law**"), currently applicable. The CNPD does not have to be informed before the start of each internal investigation.

c) The prosecution authorities do not have the right to be informed. However, voluntary involvement and a cooperative stance can be advantageous in case of an eventual conviction.

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3. Do employees have a duty to support the investigation, e.g. by participating in interviews? If so, may the company impose disciplinary measures if the employee refuses to cooperate?

Upon the Board of Directors / Management's decision to pursue an internal investigation procedure in order to assess possible wrongful acts carried out within the company, employees are bound to cooperate. However, employees are entitled to the privilege against self-incrimination, set forth in the Portuguese Criminal Code, according to which individuals are not obliged to self-report.

The employee's refusal to cooperate in the internal investigation may be regarded as breach of their duty of obedience towards the employer. Thus, the company may impose disciplinary measures upon the respective employee.

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4. May any labour law deadlines be triggered or any rights to sanction employees be waived by investigative actions? How can this be avoided?

The employer must commence the disciplinary proceeding within 60 days, upon becoming aware of the relevant facts (i.e. identification of the party responsible and a detailed description of the circumstances of the infringement). The 60-day deadline can only be interrupted by the presentation of the notice of misconduct ("*nota de culpa*") to the employee. If the employer does not have detailed knowledge of the circumstances of the infringement, he/she must commence the preliminary enquiry proceeding within 30 days of the suspicion of irregular behavior arising.

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5. Are there any relevant data privacy laws, state secret laws, or blocking statutes in your country that have to be taken into account before

a) Conducting interviews?

The Data Protection Law concerns any processing of data.

b) Reviewing emails?

Private communications are highly protected under Portuguese law.

The Portuguese Constitution sets forth the right to privacy and the invalidity of evidence collected with abusive intrusion in the personal life, residence, communications or telecommunications of citizens.

The Portuguese Labour Code establishes the general principle of the confidentiality of personal messages and of information of a non-professional nature.

The Data Protection Law and Resolution of the CNPD No. 50/2011, of 7 January, determine the need for the express consent of the employee for the processing of personal data, given that any private communications of the employee are subject to special protection.

Resolution of the CNPD No. 1638/2013 sets forth the prohibition of access by the company to any messages of the employee of a personal nature and any information of a non-professional nature.

c) Collecting (electronic) documents and/or other information?

Please refer to the answer to question 5b above.

d) Analysing accounting and/or other mere business databases?

There are no relevant laws to be taken into account before analysing accounting and/or other business databases.

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6. Before conducting employee interviews in your country, must the interviewee

a) Receive written instructions?

There is no general and statutory obligation to present written instructions to the employee.

b) Be informed that he/she must not make statements that would mean any kind of self-incrimination?

Pursuant to Portuguese law, the interviewer is not obliged to inform the interviewee that he/she must not make statements that would mean any kind of accusation. However, individuals are not obliged to self-report any wrongdoings concerning crimes or administrative offences to the company or to any authorities.

c) Be informed that the lawyer attending the interview is the lawyer for the company and not the lawyer for the interviewee (so-called "Upjohn warning")?

Pursuant to Portuguese law, the interviewer is not obliged to formally inform the interviewee that he/she is the lawyer of the company. However, it is recommended to do so.

d) Be informed that he/she has the right that his/her lawyer attends?

Pursuant to the statutes of the Portuguese Bar Association, the assistance of a lawyer is admissible at all times and cannot be prevented before any jurisdiction, authority, public or private entity, namely for the defence of rights or within verification procedures. Therefore, and even though case law is not unanimous regarding this matter, it is recommended to inform the employee that he/she is entitled to be assisted by a lawyer.

e) Be informed that he/she has the right of a representative from the works council (or other employee representative body) to attend?

There is no legal right for the interviewee to be assisted by a representative from the works council.

f) Be informed that data may be transferred cross-border (in particular to the United States)?

The employee should be informed and his/her consent should be requested. Under the Data Protection Law, the transfer of data to non-EU states is only permissible if it is subject to compliance with the Data Protection Law and provided that the state to which they are transferred ensures an adequate level of protection. However, the consent of the employee may allow the transfer of data to countries which do not ensure an adequate level of protection.

g) Sign a data privacy waiver?

The employee should sign a data privacy waiver concerning personal data and non-professional information before the interview takes place. It could be of use afterwards, during the course of potential judicial proceedings.

h) Be informed that the information gathered might be passed on to authorities?

The employee should be informed of the possibility of passing the collected information to authorities.

i) Be informed that written notes will be taken?

The Data Protection Law concerns any processing of data. Hence, the employee should be informed that written notes will be taken during the interview.

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7. Are document hold notices or document retention notices allowed in your country? Are there any specifics to be observed (point in time/form/sender/addressees etc.)?

There is no specific law governing this matter, but issuing document hold notices is a common procedure in Portugal. Such notices should be clear, detailed, precisely circumscribed and issued as early as possible. The scope

of the hold notices can only include information of an exclusively professional nature. This is because companies are generally prohibited to access information of a non-professional nature. Please refer to the answer to question 5b above.

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8. May attorney-client privilege be claimed over findings of the internal investigation? What steps may be taken to ensure privilege protection?

Should the internal investigation be conducted by lawyers, companies may claim attorney-client privilege over any findings arising from said investigation. In fact, pursuant to the statutes of the Portuguese Bar Association, any attorney-client relation is subject to strict duties of professional secrecy regarding facts and circumstances acknowledged exclusively by the disclosure of the respective client. The duty of professional secrecy can only be withdrawn under exceptional circumstances and upon request of the concerned attorney to the president of the respective Regional Council of the Portuguese Bar Association.

Please note that companies are also protected from self-incrimination set forth in the Portuguese Criminal Code. Please refer to the answer to question 3 above.

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9. Can attorney-client privilege also apply to in-house counsel in your country?

Yes. Attorney-client privilege is also applicable to documents created by and communication with inside counsel.

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10. Are any early notifications required when starting an investigation?

a) To insurance companies (D&O insurance etc. to avoid losing insurance coverage)?

Early notifications to insurance companies when starting an investigation are generally not required, unless required under the respective insurance policy.

b) To business partners (e.g. banks and creditors)?

Early notifications to business partners when starting an investigation are not required, unless provided for under a specific contract.

c) To shareholders?

Early notifications to shareholders when starting an investigation are generally not required. However, if the internal investigation concerns an issuer of financial instruments, the company is obliged to inform the public, as soon as possible, of inside information which directly concerns that issuer. Pursuant to Article 7 of Regulation 596/2014 of the European Parliament and the Council of 16 April 2014, and to Article 248-A of the CVM, the concept of inside information comprises, *inter alia*, the information of *precise nature* which has not been made public, relating directly or indirectly, to one or more issuers of *financial instruments* or to one or more financial instruments which, if made public, would be likely to have a *significant effect* on the prices of those financial instruments or on the price of the related derivative financial instruments.

d) To authorities?

Early notifications to authorities when starting an investigation are not required. However, voluntary involvement of the authorities and a cooperative stance can be advantageous in case of a potential conviction.

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11. Are there certain other immediate measures that have to be taken in your country or would be expected by the authorities in your country once an investigation is started, e.g. any particular immediate reaction to the alleged conduct?

The start of an internal investigation does not trigger any measures to be taken with regard to authorities. The company should, however, make sure that any alleged on-going breach of law by the company or its employees is stopped immediately.

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12. Will local prosecutor offices generally have concerns about internal investigations or do they ask for specific steps to be observed?

Local prosecutor offices do not ask for specific steps to be observed nor have any concerns about internal investigations. Additionally, Portuguese law does not provide for a general duty to report criminal and/or administrative offences to the local prosecutor offices. However, voluntary involvement of the authorities and a cooperative stance can be advantageous in case of an eventual conviction. However, the conclusions of internal investigations may be used by the prosecutor office against the company as evidence of misconduct and therefore voluntary involvement of the authorities should be thoroughly considered when initiating internal investigations.

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13. Please describe the legal prerequisites for search warrants or dawn raids on companies in your country. In case the prerequisites are not fulfilled, may gathered evidence still be used against the company?

Pursuant to the Portuguese Criminal Procedure Code ("**PCPC**"), searches and seizures are admissible upon the verification of the formal and material requirements established by law.

Searches must be authorised, ordered or validated by a judicial authority, if there is reasonable evidence that any objects related to a crime or which may be used as evidence are within a private or restricted area. The judicial warrant will be valid for 30 days.

Seizures must also be authorised or ordered by judicial authority. Police authorities may carry out a seizure during the course of a search when there is urgency or a danger in delay. In such cases, the seizure must be validated by the judiciary authority within the following 72 hours. The seizure of communications must be authorised or ordered by a judge. Additionally, the seizure of personal documents or documents covered by legal privilege is strictly forbidden. Please refer to the answer to question 5b above.

Within financial institutions, the seizures of documents, securities, valuables, amounts and other objects should be personally carried out by a judge (with the assistance of the police authorities, if needed), upon the verification of sound reasons that they are related with a crime.

Evidence collected in breach of these formalities is deemed inadmissible, and therefore cannot be used against the company.

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14. Are deals, non-prosecution agreements, or deferred prosecution agreements available and common for corporations in your jurisdiction?

Outside of specific lenience provisions, any deals and non-prosecution agreements entered into by individuals or companies are strictly prohibited. As a result, evidence collected within criminal proceedings upon (unlawful) promises of leniency is inadmissible. However, under certain circumstances the prosecutor office may agree not to indict the defendant and suspend the criminal proceedings (*suspensão provisória do processo*) until certain injunctions voluntarily undertaken by the defendant are performed, and close the proceedings after said performance. Such circumstances may, for example, be crimes punishable with imprisonment no higher than five years, lack of a previous conviction for a crime of the same nature, lack of a high degree of guilt or acceptance by the victim's assistant to the prosecution. This possibility should not be considered a deal insofar that the prosecutor office is in theory bound to suspend the proceedings if the legal requirements are met. Despite not being a deal, some of the requirements are highly subjective (e.g. the lack of a high degree of guilt) and hence the prosecutor

office has, in practice, a discretionary power. The prosecutor office thus is surely tempted to demand cooperation from the suspect in return for suspending the proceedings.

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15. What types of penalties (e.g. fines, imprisonment, disgorgement, or debarment) may companies or its directors, officers, or employees face for misconduct of (other) individuals of the company?

The main penalties imposed upon companies include fines or, when the company has been incorporated with the sole or predominant intention of committing crimes, dissolution. Possible ancillary sanctions include judiciary injunctions, prohibition from pursuing certain activities or prohibition from applying for subsidies or grants. Corporate liability does not exclude individual liability: individuals may face sanctions such as imprisonment, fines, dismissal with just cause and they may also face debarment from the respective professional associations.

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16. Please briefly describe any investigations trends in your country (e.g. recent case law, upcoming legislative changes, or special public attention on certain topics)?

A new trend regarding corporate liability has arisen, concerning the subsidiary responsibility of the board of directors/management for the conviction of the company in the payment of fines, in the event of infringements committed by employees of the company.

Moreover, the Portuguese Bar Association, inspired by an on-going debate in Brazilian criminal law, is currently preparing a draft law with the purpose of including general provisions on whistleblowing in the PCPC. These provisions are intended to be applicable to a wide range of crimes.

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Romania

Mares / Danilescu / Mares in association with Dan Lupascu SCA


Mihai Mares

TABLE

	Corporate Liability	Public Bribery	Commercial Bribery	Extraterritorial Applicability of Criminal Laws	Adequate Procedures Defence
Yes	X	X	X	X	X
No					

QUESTION LIST

1. Do any specific procedures need to be considered in case a whistleblower report sets off an internal investigation (e.g. for whistleblower protection)?

Romania has adopted a special law for the protection of whistleblowers, in force since 2004, namely Law No. 571/2004. However, it applies only to personnel hired within public authorities, public institutions, and other budget units. Private-sector employees are not protected by this law.

Law No. 571/2004 offers protection before the discipline commission or other similar bodies, as follows:

- Whistleblowers benefit from the presumption of good faith, until proven otherwise.
- At the request of the whistleblower, following a warning act, disciplinary commissions or other similar bodies within public authorities or public institutions have the obligation to invite the press and a representative of the trade union or professional association.
- If the wrongdoer is a hierarchical superior, directly or indirectly, or has control, inspection or evaluation powers over the whistleblower, the disciplinary commission or other similar bodies will ensure the protection of the whistleblower, by concealing his/her identity.

In case the whistleblower reports on corruption offences, offences assimilated to corruption offences, forgery offences, offences committed in office or work-related offences, and offences against the financial interests of the European Union, the protection measures set out under Article 12 paragraph 2 of Law No. 682/2002 on the protection of witnesses shall be applied *ex officio*.

In labour disputes or in those regarding labour relations, the courts may order the annulment of the disciplinary or administrative sanction imposed on a whistleblower, if the sanction was applied following a report done by the whistleblower in good faith.

Regarding the protection of whistleblowers in the private environment, some degree of protection is offered indirectly under Romanian law. For instance, an employee cannot be dismissed solely on grounds of submitting a whistleblower report that set off an internal investigation. This is due to the fact that, pursuant to the Romanian Labour Code, there are strict conditions that must be met for a dismissal of an employee. Reporting misconduct is none of the conditions under this law.

2. Do the following persons/bodies have the right to be informed about an internal investigation before it is commenced and/or to participate in the investigation (e.g. the interviews)?

a) Employee representative bodies, such as a works council

b) Data protection officer or data privacy authority

c) Other local authorities

What are the consequences in case of non-compliance?

a) The only set of general provisions regarding internal investigations are to be found in the Romanian Labour Code, regulating the disciplinary investigation of an employee in case of disciplinary misconduct. There are also specific procedures for internal disciplinary investigations, particularised for specific professions.

Disciplinary misconduct is a work-related act consisting of an action or omission committed by the employee, thereby violating the legal provisions, the internal regulation, the individual employment contract or the applicable collective labour contract, the orders and the lawful commands of hierarchical leaders.

In case of an internal disciplinary investigation, the law requires that the employee be summoned in writing for an interview, by the person empowered by the employer to carry out the investigation. If the employer does not comply with this requirement, a decision of sanctioning the employee will be void.

The only measure that may be ordered without carrying out a disciplinary investigation is the warning.

There is no other obligation for informing other people or employee representative bodies.

The employee, which is being disciplinarily investigated, has the right to request that a member of the trade union, of which he/she is a member of, participates in the interview.

For any other type of misconduct, the law does not provide any regulations for conducting an internal investigation. Nevertheless, provisions regarding internal investigation for other types of misconduct may be provided by internal regulations of any legal person.

b) The Romanian Law does not impose an obligation for a data protection officer or data privacy authority to be informed about the investigation. Nevertheless, if during the investigation personal data are processed by the company acting as an operator, the operation should be notified to the Romanian Data Protection Authority. The requirement results from the provisions set out under Article 22 of the Law No. 677/2001.

c) In accordance with Article 267 of the Romanian Criminal Code, if a public servant becomes aware of a criminal offence that is related to the work place where he/she carries out his/her job duties, the public servant must immediately refer it to the criminal prosecution body. Otherwise, the public servant may be subject to criminal liability punishable with imprisonment of three months to three years or with a fine, when committed wilfully, or imprisonment of three months to one year or by a fine, when committed negligently. There is no such reporting obligation of an employee of a private sector company.

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3. Do employees have a duty to support the investigation, e.g. by participating in interviews? If so, may the company impose disciplinary measures if the employee refuses to cooperate?

There is no explicit obligation of this nature under Romanian law in case of an internal disciplinary investigation. The employee that is summoned to an interview does not have a duty to support the investigation and he/she may participate in the interview or not. Also, he/she may provide information regarding the accusation brought against him/her, or not. However, if the employee unjustifiably refuses to adhere to his/her employee's instruction to appear, the company may impose disciplinary measures without having to perform the prior disciplinary investigation.

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4. May any labour law deadlines be triggered or any rights to sanction employees be waived by investigative actions? How can this be avoided?

According to the Romanian Labour Code, following a disciplinary investigation, the employer can apply a sanction within 30 calendar days as of becoming aware of the disciplinary misconduct, but no later than six months from the date of the act.

Regarding the first time-period, of 30 calendar days, the Romanian Supreme Court established that the term will start to run from the date when the employer took note of what is written in the report following the disciplinary investigation.

Should any of the two time-periods lapse, the employer loses the right to sanction the respective employee.

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5. Are there any relevant data privacy laws, state secret laws, or blocking statutes in your country that have to be taken into account before

a) Conducting interviews?

Data privacy laws or laws protecting classified information apply to any type of data processing, as the case may be.

There are regulations in the Criminal Code and in other Romanian laws that must be taken into account, before any processing of data. Among the most relevant, the following are to be mentioned:

- The Romanian Criminal Code: Articles 226 (violation of privacy), 302 (violating privacy of correspondence), 303 (disclosure of information classified as state secret), 304 (disclosure of information classified as professional secret or not public), 305 (negligence in storing information);
- Law No. 677/2001 on the protection of individuals with regard to the processing of personal data and the free movement of such data;
- Law No. 182/2002 regarding classified information.

b) Reviewing emails?

Private communication is protected under Romanian Law, and access to private communications is permitted only under the conditions set out by law, namely if it is approved in advance by a judge and enforced by the judicial bodies.

Otherwise, accessing an email without permission may constitute the criminal offences of violating the privacy of correspondence (as per Article 302 of the Romanian Criminal Code) and of accessing a computer system illegally (Article 360 Criminal Code).

Criminal liability may be excluded and such private communication may be used without impunity if it was originally viewed accidentally and only if it proves the perpetration of an offence or if it serves a general interest (e.g. acts of public interest, meaningful for the community), of higher import than the potential damage caused.

In this context, when assessing the lawfulness of accessing professional emails used within an organisation, the ownership of the information contained therein must be established as a first step; either it is deemed to belong to the employer or it is attributed solely to the employee.

c) Collecting (electronic) documents and/or other information?

Any and all processing of documents and/or data must take into account the applicable provisions of data privacy laws. In case of an internal investigation the company holds ownership over the equipment used and data/information processed by the employee under employment provisions. As such, the employer may secure, collect and review such work data and work products, subject to an assessment of the applicable data privacy laws.

On the contrary, accessing/collection of documents or information exceeding the scope of work relations may only be permitted to state authorities, pursuant to special legal procedures (e.g. searches and seizures).

d) Analysing accounting and/or other mere business databases?

Analysing private databases is only permitted pursuant to the procedures provided for by law (e.g. expert reports). Any professional accounting and/or business databases pertaining to labour relations between the employer and his/her employees generally constitute the property of the employer, thus being fully accessible to such employer.

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6. Before conducting employee interviews in your country, must the interviewee

a) Receive written instructions?

There is no legal obligation to provide written instructions to an employee regarding legal circumstances or his/her rights. Nevertheless, the company internal regulation, which shall be made available to all employees, must contain specific provisions and information as to the disciplinary procedures enforced by such company.

b) Be informed that he/she must not make statements that would mean any kind of self-incrimination?

The Romanian Criminal Procedure Code provides that a suspect or a defendant will be informed about the right to remain silent during interrogations conducted by the judicial bodies. There is no corresponding obligation for other types of interviews, including interviews as part of an internal investigation.

c) Be informed that the lawyer attending the interview is the lawyer for the company and not the lawyer for the interviewee (so-called "Upjohn warning")?

There is no obligation for an Upjohn warning under Romanian law.

d) Be informed that he/she has the right that his/her lawyer attends?

According to Article 251 paragraph 4 of the Romanian Labour Code, during an internal disciplinary investigation, the employee, who allegedly committed the wrongdoing, has the right to defend himself/herself and to give the person empowered to carry out the investigation all the evidence and motivations he/she considers necessary. The same paragraph offers the employee access to a lawyer, upon request. However, there is no explicit legal obligation of the employer to inform his/her employees about that right. The company internal regulation, which shall be made available to all employees, must contain specific provisions in that regard, however.

e) Be informed that he/she has the right of a representative from the works council (or other employee representative body) to attend?

Article 251 paragraph 4 of the Romanian Labour Code provides the employee the right to be assisted, at his/her request by a representative of the trade union of which he/she is a member of in case of a disciplinary investigation. However, there is no explicit legal obligation of the employer to inform his/her employees. The company internal regulation, which shall be made available to all employees, must contain specific provisions in that regard, however.

f) Be informed that data may be transferred cross-border (in particular to the United States)?

According to the provisions of Law No. 677/2001 as well as the relevant European legal provisions (see the new European General Data Protection Regulation, Regulation (EU) 2016/679 – ("**GDPR**"), applicable as of 25 May 2018), the data subject has to be informed of the purpose of data processing. This also includes any processing of personal data conducted during an internal investigation. The information process has to include also any references to where the personal data is transferred and the rights of the data subject in relation to such processing.

In order to avoid any further approvals from the Romanian Data Protection Authority for transferring the personal data to the U.S., data subject consent for such transfer is compulsory. In all other cases, the Romanian Data Protection Authority will assess whether the recipient country provides an adequate level protection for the transferred personal data.

g) Sign a data privacy waiver?

Under Romanian law, the employer is not obliged to ask the employee to sign a data privacy waiver. However, in practice, the employer will request such document to be signed for evidentiary purposes.

The right to the protection of personal data, which applies to all employees, implies the right to information regarding all relevant data privacy matters (such as the identity of the operator, the purpose of data processing, the rights of the persons concerned and the conditions for exercising them), the right of access to the data, the right of intervention on the data as well as the right to opposition.

h) Be informed that the information gathered might be passed on to authorities?

There is no obligation for the employer to inform the employee of passing information to authorities under Romanian law.

i) Be informed that written notes will be taken?

There is no obligation for the employer to inform the employee that written notes will be taken under Romanian law.

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7. Are document hold notices or document retention notices allowed in your country? Are there any specifics to be observed (point in time/form/sender/addressees etc.)?

There is no legal provision under Romanian Law for this kind of activity. Thus, such notices are allowed and are generally in the discretion of the employer.

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8. May attorney-client privilege be claimed over findings of the internal investigation? What steps may be taken to ensure privilege protection?

Attorney-client privilege may be claimed over findings of the internal investigation.

According to the Lawyer Profession Statute, the lawyer is required to keep professional secrecy on any aspect of the case entrusted to him/her.

The professional secrecy applies to any information and data of any kind, in any form and on any support, as well as any documents drawn up by a lawyer containing information or data provided by the client or based on them for the purpose of providing legal assistance and whose confidentiality has been requested by the client.

In order to ensure privilege protection, any documents, information, or data regarding an investigation should be kept only at the professional headquarters of the lawyer – which can also be situated at the lawyer's domicile – or in areas approved by the Bar. Documents of professional nature are inviolable.

Also, for ensuring the professional secrecy, correspondence with a client or notes regarding the defence of a client are exempted from seizure and confiscation. Moreover, the lawyer-client relationship cannot be subject to technical surveillance measures unless strictly prescribed by law.

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9. Can attorney-client privilege also apply to in-house counsel in your country?

In case the lawyer is an active member of the Bar and is not bound by an employee-employer relation but exercises the legal profession based on an agreement of legal services, the attorney-client privilege will apply under any circumstances in regard to the documents, data and information mentioned at question 8.

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10. Are any early notifications required when starting an investigation?

As a general principle, we note that there is no legal obligation under the Romanian law for such notifications, unless they are necessary under respective financing or insurance contracts of the respective legal entity. As such, a case by case evaluation must be performed, as to the subject matter of the internal investigation, by reference to any stakeholders, including the below.

a) To insurance companies (D&O insurance etc. to avoid losing insurance coverage)?

To the extent that the internal investigation may generate any liability or claim under the employer's/employee's insurance policies, the specific notification obligations under the insurance policy must be thoroughly observed. Moreover, special attention should be paid to the timelines and deadlines provided by such insurance documentation, as their lapse may prevent a successful insurance claim.

b) To business partners (e.g. banks and creditors)?

Specific contractual provisions pertaining to the respective business partnership must be reviewed and analysed in order to determine potential reporting obligations arising from an internal investigation.

c) To shareholders?

To the extent that the subject matter of the internal investigation may be interpreted as a potential trigger on the company's stock price, a thorough analysis should be performed as to whether the matter of the internal investigation should be notified to the regulatory/supervisory authorities and/or to the company shareholders (including the legal provisions on insider trading).

Specific criteria must be met in order for the internal investigation to be subject to the company's legal notification obligations. Nevertheless, if such conditions are met and the company fails to report it to the supervisory authority, its liability may be incurred.

d) To authorities?

There is no specific duty to inform criminal law authorities when conducting an internal investigation. Nevertheless, the company may find it in its best interest to immediately inform the prosecutor's office if and as soon as the internal investigation uncovers acts that meet the specific criteria of criminal offences.

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11. Are there certain other immediate measures that have to be taken in your country or would be expected by the authorities in your country once an investigation is started, e.g. any particular immediate reaction to the alleged conduct?

If a company becomes aware of a breach of laws by the company or its employees, the company must take all suitable steps to end such behaviour.

Also, as described above, a public official that gains knowledge of the commission of criminal actions pertaining to the workplace in which the said public official fulfils his/her duties has to immediately refer to the criminal prosecution body.

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12. Will local prosecutor offices generally have concerns about internal investigations or do they ask for specific steps to be observed?

The prosecutor's offices will not be concerned about internal investigations.

In any case, if a criminal offence has been committed and the prosecutor office learns about it, either *ex officio*, or through complaint or denunciation, there is an obligation for criminal proceedings to be initiated.

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13. Please describe the legal prerequisites for search warrants or dawn raids on companies in your country. In case the prerequisites are not fulfilled, may gathered evidence still be used against the company?

The domiciliary search warrant in Romania must be issued by a judge of a court of law.

Such warrant must comprise:

- Name of the court;
- Date, time and place of issuance;
- Surname, first name and capacity of the issuer of the warrant;
- The time frame for which the warrant was issued, which may not exceed 15 days;

- The purpose for which the warrant was issued;
- A description of the location where the search is to be conducted, or, if the case may be, also of the places adjacent to it;
- Name or business name of the person at whose domicile, residence or office the search is to be conducted, if known;
- Name of the offender, suspect, or defendant, if known;
- A description of the perpetrator, suspect, or defendant;
- Indications of traces of the committed offence or of other objects that are presumed to exist at the location;
- A note that the search warrant may be used only once;
- The judge's signature and the court's stamp.

The search can be conducted only by the prosecutor, or by criminal investigation bodies, accompanied, as applicable, by operative workers.

Searches cannot be initiated before 6.00 a.m. or after 8.00 p.m., except for in-the-act offences, or when a search is to be conducted in a place open to the public at that time.

In case the legal prerequisites are not fulfilled, the evidence may be subject to exclusion, carried-out through the nullity sanction.

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14. Are deals, non-prosecution agreements, or deferred prosecution agreements available and common for corporations in your jurisdiction?

The Romanian Criminal Procedure Code allows for the conclusion of a plea bargain between the defendant and the prosecutor. This possibility is also available to legal entities, although less common in practice. The effects of such agreement are the reduction of the penalty limits provided by law for a particular offence by one-third in case of prison sentences or one-fourth in case of criminal fines.

In the trial phase, the admission to the charges may entail special, more expeditious proceedings, which also result in the reduction of the penalty limits as indicated above.

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15. What types of penalties (e.g. fines, imprisonment, disgorgement, or debarment) may companies or its directors, officers, or employees face for misconduct of (other) individuals of the company?

A company can face either criminal or administrative penalties in Romania.

As far as criminal penalties are concerned, the primary penalty for companies is fines. Depending on the offence, companies may also face the following complementary penalties:

- Liquidation;
- Suspension of the activity, or of one of the activities performed by the legal entity;
- Closure of individual company sites;
- Prohibition to participate in public procurement proceedings;
- Placement under judicial supervision;
- Display or publication of the conviction sentence.

The directors, officers, or employees, as individuals, can face fines, imprisonment or disciplinary measures, depending on the nature of the misconduct. Also, some of their rights may be restricted as part of the criminal sentencing system.

The criminal liability of a legal person does not exclude criminal liability of the natural person that contributed to the commission of the same act.

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16. Please briefly describe any investigations trends in your country (e.g. recent case law, upcoming legislative changes, or special public attention on certain topics)?

Currently, the public attention in Romania focuses on legislative proposals to amend the laws on the justice system, including improving the activity of the Judicial Inspection, which is the entity exercising disciplinary action against judges and prosecutors.

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His practice focuses exclusive on criminal defence for senior executives, entrepreneurs, major industrial groups, financial institutions and large international and domestic companies, in a wide range of matters involving accounting, financial, securities and tax fraud; bribery, antitrust or money laundry cases.

In addition, he advises clients in internal investigations and audits involving money laundering, fraud and other corporate misconduct. In international criminal law, Mihai acts in international corruption, freezing of assets, multi-jurisdictional investigations and extradition.

Mihai Mares is member of European Criminal Bar Association and International Bar Association (Business Crime Committee), speaking regularly in local and international seminars related to white-collar crime matters.

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TABLE

	Corporate Liability	Public Bribery	Commercial Bribery	Extraterritorial Applicability of Criminal Laws	Adequate Procedures Defence
Yes		X	X	X	
No	X				X Because companies are not subject to criminal liability in Russia.

QUESTION LIST

1. Do any specific procedures need to be considered in case a whistleblower report sets off an internal investigation (e.g. for whistleblower protection)?

Russian law provides neither for any specific procedures nor for any specific protection in connection with whistleblower reports. A draft law has been recently introduced to the Russian Parliament providing for (a) confidentiality of information about a whistleblower and information provided by him/her; (b) provision of legal assistance to him/her for free; (c) protection against illegal dismissal or other violation of labour rights.

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2. Do the following persons/bodies have the right to be informed about an internal investigation before it is commenced and/or to participate in the investigation (e.g. the interviews)?

a) Employee representative bodies, such as a works council

b) Data protection officer or data privacy authority

c) Other local authorities

What are the consequences in case of non-compliance?

a) The discussed requirements are set by Russian law only for investigations of accidents at work which caused death or injuries to employee(s). In case of investigations with a different subject, the company is not obliged to inform employee representative bodies about the investigation or invite them to participate in it.

A duty to do so can be provided by a collective agreement between the company and its employees. Also, the employee may authorise a trade union to represent his/her interests in labour relations with the employer, which may result in the trade union's participation in the investigation. The discussed situations are rare in practice. Trade unions usually get involved at a late stage, after the investigation is completed and the company proceeds with dismissing the employee.

b) There is no requirement to inform a data protection officer or authority about the investigation.

c) The requirement to inform certain local authorities about the investigation is set only for investigations of accidents at work which caused death or injuries to employee(s).

3. Do employees have a duty to support the investigation, e.g. by participating in interviews? If so, may the company impose disciplinary measures if the employee refuses to cooperate?

In general, the employee's refusal to participate in or support the investigation does not form a ground for dismissal or other disciplinary action. To be able to hold the employee liable for a failure to cooperate during the investigation, the company should provide in documents mandatory for an employee (e.g. labour contract, job description, internal code of labour conduct, ethical code) an obligation to cooperate and specify what actions are required from the employee, such as to provide oral and written explanations and preserve documents related to the issues under investigation. Such provisions could also indicate what actions are prohibited, e.g. not to distort documents related to the issues under investigation or disclose information about the investigation to third parties. It is important to make sure that the employee signs the respective documents confirming familiarisation with them before his/her refusal to cooperate.

Every person has the constitutional right to refuse giving testimony incriminating himself/herself, his/her spouse or close relatives. Thus, the employee may not be held liable for refusing to provide responses of a self-incriminatory nature.

Finally, the employee may be dismissed for a failure to cooperate during the investigation only if previously he/she already committed a disciplinary offence and less than one year has passed since he/she was held liable for it.

4. May any labour law deadlines be triggered or any rights to sanction employees be waived by investigative actions? How can this be avoided?

Disciplinary sanctions may be imposed on an employee within the earliest of (a) one month after a person whom he/she reports to at work (regardless of whether this person is authorised to impose disciplinary sanctions) became aware of the misconduct or (b) six months (two years if the misconduct was revealed as a result of an audit or inspection) after the misconduct was conducted.

If the employer intends to withhold from the employee's salary the amount of damages caused by him/her, it should issue an order within one month after the amount of the damage was finally determined. Such withdrawal is allowed in the amount not exceeding the employee's average monthly salary, whereas the recovery of the remaining amount of damages (if any) requires application to the court.

This should be taken into account when planning and documenting the investigation. If final conclusions have not yet been reached, the employer should make sure that any preliminary findings are marked as preliminary and subject to confirmation, and avoid definitive statements regarding the employee's misconduct or amount of damages caused by him/her.

5. Are there any relevant data privacy laws, state secret laws, or blocking statutes in your country that have to be taken into account before

a) Conducting interviews?

b) Reviewing emails?

c) Collecting (electronic) documents and/or other information?

d) Analysing accounting and/or other mere business databases?

For any of the abovementioned activities the following restrictions shall be taken into account.

Personal data

The reviewed documents usually contain a wide range of personal data: name, address, email address, contact telephone number, instant messenger accounts, etc. Any operations with such information, including collection, recording, systematisation, storage, update, amendment, recovery, use, transfer, etc., require the data subject's prior express written consent.

In practice employers often obtain data processing consents from employees when signing labour contracts. If these consents contain all required information and fully cover the purpose, possible recipients (e.g. external counsel, state authorities) and types of operations with personal data for the needs of the investigation, they may be relied upon.

If the employer decides to engage a consultant for an internal investigation, the employees will need to sign a special data processing agreement, setting out the purpose of data processing, operations to be performed, data protection obligations, etc.

For the information about cross-border transfer of personal data, see response to question 6f.

Information about private life

Collection, storage, use and dissemination of information about the private life of a person, including review of his/her correspondence and telephone conversations, requires his/her prior consent. This consent should be obtained before taking any actions that could lead to obtaining such information (i.e. usually at the start of the investigation and in any case before reviewing the employee's emails and other files).

Employers are advised to obtain such consents in advance, at the start of employment. Labour contracts or internal policies should contain provisions prohibiting employees from using business facilities (mailbox, cell phone, laptop, fax, etc.) for personal needs and allowing the employer to review any information stored at or derived from such facilities. Employees need to be especially careful with this type of information as the failure to handle it properly could trigger criminal liability under Russian law.

Other types of information

There are no statutes specifically blocking transfer and review of general financial, accounting or other business information abroad. There are a number of important restrictions. However, these only apply to information constituting state secrets or commercial secrets. Any access to such information requires a licence/permit by state authorities (in case of state secret) or consent of the holder of the information (in case of commercial secret).

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6. Before conducting employee interviews in your country, must the interviewee

a) Receive written instructions?

There is no requirement to issue written instructions. When starting the interview the interviewer generally briefly explains the reason for the interview and its procedure.

b) Be informed that he/she must not make statements that would mean any kind of self-incrimination?

There is no express requirement to do so. However, as stated in response to question 3, every person has a basic constitutional right to refuse providing information of a self-incriminatory nature. To enhance the evidentiary force of the interview, the interviewer could remind the employee about this right and reflect it in the interview protocol.

c) Be informed that the lawyer attending the interview is the lawyer for the company and not the lawyer for the interviewee (so-called "Upjohn warning")?

There is no express requirement to do so, but it is regarded as a best practice.

d) Be informed that he/she has the right that his/her lawyer attends?

The interviewer may not prohibit the employee from bringing a lawyer to the interview. However, there is no formal requirement to inform the employee about this right. In practice, employees insist on legal representation only in exceptional cases.

e) Be informed that he/she has the right of a representative from the works council (or other employee representative body) to attend?

There is no formal requirement to do so.

f) Be informed that data may be transferred cross-border (in particular to the United States)?

Such restrictions apply to personal data. Cross-border transfer of personal data, subject to certain limited exceptions, requires a prior written consent of the data subject. In case of transfer of personal data to countries that are considered not to provide adequate protection of personal data (e.g. the United States, Hong Kong, China), the data subject's consent should be made in a specific form and include the data subject's ID information and address, a detailed list of actions to be undertaken with respect to the data, purpose of the transfer, etc. In case of a transfer of personal data to countries that provide adequate protection of personal data, the consent may be made in a simple form.

g) Sign a data privacy waiver?

See response to question 5.

h) Be informed that the information gathered might be passed on to authorities?

Transfer of personal data or private data to authorities (as well as any other third parties) is subject to the employee's consent. For other types of information, there is no formal requirement to inform the employee that the information might be passed to authorities. It may be advisable to do so to enhance the evidentiary force of the interview.

i) Be informed that written notes will be taken?

There is no formal requirement to do so. To enhance the evidentiary force of the interview, the interviewer could prepare the interview minutes and ask the employee to sign it to confirm its accuracy.

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7. Are document hold notices or document retention notices allowed in your country? Are there any specifics to be observed (point in time/form/sender/addressees etc.)?

There are no special rules governing such notices in Russia. Companies usually use them in the form of internal orders to make them mandatory for the company's employees. It is recommended to obtain a written acknowledgement from each of the company's employees that he/she read the notice, understands its content and will comply with it.

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8. May attorney-client privilege be claimed over findings of the internal investigation? What steps may be taken to ensure privilege protection?

The attorney-client privilege is known in Russia as 'advocate secrecy'. Advocate secrecy in Russia applies to any information related to the legal advice provided by a lawyer admitted to the Russian Bar who has the status of an 'advocate'. If an internal investigation is conducted by a duly retained advocate, it is likely that the information regarding the investigation and obtained in the course of the investigation will be protected by advocate secrecy.

It is highly recommended to mark all the documents produced or obtained in the course of an internal investigation as 'confidential' and 'subject to advocate secrecy' as well as to keep the most important documents and information in the offices or on the servers of the advocates to reduce the risk of their seizure by the authorities.

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9. Can attorney-client privilege also apply to in-house counsel in your country?

The privilege applies only to advocates and not to other lawyers who are not advocates, whether they are inside or outside counsel. Advocates may only practice law as self-employed practitioners through specific Bar institutions, they are not allowed to be employed.

The said approach is also shared by foreign courts. In 2014 in Veleron Holding, B.V. v. BNP Paribas SA et al. the United States District Court for the Southern District of New York granted a request for production of communications with Russian attorneys on the basis that "Russian law does not recognise attorney-client privilege or work product immunity for communications between or work product provided by in-house counsel or 'outside' counsel who are not licenced 'advocates' registered with the Russian Ministry of Justice".

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10. Are any early notifications required when starting an investigation?

a) To insurance companies (D&O insurance etc. to avoid losing insurance coverage)?

Only if provided by an insurance contract.

b) To business partners (e.g. banks and creditors)?

Only if provided by a contract.

c) To shareholders?

A company with a registered securities prospectus or a prospectus of bonds/Russian depositary receipts admitted to trade at a stock exchange is obliged to disclose information about any facts that, in the company's view, can materially affect the value of its securities. Theoretically, suspicions of certain violations and the opening of an internal investigation can fall within this category.

d) To authorities?

Only for investigations of accidents at work, as mentioned in the response to question 2c above.

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11. Are there certain other immediate measures that have to be taken in your country or would be expected by the authorities in your country once an investigation is started, e.g. any particular immediate reaction to the alleged conduct?

Russian law does not provide for any such measures. However, if the company voluntarily stops the misconduct, reports it to the authorities, takes steps to prevent negative consequences and/or compensates for harm resulting from it, the court may treat the company's actions as a mitigating circumstance and reduce an administrative fine to be imposed on the company.

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12. Will local prosecutor offices generally have concerns about internal investigations or do they ask for specific steps to be observed?

Companies are not required to alert the prosecutor office about the start of an investigation. It might be advisable to do so when there is a duty of self-reporting in relation to the issue under foreign law or the company's policy. It may also be advisable to self-report when the risk of leaks about the issue is significant and such self-reporting is part of the risk mitigation strategy.

If the company informs the prosecutor office about the investigation, the Russian authorities are expected to start their own investigation rather than interfere in the internal investigation.

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13. Please describe the legal prerequisites for search warrants or dawn raids on companies in your country. In case the prerequisites are not fulfilled, may gathered evidence still be used against the company?

Searches at companies' offices are conducted on the basis of the investigator's order while searches of private premises require the court's prior approval, which in exceptional urgent cases may be substituted by the court's subsequent approval. Searches at an advocate's offices or premises where he/she lives are subject to the court's prior approval and a number of additional limitations aimed at preserving advocate secrecy (e.g. presence of a representative of a local Bar Association).

Searches should be attended by a person in whose premises the search is carried out (in case of a company, its representative) and at least two attesting witnesses. An advocate of the person in whose premises the search is carried out may also attend. Searches shall not be carried out at night unless there is an urgent need.

Russian law does not have a separate concept of dawn raids. The investigator announces the decision to conduct the search when he/she arrives at the premise, shortly before the search. No advance notices are required.

If the search was conducted with violation of applicable laws, the evidence obtained upon it is deemed inadmissible.

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14. Are deals, non-prosecution agreements, or deferred prosecution agreements available and common for corporations in your jurisdiction?

Non-prosecution agreements or deferred prosecution agreements are not available in Russia. The court may decide not to impose a penalty on the individual or impose a reduced amount if he/she self-reports the offence, cooperates during the investigation (including under a pre-trial cooperation agreement) and/or voluntary remedies the damage.

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15. What types of penalties (e.g. fines, imprisonment, disgorgement, or debarment) may companies or its directors, officers, or employees face for misconduct of (other) individuals of the company?

Sanctions under criminal law include fines, disqualification, compulsory community service, corrective or compulsory labour, restriction of liberty, arrest and jail. In addition, assets received as a result of certain criminal offences are subject to confiscation.

Only individuals can be held criminally liable. There is no criminal liability for legal entities. If a criminal offence is committed in the interests or on behalf of a legal entity, an individual (director, officer or employee) involved in the offence will be held criminally liable while the company may be held liable for an administrative offence. Administrative sanctions for companies are warnings, fines, confiscation and suspension of operations.

A company may not participate in public procurement under Federal Law No. 44-FZ On the Contract System in the Area of Procurement of Goods, Work and Services to Support State and Municipal Needs, dated 5 April 2013 if

- The company was held liable for bribery within two preceding years;
- The company has been held liable for an administrative offence and its operations have been suspended; or
- The company's director, member of the executive board, person performing functions of the CEO or chief accountant (a) has been held criminally liable for economic crimes or bribery; (b) has been disqualified; or (c) has been prohibited to hold positions and carry out activities related to goods, works or services which are the subject of the relevant procurement.

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16. Please briefly describe any investigations trends in your country (e.g. recent case law, upcoming legislative changes, or special public attention on certain topics)?

An increased attention of the Russian legislative and law enforcement authorities over the recent years has been attracted to countering corruption. The majority of criminal cases concerns corruption at low levels with insignificant amounts at stake (less than US$1,000). However, large-scale high-level offences are also on the rise. Also, most of the high profile corruption cases' discussions in the public domain focus on persons taking bribes, while bribe-givers are often not mentioned or not focused on.

Another trend that is worth mentioning is intense efforts of Russian competition authorities to counter manipulation of prices (including so-called cartel agreements) and corruption at public tenders. This makes companies in Russia pay increased attention to their practices of participating in public procurement, including through distributors and other intermediaries.

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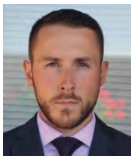 Dr. Michal Rampášek

TABLE

	Corporate Liability	Public Bribery	Commercial Bribery	Extraterritorial Applicability of Criminal Laws	Adequate Procedures Defence
Yes	X	X	X	X	X
No					

QUESTION LIST

1. Do any specific procedures need to be considered in case a whistleblower report sets off an internal investigation (e.g. for whistleblower protection)?

There is specific Slovak employment law providing whistleblower protection in the field of employment. Slovakia adopted Act No. 307/2014 Coll. on Certain Aspects of Whistleblowing. This Act provides protection of employees in an employment relationship in connection with the reporting of crime or other anti-social activities. An employer with at least 50 employees is obliged to maintain a system providing for internal handling of whistleblower reports. The employer is *inter alia* obliged to maintain confidentiality with respect to the identity of the whistleblower. The employer is further obliged to notify the whistleblower about the result of the assessment of his/her report.

2. Do the following persons/bodies have the right to be informed about an internal investigation before it is commenced and/or to participate in the investigation (e.g. the interviews)?

a) Employee representative bodies, such as a works council

b) Data protection officer or data privacy authority

c) Other local authorities

What are the consequences in case of non-compliance?

a) According to the Slovak Labour Code No. 311/2001 Coll. ("**LC**") the employer is obliged to inform the employee's representatives on its economic and financial situation and on the presumed development of its activities in an understandable manner and in an appropriate time. The employer may refuse to provide information, which could harm the employer, or may require that this information be regarded as confidential. However, there is no direct obligation of the employer to inform the employee's representatives on their right to participate before starting an internal investigation.

b) According to the Slovak Data Protection Act No. 122/2013 Coll., it is required to allow the responsible person (data protection officer or "**DPO**") to independently exercise personal data protection supervision and to accept his/her proposals. Therefore, the company in general must inform the DPO about all data privacy related procedures and processes of an investigation. Starting from 25 May 2018 the company will obliged to ensure that the DPO is involved, properly and in a timely manner, in all issues which relate to the protection of personal data under the European General Data Protection Regulation, Regulation (EU) 2016/679 ("**GDPR**"). Further, the company may be obliged to inform the Data Privacy Authority in case of a personal

data breach, without undue delay and, where feasible, not later than 72 hours after having become aware of it. This does not apply in case the personal data breach is unlikely to result in a risk to the rights and freedoms of natural persons.

c) The prosecution authorities do not have the right to be informed, but depending on the information and outcomes of the investigation, the company may be obliged to file a criminal complaint if there are circumstances suggesting that a crime was committed.

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3. Do employees have a duty to support the investigation, e.g. by participating in interviews? If so, may the company impose disciplinary measures if the employee refuses to cooperate?

Under the LC, employees are generally obliged to cooperate as far as the facts to be investigated relate to activities conducted or perceptions made as part of their employment. They must protect the employer's property against damage, loss, destruction and abuse. The employees must not act in contradiction to the justified interests of the employer. If unrelated to work, a balancing of interests test is required to determine if a duty to cooperate exists. Further and detailed obligations may be governed in internal rules of the employer, e.g. in work rules, which may be adopted by the employer.

In case the employee is required to participate, the employee's refusal may be regarded as breach of his duties. And based on its seriousness this may justify a reason for a formal warning, for giving a notice or for immediate termination of the employment.

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4. May any labour law deadlines be triggered or any rights to sanction employees be waived by investigative actions? How can this be avoided?

An employer may give notice to an employee or immediately terminate the employment, only within a period of two months from the day the employer gained knowledge about the reason for notice or immediate termination. However, notice of immediate termination must be delivered at latest within one year since the reason occurred. To avoid an early commencement of the two months deadline, the employer should be informed of results of the investigation at an advanced stage of the investigation after comprehensive information was gathered. Further, the interviewer should not be a member of a statutory body nor an executive employee, since the commencement of the two months period may be triggered even by knowledge of a superior executive employee.

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5. Are there any relevant data privacy laws, state secret laws, or blocking statutes in your country that have to be taken into account before

a) Conducting interviews?

As data is being processed, each interview and related documentation such as interview files and reports are subject to data privacy laws. It is highly recommended to perform an early assessment of the applicable data privacy laws and to document the steps taken.

b) Reviewing emails?

Difference must be made between private and work-related communication. Private communication is highly protected and the company cannot violate secrecy of such communication. The employer can generally not intrude upon the privacy of an employee in the workplace and common areas of the employer by monitoring him/her, keeping records of telephone calls made using the employer's equipment nor checking emails sent from a work email address and delivered to such an address without giving notice in advance. However, such activities may be possible without prior notice if there were serious reasons relating to the specific character of the employer's activities. If an employer implements a control mechanism, the employer is obliged to consult with employee's representatives on the extent of control, its method of implementation and its duration. The employer is obliged to inform employees of the extent of control, its method of implementation and its duration.

c) Collecting (electronic) documents and/or other information?

Slovakia does not have a blocking statute regime. Slovak data protection law is based on the GDPR (effective as of 25 May 2018).

Under Slovak data protection law, the company may process personal data without the data subject's consent also if it is necessary for the protection of rights and interests of the company or the third party. However, the principle of proportionality applies. Therefore collecting documents or other information without consent is not permitted if fundamental rights and freedom of the person are predominant in the individual case. In critical cases, it is recommended not to produce data on a voluntary basis but to request/wait for a written formal request of the authority.

d) Analysing accounting and/or other mere business databases?

The analysis of accounting and other business databases of a company is allowed. However, depending on the manner of analysis and categories of data, please see question 5c above.

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6. Before conducting employee interviews in your country, must the interviewee

a) Receive written instructions?

There is no general and statutory obligation to instruct an employee on his/her rights. Nevertheless, it is recommended to begin the interview with a brief description on the background of the investigation and the subject matter. For documentation purposes, it is advisable to put these instructions into written minutes from the interview signed by the interviewee.

b) Be informed that he/she must not make statements that would mean any kind of self-incrimination?

The right to remain silent, which applies during interrogations of criminal authorities, does not apply. There is no corresponding right in internal investigations.

c) Be informed that the lawyer attending the interview is the lawyer for the company and not the lawyer for the interviewee (so-called "Upjohn warning")?

There is no explicit obligation that an Upjohn warning or similar information has to be provided under Slovak law.

d) Be informed that he/she has the right that his/her lawyer attends?

The employee has a constitutional right to legal assistance of his/her lawyer. The right for legal assistance was confirmed by case law of the Constitutional Court of the Slovak Republic. Companies often allow lawyer's attendance or phone calls to the employee's lawyer to respect the rights of the employee. However, there is no explicit obligation of the company to actively inform the employee of such right.

e) Be informed that he/she has the right of a representative from the works council (or other employee representative body) to attend?

The employee does not have a strict legal right to be attended by employee representatives. However, companies may allow such attendance to avoid any misinterpretations of the interview.

f) Be informed that data may be transferred cross-border (in particular to the United States)?

The employee must be informed about the transfer of his/her data. Under Slovak data privacy law, transfer of data to the United States is only permissible if the company adopts adequate safeguards of privacy and fundamental rights and freedoms of individuals as well as the executing of corresponding rights protection (in form of standard contractual clauses, binding business rules, or EU-U.S. Privacy Shield). However, if the company does not ensure the adequate level of the personal data protection, the transfer is possible based on written consent of the data subject with such transfer before its executing.

g) Sign a data privacy waiver?

In case that personal data of the interviewed employee might be used for other purposes in the future, such as in later court proceedings, a broader consent of the data subject may be very helpful. However, Slovak law does not recognise the concept of data privacy waiver.

h) Be informed that the information gathered might be passed on to authorities?

If relations to U.S. law exist the interviewed employee should be informed in this regard. Otherwise there is no legal obligation to inform the employee. However, it may be included in the instructions at the beginning of the interview as a matter of fairness.

i) Be informed that written notes will be taken?

To secure transparency during the interview, the form of documentation should be explained. However, there is no legal obligation under Slovak law.

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7. Are document hold notices or document retention notices allowed in your country? Are there any specifics to be observed (point in time/form/sender/addressees etc.)?

There is no specific law governing this question, so there is no obstacle for issuing such notices in practice. Such notices should be clear, be sent to all potentially relevant addressees and be issued as early as possible.

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8. May attorney-client privilege be claimed over findings of the internal investigation? What steps may be taken to ensure privilege protection?

Attorney-client privilege rules apply only to information gathered or created within providing legal services by an attorney registered with the Slovak Bar Association. These rules do not apply to in-house lawyers.

To ensure privilege, the safest way is to involve an external counsel (registered attorney). In general, documents in custody of external counsel are protected. Documents in custody of the company are, however, only protected in isolated cases.

It may also be helpful to label privileged documents accordingly to prevent investigators' accidental access. However, the labelling itself does not automatically entail privilege.

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9. Can attorney-client privilege also apply to in-house counsel in your country?

Communication with and documents created by inside counsel are not privileged under Slovak law.

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10. Are any early notifications required when starting an investigation?

a) To insurance companies (D&O insurance etc. to avoid losing insurance coverage)?

Depending on terms and conditions, as far as circumstances arise which could give reason to a claim against the insurance company; the insured company should make a notification of circumstances to the insurer.

b) To business partners (e.g. banks and creditors)?

Notification obligations may arise from contractual obligations between the company and the business partner. Even if there is no explicit provision in the contract, the company must consider notification with regard to the purpose of the agreement. The general provision to avoid damage or rising of damage under the Civil Code No. 40/1964 Coll. also applies. These interests of the business partner need to be evaluated against the legitimate interests of the company. Circumstances of the individual case must be considered.

c) To shareholders?

The company (its Board of Directors) has to evaluate the individual case balancing reporting duties towards shareholders with the company's intention to maintain confidentiality, if there is an *ad hoc* duty to report to the shareholders. Under Slovak Commercial Code No. 513/1991 Coll., the Board of Directors submits to the General Meeting for discussion, at least once a year, a report on the company's business activities and the state of its assets. The shareholder is entitled to request for information concerning the affairs of the company or the affairs of persons controlled by the company that are related to the subject matter of the

General Meeting. The Board of Directors is obliged to provide to every shareholder, upon request at the General Meeting, complete and truthful information.

d) To authorities?

Generally, there is no duty to inform the prosecutor about an internal investigation or potential misconduct within the company. But depending on the information and outcomes of the investigation, the company is obliged under the Criminal Procedure Code to file a criminal complaint if there are circumstances suggesting that a crime was committed. This applies to any kind of criminal conduct.

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11. Are there certain other immediate measures that have to be taken in your country or would be expected by the authorities in your country once an investigation is started, e.g. any particular immediate reaction to the alleged conduct?

To mitigate damage, the company should audit its procedures, identify the breach, and eliminate or minimise increases of damage. On-going breaches of law should be stopped. In further steps, the company must review its complete compliance system, re-evaluate the risks, to improve the system against other potential vulnerabilities. The company may also apply labour discipline sanctions against given employees.

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12. Will local prosecutor offices generally have concerns about internal investigations or do they ask for specific steps to be observed?

Early involvement, communication and coordination of an internal investigation may be helpful for a good cooperation with local prosecutors. In this regard, it is crucial that the company does not destroy any potential evidence or make impression that evidence is or will be destroyed.

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13. Please describe the legal prerequisites for search warrants or dawn raids on companies in your country. In case the prerequisites are not fulfilled, may gathered evidence still be used against the company?

Formal and material requirements for search warrants are stipulated by the Criminal Procedure Code No. 301/2005 Coll., and for dawn raids in the Competition Act No. 136/2001 Coll.

Search warrants by criminal authorities

A *House Search Warrant* (search of private property) is to be issued by the presiding judge of a panel or, in pre-trial proceedings, by a judge for preliminary proceedings on a motion from a prosecutor. In urgent cases, the competent judge may be substituted by the judge in whose circuit the search is to be performed. House search warrants must be issued in writing and has to contain the reasoning. The warrant has to contain the description of the thing to be seized or, where known, of the person to be detained during the house search. It must be served on the person whose home is to be searched at the time of the search and, if this is not possible, not later than 24 hours after the elimination of the impediment that prevented the service. The house search has to be performed without delay.

The *Warrant for Searching Other Premises or Landed Property* is to be issued by a judge or the presiding judge of a panel or, in pre-trial proceedings, by a prosecutor or a police officer with prosecutor's consent. The warrant must be issued in writing and has to contain the reasoning. It must be served on the owner or the user of premises or property, or an employee thereof, at the time of the search and, if this is not possible, within 24 hours after the impediment that prevented the service was eliminated.

In the absence of a warrant or authorisation, a police officer may conduct the search of other premises or property only if such warrant or authorisation could not be secured in advance and in cases of emergency, or if it involves a person caught in the act of committing a crime or a person in respect of whom the arrest warrant was issued.

Authorisation for Dawn Raid by competition authorities

The *Authorisation for Dawn Raid* ("Inspection") has to be issued for each employee of the Antimonopoly Office (the "**Office**") in writing signed by the Vice-Chairman of the Office within the investigation and within the first-instance proceedings; or by the Chairman of the Council of Office in the second-instance proceedings. An

authorisation must contain name, surname, and position of the person issuing the authorisation, indication of premises, and means of transport of which the inspection will be conducted, time period of the inspection, subject, and purpose of the inspection, name and surname of the employee of the Office authorised to conduct the inspection, instruction on rights and obligations of the company, signature of the person issuing the authorisation, authorisation number, and the Office's stamp. The authorisation is limited to entry to all premises and means of transport of the company that are related to the activity or the conduct of the company. The authorisation serves to fulfil tasks stated by the Competition Act.

If there is a reasonable suspicion that documents relating to the activity or conduct of the company are situated in the premises or means of transport of the company other than referred to above, as well as in the private premises or private means of transport of the current or former employees of the company, the Office may carry out an inspection in those premises only based on the consent of the court with an inspection issued at the request of the Office.

General remarks

Generally, if legal requirements are not fulfilled, the seized evidence should not be used in court proceedings. In Slovakia, the case law of the Supreme Court interprets "fruit of the poisonous tree" as procurement which is inconsistent with the law, and where the information obtained by such procedure or the information obtained from the evidence carried out in direct and exclusive follow-up to the abovementioned primary information is to be used as evidence (for example, an object taken at home search without a court order or a police interception of telecommunication without a court order).

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14. Are deals, non-prosecution agreements, or deferred prosecution agreements available and common for corporations in your jurisdiction?

Deals, non-prosecution agreements or deferred prosecution agreements are available for individuals, as well as to corporations.

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15. What types of penalties (e.g. fines, imprisonment, disgorgement, or debarment) may companies or its directors, officers, or employees face for misconduct of (other) individuals of the company?

The company may face:

a) Prohibition of activities (from one to 10 years);

b) Forfeiture of thing;

c) Fine (from €1.500 to €1.6 million);

d) Forfeiture of property;

e) Liquidation of the corporate entity (if the activities were focused on committing of crime);

f) Prohibition of participation in public procurement (from one to 10 years);

g) Prohibition of receiving of subsidies and subventions, receiving help and support provided from EU funds (from one to 10 years);

h) Publication of judgment (at the expense of the corporate entity).

Individuals may face criminal prosecution also for misconduct of other employees when they failed to implement a sufficient supervision or control. They may face following penalties:

a) Imprisonment;

b) Home imprisonment;

c) Compulsory work;

d) Fine (from €160 to €331.930);

e) Property forfeiture;

f) Forfeiture of thing;

g) Ban on activity;

h) Ban on residence;

i) Ban on participation in public events;

j) Loss of honorary titles and honours;

k) Loss of military and other rank;

l) Expulsion order.

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16. Please briefly describe any investigations trends in your country (e.g. recent case law, upcoming legislative changes, or special public attention on certain topics)?

Criminal liability of the legal entities was newly introduced in the Slovak Republic by the Corporate Criminal Liability Act No. 91/2016 Coll., which entered into force on 1 July 2016. Focus of law enforcement agencies is given mainly on corruption, environmental crimes, and tax crimes.

In plan of the main tasks of the Antimonopoly Office of the Slovak Republic for 2017, the Office considers to be priority sectors:

1. E-Commerce;
2. Agriculture, food industry;
3. Information systems, information technologies; and
4. Sectors affected by state regulation (utilities, financial and insurance services, etc.).

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Havlát & Partners is a multi-practice Slovak law office since 1990 with its seat in Bratislava. Havlát & Partners provides to its clients complete legal services on excellent expert level in Slovak, English, German, and Hungarian. Havlát & Partners renders legal services in various fields of law, especially in Civil Law, Labour Law, Criminal Law (including counseling and defence in criminal matters), Commercial Law (Corporate and Company Law, Law of Obligations, Acquisitions), Antimonopoly Law, Bankruptcy and Insolvency Law, Information and Communications Technology Law, Data Protection, Personality Protection, Protection of Corporate Reputation. At the moment Havlát & Partners consists of seven partners, two associates, and four expert employees (including translators and accountants).

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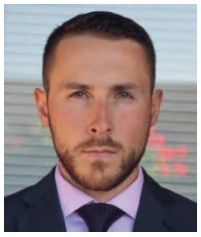

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TABLE

	Corporate Liability	Public Bribery	Commercial Bribery	Extraterritorial Applicability of Criminal Laws	Adequate Procedures Defence
Yes	X Corporations (legal persons) can be criminally liable under the conditions defined in the Liability of Legal Persons for Criminal Offences Act ("**ZOPOKD**").	X	X	X	
No					X

QUESTION LIST

1. Do any specific procedures need to be considered in case a whistleblower report sets off an internal investigation (e.g. for whistleblower protection)?

There is no general Slovenian law that regulates whistleblower protection in case an internal investigation is set off.

However, certain statutes contain some provisions relating to whistleblower protection.

Firstly, Article 23 of the Integrity and Prevention of Corruption Act stipulates, *inter alia*, that the whistleblower's identity has to be protected by competent authorities to whom a report is made.

Secondly, the Slovenian Employment Relationship Act ("**ZDR-1**") contains a general prohibition of discrimination and retribution (Article 7) and of sexual and/or other harassment and mobbing (Article 7) by employer towards an employee at workplace. However, there is no specific anti-discrimination and anti-retribution provision specifically with regard to whistleblowers.

Thirdly, Article 294 of the Criminal Code ("**KZ-1**") stipulates that the punishment of a person, who prevents the continuation of criminal society activities, can be mitigated. Moreover, Article 142 KZ-1 stipulates that a person, who reports about information he/she obtained as advocate, lawyer, doctor, priest, social worker, psychologist, or as another professional person, may not be punished if the report is made for the legitimate public interest or to the benefit of another. This may only apply if the interest for revealing the information outweighs the (benefit of) secrecy or if one is relieved from the duty of secrecy by law (statute).

Fourthly, Article 260 KZ-1 stipulates that a person who discloses classified information shall be sentenced to imprisonment for not more than three years. However, this person shall not be punished, if such classified information reveals unlawful restriction of human rights and fundamental freedoms, other constitutional and legally established rights, serious abuse of authority or powers or other serious irregularities while exercising (public) authority or conducting public service. Further, this disclosure of classified information must not be committed out of self-serving interest, must not be life threatening or have any serious or irreparable detrimental effects for the safety or legally protected interests of Slovenia. Furthermore, whoever obtains such classified

information without authority and with the intention of using this information shall be sentenced to imprisonment for not more than three years. However, this person shall not be punished if the circumstances of the case show that there is a stronger public interest for disclosing it than for keeping it confidential. This only applies if lives are not directly put on stake.

Fifthly, Article 239 of the Slovenian Banking Act stipulates that the Bank of Slovenia is obliged to create a system for the protection of whistleblowers, who are employees of banks.

And lastly, the Slovenian Sovereign Holding Act contains provisions in relation to a whistleblower protection scheme that is applicable for the employees of the Slovenian Sovereign Holding.

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2. Do the following persons/bodies have the right to be informed about an internal investigation before it is commenced and/or to participate in the investigation (e.g. the interviews)?

a) Employee representative bodies, such as a works council

b) Data protection officer or data privacy authority

c) Other local authorities

What are the consequences in case of non-compliance?

a) Pursuant to the Slovenian Worker Participation in Management Act ("**ZSDU**") workers have the ability to participate in companies' management via representative bodies or functions. In accordance with Article 2 ZSDU, workers' participation could be exercised, *inter alia*, via the right of information, the right to give opinion and proposition, the right to consult and/or the right to participate in decisions. The exact execution of these rights may be specified by a written agreement between employer and works council. In such an agreement the envisaged rights could even be expanded.

Although the ZSDU does not specifically require employee representative bodies to be informed and/or to participate in an internal investigation, an agreement between employer and works council may stipulate such obligations.

According to Article 174 ZDR-1, an association may participate in disciplinary proceedings against an employee, if authorised by the employee. Members of the association could be another employee, the works council or a trustee.

According to paragraph 1 of Article 86 ZDR-1 the association has to be informed in writing about the intended termination of the employee's employment contract, if so requested by the employee. According to paragraph 3 of Article 85 ZDR-1, violations of particular provisions of the ZSDU or ZDR-1 may be sanctioned with administrative fines.

b) According to Article 25 of the Slovenian Personal Data Protection Act ("**ZVOP-1**"), the administrators of personal data filing systems (e.g. corporations) are obliged to adopt the procedures and actions for the protection of personal data in accordance with Article 24 ZVOP-1 into its internal regulations regarding. Further, the administrators of personal data filing systems are obliged to determine individuals who are entitled to process personal data. However, according to the recently adopted European General Data Protection Regulation, Regulation (EU) 2016/679, one of the Data Protection Officer's ("**DPO**") duties would be to consult the employees regarding their data privacy rights. Provided that the company's internal regulations have to be taken into account, the DPO has to be informed in general about all data privacy related procedures and processes of an internal investigation.

c) There is neither a need to inform authorities about the investigation nor do they have to be invited to participate. However, informing authorities may be advantageous.

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3. Do employees have a duty to support the investigation, e.g. by participating in interviews? If so, may the company impose disciplinary measures if the employee refuses to cooperate?

According to Article 34 ZDR-1, an employee has to follow the employer's requirements and instructions in relation to the execution of its contractual obligations and employments' relationship obligations. They therefore generally have to participate in an internal investigation.

Further, according to Article 172 ZDR-1, disciplinary measures, such as a notice, fines or withdrawal of bonuses, may be imposed upon an employee if he/she violates contractual employment obligations or other obligations from the employment relationship.

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4. May any labour law deadlines be triggered or any rights to sanction employees be waived by investigative actions? How can this be avoided?

Investigative actions may trigger notification and termination deadlines.

According to Article 85 ZDR-1, prior to an ordinary termination of an employment contract due to misconduct, the employer is obliged to remind an employee that in case of repeated violations his/her employment contract could be terminated within 60 days following the identification of the violation (relative deadline) or no later than six months (absolute deadline) from the occurrence of the violation. This notice is a procedural deadline for lawful termination of an employment contract.

The employer should not be informed about the results of the investigation until comprehensive results are gathered to avoid a premature triggering of this deadline.

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5. Are there any relevant data privacy laws, state secret laws, or blocking statutes in your country that have to be taken into account before

a) Conducting interviews?

According to Article 48 ZDR-1, personal data may only be collected, processed, used or transferred to third parties if required by statutory law or in case collecting, processing, using and transferring of data is necessary for the execution of rights or obligations arising from the employment relationship.

In general, collecting, processing, using and transferring of personal data are regulated in the Slovenian ZVOP-1.

b) Reviewing emails?

Privacy of communication is protected on a constitutional level (Article 37 of the Slovenian Constitution). The Electronic Communications Act ("**ZEKom-1**") regulates the privacy of communication. In general, an employee has to be informed in advance under which conditions his/her emails may be reviewed. This should be stipulated in the employer's internal regulations. Employers have to provide an employee with the chance to delete his/her private emails, prior to the review of those emails. Further, reviewing of emails has to be necessary, which means a legitimate aim for the review must exist. In this process, a balancing of interests test has to be performed. Please note that the violation of privacy of communication may constitute a criminal offence.

c) Collecting (electronic) documents and/or other information?

According to Article 6 ZVOP-1, collecting information, in particular employees' documents may be considered as processing of personal data under Slovenian Law.

According to ZVOP-1, personal data may only be processed on an existing appropriate legal basis, either in the public sector (Article 9) or in the private sector (Article 10). For instance the police may request employers to provide documents and/or other information on the basis of the Slovenian Police Tasks and Powers Act. In case of a doubtful legal basis we suggest to wait until an authority makes a formal written request with the announcement for enforcement.

Further, please note that according to Article 25 ZVOP-1, operators of personal data filing systems (e.g. employers) are obliged to determine the rules about procedures and measures for the protection of personal data and to name individual employees allowed to process personal data. Those rules need to be determined in the employer's internal policies.

d) Analysing accounting and/or other mere business databases?

There is no specific legal basis applicable for analysing accounting and/or mere business databases during an internal investigation. In the broadest sense there are two (general) legal bases: Pursuant to Article 53 of the Slovenian Accounting Act companies are obliged to regulate the controlling of data and internal auditing in accordance with applicable law and companies' internal acts. Further, paragraph 2 of Article 281a of the Slovenian Companies Act ("**ZGD**") (applicable for joint-stock companies and private limited companies) stipulates that supervisory board has to give its consent to the company's internal policies stipulating the purpose, meaning and assignments of internal audit.

If analysing accounting and/or other mere business databases includes personal data processing (as per ZVOP-1), the processing is lawful if a sufficient legal basis exists. Therefore, general privacy laws apply (i.e. ZVOP-1), whereby the existence of other legal basis should be considered in the specific case. For instance, according to Article 19 of the Slovenian Inspection Act ("**ZIN**") –regulating inspection procedures conducted by authorities) the inspector has a right to inspect business documentation and all other documents needed for the inspection. This documentation may also be retained under conditions specified in the ZIN.

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6. Before conducting employee interviews in your country, must the interviewee

a) Receive written instructions?

The Slovenian law does not contain any statutory obligation to instruct an employee about the legal circumstances and his/her rights regarding internal investigation procedures. As established by Slovenian case law, employers' internal investigation procedures are not formal procedures. Therefore the employer is not obliged to grant the employee with the same level of rights as granted in court proceedings. The employer is, however, obliged to observe the general prohibition of discrimination.

b) Be informed that he/she must not make statements that would mean any kind of self-incrimination?

In contrast to an individual's right to remain silent in case of self-accusation during interrogations of criminal authorities, there is no corresponding right with regard to employee interviews as part of internal investigations. In addition, according to Article 36(2) ZDR-1, the employee is obliged to inform the employer about any danger to life, health or property that he or she becomes aware of during work.

c) Be informed that the lawyer attending the interview is the lawyer for the company and not the lawyer for the interviewee (so-called "Upjohn warning")?

Giving an Upjohn warning is an accepted best practice in Slovenia. However, there is no explicit legal obligation to do so under Slovenian law.

d) Be informed that he/she has the right that his/her lawyer attends?

There is no such legal obligation. However, companies are obliged to allow such attendance of the employee's lawyer during termination procedure interviews.

e) Be informed that he/she has the right of a representative from the works council (or other employee representative body) to attend?

There is generally no such explicit legal obligation in internal investigations.

In case the internal investigation is part of disciplinary or termination procedures the employee representative body has the right to attend if the employee under investigation requires so.

f) Be informed that data may be transferred cross-border (in particular to the United States)?

When transferring personal data cross-border and if the employer has no statutory right or obligation for the transfer of data to the United States, the employer is obliged to inform the employee and to obtain his/her

written consent before transferring the data cross-border. In such cases the employer must be in strict compliance with the Slovenian data privacy laws.

g) Sign a data privacy waiver?

This is not necessary if no other personal data shall be gathered than the data already gathered by the employer according to the applicable labour law legislation, such as employee name, address, ID number, tax number (see also response above under question 6f).

h) Be informed that the information gathered might be passed on to authorities?

There is no such legal obligation with regard to internal investigations.

i) Be informed that written notes will be taken?

There is no legal obligation to do so. However it is a common practice in companies to inform the interviewee that written notes shall be taken.

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7. Are document hold notices or document retention notices allowed in your country? Are there any specifics to be observed (point in time/form/sender/addressees etc.)?

There is no specific law regulating this matter. However, according to Article 24 ZVOP-1, operators of personal data filing systems are obliged to adopt measures and procedures that prevent, *inter alia*, deliberate destroying of personal data. Moreover, it may be advisable to communicate data retention orders at the earliest stage possible to avoid that evidence is lost.

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8. May attorney-client privilege be claimed over findings of the internal investigation? What steps may be taken to ensure privilege protection?

The confidential relationship between a defence counsel and a defendant is protected by the Slovenian Constitution. This relationship is protected irrespective of whether the documents or information are intended for defence in criminal proceedings. Because, for example, in case of a search of a law firm there is the danger that the police will obtain documents and objects that are not related to the criminal offence which is the subject of the investigation. The investigating authorities have to adhere to the rights referred to in the Slovenian Constitution. Thus, they may not seize such documents when in custody of the defence counsel. This is not due to the protection of the interests of the attorney (or about their privilege), but to preserve the attorney's duty to protect professional secrecy and to protect the human rights and fundamental freedoms of their clients. The legal protection of this confidential relationship encourages the client to communicate with an attorney or defence counsel without restrictions, i.e. without the fear that any subsequent disclosure of confidential information would jeopardise their legal position. Documents in the custody of the client may, however, be seized and used in proceedings against the client.

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9. Can attorney-client privilege also apply to in-house counsel in your country?

No. The confidential relationship is binding only for attorneys who must keep secret everything that the client has entrusted to him/her (Article 6 of the Slovenian Attorneys Act). This obligation also applies to other persons working in a law firm, but it does not apply to in-house lawyers.

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10. Are any early notifications required when starting an investigation?

a) To insurance companies (D&O insurance etc. to avoid losing insurance coverage)?

If any kind of circumstance arises which could trigger a claim against insurance companies, the latter should be informed. A general duty to notify the insurance company is stipulated in Article 941 of the Slovenian Obligations Code. According to this law, the policyholder must inform the agency regarding any insurance case within three days after gaining knowledge about it.

b) To business partners (e.g. banks and creditors)?

Whether there is a duty to notify business partners should be evaluated in each individual case. Even if a business contract does not contain specific notification duties of the contracting parties, such duties may be construed on the basis of general principles of the Slovenian obligations law. This applies in particular if the information concerning the start of the investigation constitutes important information for the other party and is relevant with respect to the purpose of the agreement.

c) To shareholders?

Slovenian Law does not provide any specific duty to inform shareholders about starting an investigation. However, according to paragraph 1 of Article 306 ZGD, shareholders have a right to be informed about "*reliable information on the company's affairs if this information is important for the assessment of the agenda [for the general meeting].*" In some cases the management is not required to provide information according to paragraph 2 of Article 305 ZG, which stipulates: "The management shall not be required to provide information only in the following cases:

(i) If the provision of information could, by reasonable economic judgment, cause damage to the company or its affiliate;

(ii) If the information refers to the methods of accounting and assessment, provided that the statement of methods of this kind in the annex is sufficient for an assessment of the actual situation of the company in terms of property, financial standing; and profitability;

(iii) If the provision of information would constitute a criminal act, a minor offence, or a breach of good business practice; or

(iv) If the information is published on the company's website in the form of questions and answers at least seven days before the general meeting."

Please be advised that information regarding internal investigations may have a significant effect on stock price and therefore may be considered as insider information, which may be subject to abuse.

d) To authorities?

There is no general duty to inform authorities about internal investigations. However, in certain cases failure to report that particular severe crimes may have been committed could be criminally prosecuted.

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11. Are there certain other immediate measures that have to be taken in your country or would be expected by the authorities in your country once an investigation is started, e.g. any particular immediate reaction to the alleged conduct?

Companies under investigation are generally not obliged to cooperate in the investigation or in investigative actions. The public prosecutor is the institution in charge that investigates and collects evidence in order to confirm the suspicion of a criminal offence.

However, there may be a duty to reveal evidence. The ZKP stipulates that anyone possessing objects which must be seized under the KZ-1, or which may be evidence in criminal proceedings, is obliged to hand them over to the court upon request. A custodian who declines to deliver the requested objects may be fined. In case of being fined and still refusing to surrender those objects, he/she may be arrested. The detention lasts until the objects have been delivered or until the end of the criminal proceedings, but no longer than one month.

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12. Will local prosecutor offices generally have concerns about internal investigations or do they ask for specific steps to be observed?

Actions conducted by companies' management or supervisory bodies may be regarded by authorities as positive counteractions aimed at remedying the consequences of criminal acts or misdemeanours committed by the company's employees and/or responsible persons. Paragraph 1 of Article 11 ZOPOKD stipulates that a company's criminal sanction, which derives from management or supervisory bodies' lack of control over employees, is to be

mitigated in cases where companies' management or supervisory bodies voluntarily indicated to authorities the person who committed the criminal act (on behalf of the company) before authorities gain knowledge about that person.

Pursuant to paragraph 2 of Article 11 of ZOPOKD, a company's criminal sanction, which derives from management or supervisory bodies' lack of control over employees, is to be remitted if the perpetuator is indicated to authorities before they gain knowledge about him/her and

- An order for immediate return of unlawful gains is given; or
- The damage is otherwise remedied; or
- The merits of other company's criminal liability are indicated to authorities.

Similarly, Pursuant to Article 21 of the Minor Offences Act a reprimand instead of an administrative fine may be issued to the company in an administrative procedure, if the misdemeanour was committed in circumstances which make the misdemeanour evidently insignificant (paragraph 1), or if the damage consequential to the misdemeanour was remedied prior administrative body issued its decision with which it fined the perpetuator.

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13. Please describe the legal prerequisites for search warrants or dawn raids on companies in your country. In case the prerequisites are not fulfilled, may gathered evidence still be used against the company?

Slovenian searches conducted by authorities are led by an investigative judge. Authorities' searches cannot be initiated without the prosecutor's motion. The latter has to be made by a competent prosecutor and contain the following information:

- The subject of investigation;
- The description of facts pertaining to alleged criminal offence;
- Reasonable doubts;
- A list of already gained evidence.

There is no general bright line rule regarding the admissibility of evidence in Slovenia.

Article 18 ZKP stipulates that only evidence permissible by law may be part of the procedure. Inadmissible means of evidence on this occasion is evidence obtained in violation of the Slovenian Constitution, the ZKP, if expressly stipulated, poisonous tree evidence or fishing expedition evidence.

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14. Are deals, non-prosecution agreements, or deferred prosecution agreements available and common for corporations in your jurisdiction?

In Slovenia the prosecution is bound by law to prosecute all alleged criminal offences *ex officio* regardless of the will of other subjects (e.g. injured compromised party). Therefore, non-prosecution agreements are not possible. However, prosecution could be put on hold in the course of alternative extra-judicial resolving of criminal matters. The latter can be done with the compromised party's consent in case of criminal offences punishable with fines or imprisonment up to three years.

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15. What types of penalties (e.g. fines, imprisonment, disgorgement, or debarment) may companies or its directors, officers, or employees face for misconduct of (other) individuals of the company?

In Slovenia legal entities can generally not be held criminally liable. However, in specific cases legal entities could be subject to criminal liability to the extent that the conditions specified in the ZOPOKD are met. The following punishments may be imposed upon legal entities:

- Financial punishment, such as fines;
- Assets forfeiture;

- Termination of legal entity;
- Prohibition of disposing securities held by the legal entity.

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16. Please briefly describe any investigations trends in your country (e.g. recent case law, upcoming legislative changes, or special public attention on certain topics)?

The topic of business compliance is gaining more and more attention every day in Slovenia. Slovenian corporations are establishing their own compliance departments (e.g. banks, insurance companies or pharmaceutical companies) and are implementing their own internal compliance policies.

Moreover, particular non-governmental organisations and business associations are addressing this topic daily and intensively.

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TABLE

	Corporate Liability	Public Bribery	Commercial Bribery	Extraterritorial Applicability of Criminal Laws	Adequate Procedures Defence
Yes	X	X	X	X	X
No					

QUESTION LIST

1. Do any specific procedures need to be considered in case a whistleblower report sets off an internal investigation (e.g. for whistleblower protection)?

There are no Spanish laws establishing specific procedures to be considered within the framework of an internal investigation, neither as regards the methodology to be followed nor to whistleblower protection.

However, companies can implement their own internal procedures which should respect the minimum standards set out in the Spanish Workers' Statute ("**WS**"). This includes, but is not limited to the workers' rights not to be discriminated, respect for their privacy, protection against harassment and the exertion of their individual rights deriving from their work contract.

In line with the above, companies increasingly tend to include statements granting internal protection to those who communicate facts in good faith and establishing prohibition of retaliation against them. In any event, personal data of whistleblowers must be kept safe insofar as whistleblowing channels must be confidential (please also see question 5).

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2. Do the following persons/bodies have the right to be informed about an internal investigation before it is commenced and/or to participate in the investigation (e.g. the interviews)?

a) Employee representative bodies, such as a works council

b) Data protection officer or data privacy authority

c) Other local authorities

What are the consequences in case of non-compliance?

a) Unless otherwise stated on collective bargaining agreements ("**CBAs**"), employees' legal representatives are required to be informed when the investigation involves the search on the personal belongings and lockers of the employees. In these cases, employee's legal representatives would be allowed to be present when the search takes place.

b) Data privacy authorities do generally not have to be informed. However, companies that must appoint a data protection officer ("**DPO**") pursuant to the new European General Data Protection Regulation, Regulation (EU) 2016/679 ("**GDPR**"), shall also inform him/her about all existing data-privacy related internal procedures and processes within the company, including those relating specifically to investigations.

c) It is not compulsory to inform local authorities before starting an internal investigation.

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3. Do employees have a duty to support the investigation, e.g. by participating in interviews? If so, may the company impose disciplinary measures if the employee refuses to cooperate?

There is no specific law establishing a duty of employees to support or participate in internal investigations being conducted in the employer's company.

However, their refusal to liaise could entail loss of trust and eventually be deemed as a violation of the contractual good faith. This could result in sanctions or even dismissal pursuant to the WS. This would be a case by case assessment.

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4. May any labour law deadlines be triggered or any rights to sanction employees be waived by investigative actions? How can this be avoided?

As a general rule, different deadlines apply depending on the severity of the irregular conduct. The deadlines may vary between ten to sixty days since the company became aware of the infringement or, in any case, six months since the infringement was committed.

However, if the company can prove that it did not become aware of the infringements until it started an internal investigation to have the whole picture of the situation, such deadlines may start only once the internal investigation was concluded. This is because it may be assumed that the irregular behaviour was only sufficiently known to the company at that time and not before. However, this particular issue is quite controversial and requires an in-depth analysis of the individual case before starting the investigation.

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5. Are there any relevant data privacy laws, state secret laws, or blocking statutes in your country that have to be taken into account before

a) Conducting interviews?

Data privacy laws apply to any processing of data, including all data being processed in the context of an internal investigation (securing, collecting and reviewing data, as well as the creation of work products such as interview file notes and final reports). These laws are the Spanish Personal Data Protection Act ("**PDPA**"), its Regulation ("**PDPR**") and the GDPR. Employment laws must also be observed in order to ensure the employee's rights are respected.

b) Reviewing emails?

In general, private communications are highly protected under Spanish law. Emails sent from/to employees' corporate email accounts might also be considered as "private" communications, if certain circumstances apply.

From a labour law perspective (WS), the employer has the right to manage, supervise and control the employees' activity provided that the dignity of the employee is respected. When speaking about IT systems and tools (including emails) it is important that the employer eliminates the employee's expectation of privacy and confidentiality in order to avoid that an infringement of the employee's privacy and/or secrecy of communications is declared. It is important to assess whether the company has implemented a policy regarding rules and terms of use of work equipment (including emails). Further, it should be evaluated whether the company has informed the employee about the possibility to monitor and control the equipment provided as well as about the scope of this monitoring and controlling and the way said monitoring and controlling is to be carried out.

Further, from a criminal law perspective, non-compliance with data privacy, employment and case law requirements may lead to decisions of courts declaring the respective evidence null and void.

The validity of emails reviewed as evidence in courts of law may vary depending on the branch of law implied. Typically, employment law has applied a lower standard to accept such emails as pieces of evidence

than the one required by criminal law. In the most serious cases, failing to comply with the abovementioned requirements can even be regarded as a criminal offence (breach of communications secrecy/discovery and disclosure of secrets).

c) Collecting (electronic) documents and/or other information?

Under the PDPA, collection of personal data has to be previously and specifically informed to the individual concerned.

Such person has to give his/her consent in order for a company to be allowed to process that personal data. Consent can be given through the signing of the employment contract, and also through the acknowledgement of receipt of the codes or policies implemented by the company applying to the employment relationship.

However, exceptions may apply for example in case of a request of certain authorities. In these cases, consent of the individual concerned it not necessary. Also, Spanish Labour Courts have stated that companies are entitled to carry out checks or inquiries to verify whether the employee is fulfilling the contract or not. Hence, should the employer have correctly informed the employee on the terms of the control and monitoring powers as mentioned above, express consent to collect and process personal data is no longer needed.

Lastly, communication or transfer of personal data, documents or other information containing personal data to third parties is also limited by law. In principle, consent of the individual concerned is required by the PDPA. However, consent would not be necessary under certain circumstances:

- If the transfer is authorised by law;
- If the assignment is performed due to the voluntary and legitimate entering into legal relationship that necessarily entails the communication of the data (which requires the connection of the processing with third-party files); or
- If assignment or transfer of data is addressed to the Ombudsman, the Office of the Public Prosecutor, Judges or Courts, etc. in the exercise of the functions conferred.

In addition to the PDPA, European data privacy statutes are applicable in Spain: Regulation No 2271/96 and Directive 95/46/EC – which will be substituted by GDPR with effect from 25 May 2018.

d) Analysing accounting and/or other mere business databases?

In general, the use of accounting and business databases is allowed during the time of the internal investigation if no personal data is included. Otherwise, general provisions contained within relevant Spanish data privacy statutes must be observed.

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6. Before conducting employee interviews in your country, must the interviewee

a) Receive written instructions?

In Spain, there are no specific regulations or binding provisions on how to conduct employee interviews. However, as a matter of best practice, interviewees are normally provided with written instructions including a brief description of the background of the investigation and the purposes behind the interview.

b) Be informed that he/she must not make statements that would mean any kind of self-incrimination?

The right against self-incrimination is a fundamental right. Although there are no specific formalities when conducting internal investigations, it is expected that such fundamental right is guaranteed, and that the interviewee does not feel pressured to provide the information. Therefore, it is advisable to inform the interviewee that his/her collaboration is voluntary (despite disciplinary actions), that she/he would not have to make any kind of self-accusation statements, and that the employee will have the "final say", allowing him/her to provide a last version of the facts under investigation.

c) Be informed that the lawyer attending the interview is the lawyer for the company and not the lawyer for the interviewee (so-called "Upjohn warning")?

There is no explicit legal obligation to do so, though it is advisable to always make clear to the interviewee that the lawyer attending the interview represents the company. However, when there are connections to U.S. law, an Upjohn warning must always be given.

d) Be informed that he/she has the right that his/her lawyer attends?

There is no specific provision in Spanish regulations. If the interviewee demands to be assisted by a lawyer, allowing such attendance would be advisable, even more if the interviewee is a suspect.

e) Be informed that he/she has the right of a representative from the works council (or other employee representative body) to attend?

There is no legal obligation, but it would be advisable to give such opportunity unless it can be considered unfeasible.

In case the employee requests such attendance, the person conducting the interview should not refuse it. This falls within the competences and functions assigned to employees' representatives. Only in exceptional cases the interviewer could refuse the attendance of an employees' representative (e.g. when the works council is also subject to the investigation).

f) Be informed that data may be transferred cross-border (in particular to the United States)?

Data privacy is a key issue in internal investigations conducted in Spain, like in most European Union states. The PDPA is very strict with regard to the international transfer of data (outside the European Union), and is generally only allowed when the director of the Data Protection Agency expressly authorises it or when the data subjects gave their unambiguous consent to the onward international transfer. Therefore, it is advisable to inform the interviewee that data may be transferred cross-border. Preferably, the employee should provide its consent in writing.

g) Sign a data privacy waiver?

According to the PDPA, personal data communication is only permitted when authorised by the data subject, or when a legal exception applies. The supervision of a free and legitimate legal relationship between the interviewee and the company carrying out an internal investigation (such as verifying compliance with duties derived from the employment contract) is one of those exceptions. Therefore, signing a data privacy waiver is not strictly necessary but is convenient in order to avoid any further discussions on personal data communication.

h) Be informed that the information gathered might be passed on to authorities?

Disclosure to the competent authorities without the consent of the interviewee would be authorised under PDPA. Thus, it is not necessary to inform the interviewee in that regard.

i) Be informed that written notes will be taken?

There is no such legal obligation under Spanish law. It is normal practice to memorialise interviews documenting all discussed facts, taking notes of as many details as possible. Preferably, the interviewee would be asked to review the notes to double check if she/he agrees or wants to provide further explanation of certain facts.

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7. Are document hold notices or document retention notices allowed in your country? Are there any specifics to be observed (point in time/form/sender/addressees etc.)?

There is no specific legal provision in this regard under Spanish law. However, document retention notices are generally admitted and used in order to preserve the aim of internal investigations and also in order for the company to be able to prove that this notice was served on and received by the individuals involved.

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8. May attorney-client privilege be claimed over findings of the internal investigation? What steps may be taken to ensure privilege protection?

Attorney-client privilege is not expressly regulated under Spanish law. A similar institution would be the professional secrecy. This is a wider concept and is based on the duty of confidentiality that lawyers (external counsel) and court agents owe in respect of any information received from their clients while acting on their behalf. Therefore, as both concepts entail similar consequences, attorney-client privilege or professional secrecy rights may be claimed over findings of an internal investigation.

Recommended steps to ensure this protection would be as follows:

- Labelling privileged documents accordingly;
- Appointing one or few individuals as the contact persons with the attorney to be considered as the "client";
- Limiting access of other individuals inside the company to privileged communications or documents and, of course, avoid disclosure to anyone outside the company;
- Limiting the amount of generated work products where findings and conclusions over the investigations are described;
- Avoiding keeping work product at the company's premises, but at the outside counsel instead.

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9. Can attorney-client privilege also apply to in-house counsel in your country?

Attorney-client privilege or professional secrecy does not apply to in-house counsel under Spanish law.

There is case law establishing that communication between client and legal counsel and documents drafted within such attorney-client relationship are privileged provided that (i) correspondence is related to the rights of defence of the client and (ii) communication is conducted with independent lawyers.

Insofar as in-house lawyers are not independent but employees of the company that are not entitled to reject the company's instructions, communications with inside counsel and documents drafted by him/her are not privileged.

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10. Are any early notifications required when starting an investigation?

a) To insurance companies (D&O insurance etc. to avoid losing insurance coverage)?

As far as circumstances arise which could give reason to a claim against the insurance company, it is advisable that the policy holder makes a notification of circumstances to the insurer. The respective insurance policy should be checked in that regard.

b) To business partners (e.g. banks and creditors)?

This has to be decided based on each individual case. The following aspects should be taken into account:

- Are there any contractual obligations to provide such information?; and
- Might the notice be deemed utterly important for the counterparty with regard to the purpose of the agreement, according to contractual good faith? These interests of the business partner need to be evaluated against the legitimate interests of the company.

c) To shareholders?

The Securities Market Act imposes the obligation to communicate relevant information to the investors of listed companies. Said Act understands that any information that either could concern the investors in their decision to trade in securities or could affect the securities' price is relevant. Thus, the reasons why the company decided to start an internal investigation are relevant to decide whether to get this information across or not. For instance, if the company launches a prospective investigation, there are no reasons to make this decision public, because there are no suspicions of misconduct; conversely, if the company

initiates an internal investigation based on serious indications that, for example, a criminal offence was committed, it could be reasonable conveying such information to the investors.

d) To authorities?

Listed companies also have to notify the Stock Exchange National Commission of any relevant information as described under 10c above. Besides that, there is no obligation to report the fact that an internal investigation has been started to other authorities.

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11. Are there certain other immediate measures that have to be taken in your country or would be expected by the authorities in your country once an investigation is started, e.g. any particular immediate reaction to the alleged conduct?

The commission of an illegal behaviour within a company may be an indication that the management body did not exercise its duties of care, surveillance and control over the employees, agents and other subordinates correctly. Thus, once an investigation is started, one would generally also check whether there are any shortcomings in the corporate compliance programme.

Additionally, the company can take two opposite decisions depending on the defence procedural strategy it intends to choose. The company can either (i) try to defend the alleged infringer or (ii) try to react by sanctioning him/her in order to demonstrate its intolerance with illegal or unethical conducts by publicly condemning the behaviours committed and providing resources so that third parties can help clarify the case at hand. In cases where the breach of law is evident, the second option may be a better choice aiming for exoneration or mitigation.

In any case, the company would want to make sure that any on-going breach of law is immediately stopped.

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12. Will local prosecutor offices generally have concerns about internal investigations or do they ask for specific steps to be observed?

In Spain, internal investigations are not broadly developed. However, the General Public Prosecutor's Office recently stated that providing the prosecution with the results of an internal investigation is an indication of ethical commitment and could entail exoneration from corporate criminal liability.

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13. Please describe the legal prerequisites for search warrants or dawn raids on companies in your country. In case the prerequisites are not fulfilled, may gathered evidence still be used against the company?

Search warrants and dawn raids are foreseen and regulated in the Spanish Competition Act, the Spanish General Taxation Act and the Criminal Procedural Act. The inspectors of the Spanish Competition Commission ("**SCC**") have the right to access business and domestic premises if there are indications of anticompetitive behaviour. This needs to be decided by the Director of Investigation of the SCC or alternatively a judicial warrant needs to be issued by a competent Contentious Administrative Court. Tax inspectors can only perform a dawn raid upon a judicial warrant or when the owner or entitled individual of the company expressly authorises them to access the premises of the company.

Search warrants and dawn raids in the context of criminal proceedings are extensively regulated under the Spanish Criminal Procedural Act. Both of them have to be ordered by an examining magistrate, *ex officio,* or at police's request, and have to be strongly justified specifying reasons with solid indications of a criminal offence, the dawn raid's goal, the objects to be searched, how and when the search should be performed, who must be present etc. Account books and documents may not be seized by the police unless the magistrate's order mentions them specifically.

In case these legal requirements are not fulfilled, it will generally lead to a declaration of the seized pieces of evidence as null and void and to invalidation of other pieces of evidence that may be deemed directly related to such evidence. This is because non-compliance violates fundamental constitutional rights, namely the right to the inviolability of the home/premises, which may also be held by legal entities.

14. Are deals, non-prosecution agreements, or deferred prosecution agreements available and common for corporations in your jurisdiction?

In Spain, it is not uncommon that the accused individual or entity reaches an agreement with the judge and the prosecutor once the investigative stage is concluded to terminate the proceedings with a settlement judgment ("*sentencia de conformidad*"). This does not overrule criminal liability, but generally reduces the level of penalties imposed.

Also, in those cases where the public prosecutor is the only accusing party entitled to ask for prosecution (e.g. when the injured party waives the possibility to bring a criminal action) and decides not to bring the criminal action against the defendant, the absence of a valid accusation against him would entail the dismissal of the criminal proceedings, which would impede courts-of-law from sending the case to trial.

15. What types of penalties (e.g. fines, imprisonment, disgorgement, or debarment) may companies or its directors, officers, or employees face for misconduct of (other) individuals of the company?

As a general rule, individuals cannot face criminal liability for misconduct of other individuals. However, omissions may give rise to criminal liability when an individual, in this case a director, breaches his/her duty of care. Criminal liability may then arise if the director has actively caused such misconduct, given the fact that she/he had effective control over the activities of the respective individual and should have acted to avoid such misconduct. In these cases, penalties to individuals can include fines, imprisonment, or even special barring from public employment and office, profession, trade, industry, or commerce, etc.

Companies can be held criminally liable for misconduct of other individuals (its employees, officers, or directors) acting on its behalf.

When a legal entity is criminally punished, it must be fined. Other penalties may be imposed additionally. This includes suspension of activities, closure of premises, prohibition to develop the activities through which the offence was committed or concealed, prohibition from receiving public subsidies and public procurement debarment.

16. Please briefly describe any investigations trends in your country (e.g. recent case law, upcoming legislative changes, or special public attention on certain topics)?

In past years, several international bodies (Council of Europe, OCDE) highlighted the lack of instruments to combat corruption in Spain despite it being one of the main concerns of the country's population. As a result, Spain carried out several legislative amendments that widened and hardened the regulations in this area, especially the reform of the Spanish Criminal Code made in March 2015. The above led to an increasing trend to investigate and prosecute all forms of corruption more actively. This development is particularly intense in cases regarding corruption within state-owned companies or political parties.

As a consequence of the above, there have been many cases regarding corruption under judicial investigation:

- The Noós case, involving a former member of the Royal Family;
- The Tarjetas Black case, involving directors of an important Spanish banking entity;
- The Pujol case, involving the former president of Catalonia and his family; or
- The Púnica case, involving public officials of the former regional government of Madrid, politicians and a number of private entities.

Moreover, on February 2017, the National Court issued the first sentence ever on international corruption related to a bribe granted to a vice minister of Equatorial Guinea (Apyce case).

Likewise, as the reform of 2015 provided for the exoneration of criminal liability of companies having in place corporate compliance programmes as well as for the mitigation of liability of those collaborating in the investigation of suspected irregularities, the trend within private entities and state owned companies is also focusing towards internal investigations. For instance, on March 2017, the Madrid employers' organisation CEIM announced that it intended to start an internal investigation to review whether the organisation granted illegal donations to the Popular Party in Madrid, the governing party in the context of the Púnica case.

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Jose Luis Huerta, the Head of the Hogan Lovells litigation and arbitration team in the Madrid office, believes in going above and beyond ordinary limits when representing clients in court, or in arbitration. His many years of experience afford him the insight to find just the right strategy when clients are confronted with a dispute. He represents a wide range of clients in corporate disputes, insolvency proceedings, construction and engineering disputes, as well as product liability.

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Ignacio Sánchez is a vocational criminal lawyer who will go the extra mile by using creative alternatives, meticulous preparation and attention to detail. He has a wealth of experience on various commercial fraud matters, including fraud relating to banking, insurance, the Internet, insolvency, embezzlement and employees' fraud.

Recognised for his significant experience in the Investigation, White Collar and Fraud practice, Ignacio advises and represents high profile clients in complex and sensitive criminal proceedings acting either as a prosecuting party or defence. According to his clients, he "knows how to handle the situation, and when things get complicated, I like having a lawyer like him".

Ignacio also advises on tax related crimes, money laundering and intellectual property crimes and on the development of corporate compliance programmes. In addition, he conducts independent investigations on behalf of corporate boards and supervisory authorities to assess liability determine implications and deal with authorities and agencies.

Sweden

Nordia Law

 Hans Strandberg

 Olle Kullinger

 Carl-Johan Allansson

TABLE

	Corporate Liability	Public Bribery	Commercial Bribery	Extraterritorial Applicability of Criminal Laws	Adequate Procedures Defence
Yes		X	X	X Only for certain crimes, but wide interpretation of when a crime has been committed in Sweden.	X Only in some cases, and not if a crime has been committed by a leading individual of a company.
No	X No criminal liability for companies, but companies can, in certain circumstances, be fined for crimes committed by employees or executives acting within the scope of their duties.				

QUESTION LIST

1. Do any specific procedures need to be considered in case a whistleblower report sets off an internal investigation (e.g. for whistleblower protection)?

Swedish law makes a distinction between whistleblower protection in the public and private sectors.

In the private and public sector, an employee who reports internally about severe misconduct within the employer's operation is in general protected against reprisals. The same applies in relation to an external report if an employee first reported internally and the employer did not take reasonable actions, or an employee by other reason had reasonable grounds to first report externally and there was substance to the allegation.

Within the public sector, an employer is generally not allowed to investigate who the whistleblower is, and, if the employer knows who the employer is, the employer is not allowed to take any sanctions against the whistleblower. A prerequisite for the protection is, however, that the employee made his/her report available to media for the purpose of publication.

If a whistleblower report is made, it is good practice for the employer to investigate, unless exceptional circumstances exist, like the report is clearly made in bad faith or is clearly implausible.

2. Do the following persons/bodies have the right to be informed about an internal investigation before it is commenced and/or to participate in the investigation (e.g. the interviews)?

a) Employee representative bodies, such as a works council

b) Data protection officer or data privacy authority

c) Other local authorities

What are the consequences in case of non-compliance?

a) Unless disciplinary actions are initiated against the employee, there is no requirement to notify the works council of an internal investigation.

b) In May 2018 the new European General Data Protection Regulation (EU) 2016/679 ("**GDPR**") will be implemented in Swedish law. In accordance with the GDPR, the data protection officer ("**DPO**") must consult with employees regarding data privacy rights and must monitor data protection. A company, therefore, will need to inform the DPO about all data privacy related procedures and processes of an investigation.

c) Companies do not have a general duty under Swedish law to inform the prosecution authority of an internal investigation. However, certain special legislation exists that requires reporting to authorities, e.g. the Money Laundering and Terrorist Financing (Prevention) Act, the Public Employment Act, and the Companies Act (in regards to auditors of limited liability companies).

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3. Do employees have a duty to support the investigation, e.g. by participating in interviews? If so, may the company impose disciplinary measures if the employee refuses to cooperate?

Employees have a labour law duty of loyalty to their employer, which is expansive. In general, due to the duty of loyalty, employees are required to support an investigation and participate in interviews. The employer cannot force an employee to participate, but a refusal to participate may be regarded as misconduct and can lead to sanctions, such as dismissal.

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4. May any labour law deadlines be triggered or any rights to sanction employees be waived by investigative actions? How can this be avoided?

Notice of termination or dismissal must be given by the employer within two months of knowledge of the reason for the termination or dismissal. If the company initiates an internal investigation, the two-month deadline would most likely begin if/when the employer has sufficient information concerning or regarding the conduct of the individual.

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5. Are there any relevant data privacy laws, state secret laws, or blocking statutes in your country that have to be taken into account before

a) Conducting interviews?

Data privacy laws apply to the processing of data, including securing, collecting and reviewing personal data. This includes the compiling of (electronic) documentation, which relates to the scope of the investigation (e.g. creation of a database). It is important to perform an early assessment of the applicable data privacy laws and to document the steps taken.

b) Reviewing emails?

The employer needs to adhere to the Swedish Personal Data Act, which means that the employer, in general, must inform the employees about the internal guidelines at the workplace and the inspections that might be performed. Generally, the employer has no right to read or otherwise take note of an employee's private emails or files. Exceptions exist where there is a serious suspicion of unfair or criminal conduct or where the employee is using the IT equipment contrary to internal guidelines.

c) Collecting (electronic) documents and/or other information?

Data privacy laws apply to the collection of personal data.

d) Analysing accounting and/or other mere business databases?

An employer may analyse any documents that belong to the company. However, if such databases include personal data, data privacy laws may be implicated.

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6. Before conducting employee interviews in your country, must the interviewee

a) Receive written instructions?

There are no regulations in Sweden governing the conduct of internal interviews of employees by companies. Therefore, a company has no legal obligation to instruct an employee about the legal circumstances and his/her rights. However, ethical considerations counsel in favour of giving the employee a brief description of the background and subject matter of the investigation. There is no specific form prescribed for such a description.

b) Be informed that he/she must not make statements that would mean any kind of self-incrimination?

There is no legal obligation in Sweden to inform an interviewee in an internal investigation about self-incrimination.

c) Be informed that the lawyer attending the interview is the lawyer for the company and not the lawyer for the interviewee (so-called "Upjohn warning")?

There is no legal obligation in Sweden to give an interviewee an Upjohn warning, but it is required, according to the Code of Ethics for members of the Swedish Bar Association, to do so in certain situations. In a matter before the courts, members of the Swedish Bar Association are legally obliged to follow the Code of Ethics. If a company lawyer is attending the interview, the interviewee can be informed that he/she has the right to hire his/her own lawyer. There is, however, no duty to inform.

d) Be informed that he/she has the right that his/her lawyer attends?

There is no legal obligation in Sweden to inform the interviewee that he/she has the right that his/her lawyer attends. However, the company should recommend that an interviewee suspected of criminal misconduct retain legal counsel. If the interviewee has already retained counsel, the interviewee should not be contacted directly by the company's lawyer, without prior approval from the interviewee's lawyer.

e) Be informed that he/she has the right of a representative from the works council (or other employee representative body) to attend?

Unless disciplinary actions are taken against the employee, there is neither a right for the employee to have a representative attend the interview nor a requirement for the company to inform the employee.

f) Be informed that data may be transferred cross-border (in particular to the United States)?

Personal data may not be transferred outside of the European Union without the prior consent of the person concerned. However, personal data may be transferred outside of the European Union without the prior consent of the person concerned, if the data protection level in the foreign country is adequate. The United States has been approved as "adequate", if the data receiver is connected to the EU-U.S. Privacy Shield. This means that consent is not required to transfer data to the United States to a receiver connected to the EU-U.S. Privacy Shield. This is, however, not a pre-requisite for conducting an interview.

g) Sign a data privacy waiver?

According to the Swedish Personal Data Act, the employee must consent to have his/her personal data handled, barring the application of an exception under the law. In the context of an investigation, no consent is required where the handling of personal data is in the employer's rightful interest according to the Swedish Personal Data Act and that interest outweighs a potential breach of the personal integrity. It is, nevertheless, good practice to sign a data privacy waiver. This is, however, not a pre-requisite for an interview.

h) Be informed that the information gathered might be passed on to authorities?

There is no legal obligation in Sweden to inform the interviewee that the information gathered might be passed on to authorities. It is, however, considered good practice.

i) Be informed that written notes will be taken?

There is no legal obligation in Sweden to inform the interviewee that the interview will be documented. It is, however, considered good practice.

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7. Are document hold notices or document retention notices allowed in your country? Are there any specifics to be observed (point in time/form/sender/addressees etc.)?

There is neither a regulation applicable to document hold notices in Sweden nor an accepted practice in this regard.

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8. May attorney-client privilege be claimed over findings of the internal investigation? What steps may be taken to ensure privilege protection?

Swedish regulations concerning attorney-client privilege are limited and their applicability is highly dependent on where the documents are located and the type of information in the documents. Documents collected in the course of an internal investigation (e.g. emails) are not per se protected by privilege. However, the analysis and conclusions of counsel, as well as correspondence relating to such analysis and conclusions, may be protected.

In order to ensure privilege, it is recommended to involve external counsel admitted to the Swedish Bar Association (*advokat*). In accordance with the Code of Ethics for members of the Bar Association, an *advokat* has a duty of confidentiality and, therefore, correspondence with an *advokat* is, in general, treated as confidential.

Documents in the custody of external counsel are also, in general, protected. Therefore, for sensitive matters, it is recommended that any documents generated in the course of the investigation be stored only on external counsel's servers, instead of on the company's premises.

It is recommended to label documents as privileged and confidential, even though labelling is neither required for privilege protection nor ensures privilege.

Privilege protection will more likely be granted if the advice is provided in relation to a (potential) investigation by authorities. This can be shown by setting up a separate engagement letter for the internal investigation.

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9. Can attorney-client privilege also apply to in-house counsel in your country?

According to Swedish law, communication with in-house counsel is not protected from disclosure by attorney client-privilege, as an in-house counsel may not be a member of the Swedish Bar Association.

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10. Are any early notifications required when starting an investigation?

a) To insurance companies (D&O insurance etc. to avoid losing insurance coverage)?

It is always advisable to notify the insurance company as soon as possible, as the insurance agreement can impose different notification requirements. Further, the Swedish Insurance Agreements Act Chapter 7 Section 4 contains provisions on the statute of limitations.

b) To business partners (e.g. banks and creditors)?

There is no general requirement to notify business partners of an internal investigation, except for business partners that may have a claim for damages due to the underlying conduct.

c) To shareholders?

A listed company is obliged to disclose price sensitive information to the market. Knowledge of an internal investigation constitutes price sensitive information when a director is served a notice of suspicion by authorities, but it may also be price sensitive well before that occurs.

d) To authorities?

There is no requirement to notify the prosecution authority of an internal investigation. It is advisable to be cooperative with the prosecutor as this may prevent unexpected measures by the authorities, such as dawn raids. However, there is no legal ground for relief from penalties (e.g. corporate fines) for cooperating with authorities.

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11. Are there certain other immediate measures that have to be taken in your country or would be expected by the authorities in your country once an investigation is started, e.g. any particular immediate reaction to the alleged conduct?

As mentioned under 10c above, a listed company is obliged to disclose price sensitive information. A company should also try to stop on-going criminal behaviour conducted within the compan's operations. It is further considered good practice, when permitted under labour law, to investigate and freeze email accounts and other similar measures.

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12. Will local prosecutor offices generally have concerns about internal investigations or do they ask for specific steps to be observed?

Local prosecutor offices do not, in general, have any concerns about internal investigations. An internal investigation is a company's own matter and the prosecutor has no right to intervene. However, the prosecutor may take independent actions against the company, such as confiscating documents. Documents concerning the investigation itself, if covered by attorney-client privilege, will not be confiscated.

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13. Please describe the legal prerequisites for search warrants or dawn raids on companies in your country. In case the prerequisites are not fulfilled, may gathered evidence still be used against the company?

The police, the prosecutor or the court can decide to issue a search warrant if there is reason to believe that a criminal offence punishable by imprisonment has been committed. A search warrant can be obtained for a company if: (1) the offence is believed to have been committed on the company's premises; (2) the suspect was detained on the company's premises; or (3) extraordinary reasons indicate the search will lead to an item or information regarding the offence. In relation to extraordinary reasons, there must be one or more factual circumstances that substantially show one can reasonably expect to recover evidence for the investigation.

The principle of free adducing of evidence and the principle of free evaluation of evidence under Swedish law allow the prosecution authority to use, and the court to evaluate, evidence obtained even through an unlawful search and seizure.

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14. Are deals, non-prosecution agreements, or deferred prosecution agreements available and common for corporations in your jurisdiction?

No deals, non-prosecution agreements, or deferred prosecution agreements can be made under Swedish law.

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15. What types of penalties (e.g. fines, imprisonment, disgorgement, or debarment) may companies or its directors, officers, or employees face for misconduct of (other) individuals of the company?

Corporations are not subject to criminal liability under Swedish law, but can be fined for crimes committed by employees or executives acting within the scope of their duties where the company has not done what could reasonably be required to prevent the crime or the crime is committed by an individual in a leading position or with a particular supervisory or control responsibility in the company. In such situations, corporations may be required to forfeit any illegally obtained profits.

There is no possibility for a court to impose a general debarment on a company in a criminal trial, but according to the Swedish rules on public procurement, a prior verdict imposing a corporate fine on a company may, in certain cases, lead to the company's debarment from a procurement.

Directors and/or employees to whom certain responsibilities have been delegated may be criminally liable for their acts of omission, for example regarding book keeping crimes, work environment crimes and reckless financing of bribery. Penalties for such crimes are fines or imprisonment, but several combinations and types of conditional sentences may be imposed.

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16. Please briefly describe any investigations trends in your country (e.g. recent case law, upcoming legislative changes, or special public attention on certain topics)?

Whistleblower protection legislation is new in Sweden and legal observers will be paying close attention to how the courts interpret the law in the coming months and years.

Swedish legislation regarding corporate fines is undergoing changes. An increase in the maximum penalty for large companies from 10 to 100 million Swedish krona is currently under consideration.

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Hans Strandberg is a former judge in District Court and the Court of Appeal for ten years. He is a lawyer since 1986 specialised in company and business related criminal law, besides of compliance and securities law. On the client list are more than fifteen of the largest Swedish public companies and some multinational foreign public companies besides of foreign states. He is litigator and has appeared in most of the public criminal cases involving listed companies as well as he has appeared at several times in the Supreme Court. He has also been involve in legislations work regarding the Swedish corruption law and has been active in producing the Swedish Code of Conduct related to corruption for companies. Besides of this he is active in examining lawyers to become members of the Swedish Bar Association.

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Olle Kullinger has been with the firm since 2007 specialised in company and business related criminal law, besides of compliance and securities law. Olle Kullinger has worked with many of the largest listed companies in Sweden as well as a range of other companies whose businesses have been questioned. He is litigator and has appeared in a number of cases concerning white collar crimes, representing both companies and directors. Olle Kullinger has appeared as counsel two times before the Supreme Court. Olle Kullinger has headed and taken part in a number of internal investigations. He has also been involved in legislations work regarding the Swedish corruption legislation and has been active in producing the Code on Gifts, Rewards and other Benefits in Business together with a number of the largest listed companies in Sweden.

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TABLE

	Corporate Liability	Public Bribery	Commercial Bribery	Extraterritorial Applicability of Criminal Laws	Adequate Procedures Defence
Yes	Limited	X	X	Very limited	X
No					

QUESTION LIST

1. Do any specific procedures need to be considered in case a whistleblower report sets off an internal investigation (e.g. for whistleblower protection)?

Despite recent legislative efforts, no general laws for handling of whistleblower reports and whistleblower protection have been enacted in Switzerland. Employers are subject to a general duty of care towards their employees, which might include protective measures in case of internal conflicts or mobbing triggered by a whistleblower report. In some cases it may be advisable to suspend whistleblowers (on full pay) following their report.

Termination following a whistleblowing report may be lawful in some cases, unlawful in others. In the absence of clear-cut rules, each individual whistleblowing case has to be decided on its own merits.

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2. Do the following persons/bodies have the right to be informed about an internal investigation before it is commenced and/or to participate in the investigation (e.g. the interviews)?

a) Employee representative bodies, such as a works council

b) Data protection officer or data privacy authority

c) Other local authorities

What are the consequences in case of non-compliance?

a) Internal investigations do not require prior disclosure to employees or to their representatives.

b) No information duty applies with regard to the data protection authorities or the company's (internal) data protection officer.

c) There are no information requirements to other local authorities.

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3. Do employees have a duty to support the investigation, e.g. by participating in interviews? If so, may the company impose disciplinary measures if the employee refuses to cooperate?

Employees have a general duty of loyalty towards the employer's legitimate interests. This includes supporting an internal investigation. Disciplinary measures for non-compliance are possible in principle, provided employee personality rights are respected.

Termination on grounds of non-cooperation is not advisable in most cases, however, and might be frowned upon by authorities, since employees should remain available for any subsequent official investigation.

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4. May any labour law deadlines be triggered or any rights to sanction employees be waived by investigative actions? How can this be avoided?

Investigative actions do not trigger any specific deadlines. Neither can they be qualified as waivers of any rights of the employer.

On the other hand, a whistleblowing report might lead to the suspension of termination rights. As a general rule, termination of an employee's contract may be unlawful if said employee has asserted claims under the employment relationship in good faith prior to the termination. Thus, in cases where investigative action was triggered by a (rightful) complaint of an employee, said employee is protected from termination for a certain time afterwards. Although no general whistleblower protection exists under Swiss law, this rule has in practice been applied to certain whistleblowers who acted in good faith and correctly followed any applicable procedures.

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5. Are there any relevant data privacy laws, state secret laws, or blocking statutes in your country that have to be taken into account before

a) Conducting interviews?

Secrecy obligations, such as banking secrecy, might apply depending on the sector in which the company is active. General data protection principles must be observed.

The presence of external counsel at the interview (in the role of conductor of the investigation or of employee counsel) is unproblematic if such counsel is subject to professional secrecy. Other third parties must not be present at interviews if secrecy obligations apply.

b) Reviewing emails?

Private correspondence by employees must not be reviewed. If employees' email accounts are legitimately used for private purposes, such correspondence must be excluded from the review. Such exclusion can require time-consuming and costly triage procedures. Preventive measures (email policy, clause in employment agreement) are therefore highly recommended.

As soon as emails are disclosed to third parties, secrecy obligations may have to be observed in certain sectors.

c) Collecting (electronic) documents and/or other information?

The collection of documents and other information (unlike their disclosure) is not subject to any secrecy/privacy obligations, as long as they are solely intended to be used in an internal investigation or in an official procedure by a Swiss authority.

In the case of procedures by foreign authorities or proceedings before foreign courts, the mere collection of documents on Swiss territory might qualify as an unlawful activity on behalf of a foreign state (punishable by imprisonment or monetary penalty). It is important to note that pre-trial discovery can be problematic under this rule. Exemptions can be requested (prior to the investigation!) from the competent Swiss authority.

Permanent electronic supervision of employees (by cameras or by constant monitoring of information technology use) is only permitted in exceptional circumstances.

d) Analysing accounting and/or other mere business databases?

In this regard no secrecy/privacy obligations apply.

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6. Before conducting employee interviews in your country, must the interviewee

a) Receive written instructions?

Written instructions are not mandatory by law, but highly recommended. They might subsequently serve as evidence that procedural requirements have been met.

b) Be informed that he/she must not make statements that would mean any kind of self-incrimination?

There is no directly applicable legal duty to inform employees thereof. However, it is general practice in Switzerland that such information is given. With a view to the future use of employee statements in a criminal/civil procedure, such information is highly recommended.

c) Be informed that the lawyer attending the interview is the lawyer for the company and not the lawyer for the interviewee (so-called "Upjohn warning")?

No formal requirement applies. It is, however, highly recommended to clearly explain (in writing) the circumstances of the interview to the employee.

d) Be informed that he/she has the right that his/her lawyer attends?

Swiss law does not grant an explicit right to the employee to request attendance of his/her lawyer. Nonetheless, it is general practice to allow such attendance. It is advisable (rather than mandatory) to inform the employee thereof.

e) Be informed that he/she has the right of a representative from the works council (or other employee representative body) to attend?

There are no such attendance rights that would exist under Swiss law.

f) Be informed that data may be transferred cross-border (in particular to the United States)?

Swiss data protection law requires transparency in this regard, thus the employee must be informed that data may be transferred abroad.

In addition, the transfer to countries lacking an adequate level of data protection requires specific legal justification. The list of such countries, compiled by the Swiss data protection authority, includes the United States. Employee consent is one possible form of justification. Other forms include overriding private or public interests, as well as group privilege in case of multinationals.

It is important to observe that the disclosure of sensitive information to a foreign recipient might be problematic in spite of explicit consent by the information owner. The provision on industrial espionage prohibits the disclosure of trade secrets to foreign agents. Since this provision protects public as well as private interests, a waiver by the information owner is not sufficient in some cases.

g) Sign a data privacy waiver?

Disclosure of data requires legal justification. Employee consent is one possible form of justification. Other forms include overriding private or public interests. Thus, data privacy waivers are only necessary in absence of other grounds for disclosure.

h) Be informed that the information gathered might be passed on to authorities?

General data protection principles require the employer to specify the possible use of personal data provided by the employee. It is advisable to explain the investigation procedure to the employee.

i) Be informed that written notes will be taken?

In this regard no express information requirement applies. It is, however, advisable to explain the investigation procedure to the employee.

7. Are document hold notices or document retention notices allowed in your country? Are there any specifics to be observed (point in time/form/sender/addressees etc.)?

Document hold notices are unknown in Switzerland. If issued regardless, they are without legal effect. This must not be interpreted as permission to destroy evidence. Such destruction could unfavourably influence the outcome of a trial, since it would be taken into account by the court when weighing the evidence.

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8. May attorney-client privilege be claimed over findings of the internal investigation? What steps may be taken to ensure privilege protection?

Under Swiss law, attorney-client privilege exclusively applies to external counsel. If an investigation is conducted by external counsel, any work products or forms of correspondence are protected. No formal steps, such as expressly marking documents as confidential, are required. Nevertheless, it is advisable to use such markers, in particular if documents could potentially be disclosed abroad at a later stage.

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9. Can attorney-client privilege also apply to in-house counsel in your country?

Under Swiss law, attorney-client privilege does not apply to in-house counsel or compliance officers. Thus, any findings in investigations conducted without assistance of external counsel are outside the scope of attorney-client privilege.

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10. Are any early notifications required when starting an investigation?

a) To insurance companies (D&O insurance etc. to avoid losing insurance coverage)?

In this regard, no general rules apply. Notification requirements might be included in the terms of any specific insurance policy.

b) To business partners (e.g. banks and creditors)?

In this regard, no general rules apply. Banks and other creditors may include specific clauses in loan agreements and other contractual instruments.

c) To shareholders?

Shareholders must be informed annually about the course of business of the company, at the general meeting. They are entitled to demand additional information at this opportunity. Outside the general meeting, no information duty applies and no such requests by shareholders are possible.

Listed companies are subject to *ad hoc* publicity requirements. Facts that are not known publicly and that (from an *ex ante* perspective) could potentially lead to a significant change in share prices must be communicated to the public. Under these rules, grave incidents (such as big-scale bribery) which trigger investigations must be disclosed to the public.

d) To authorities?

No general information requirement applies. Even in the case of criminal acts, companies are under no general obligation to notify authorities. Notification might, however, have a mitigating effect in criminal or administrative procedures.

A specific leniency application programme applies to cartel investigations. The first party to report the cartel to the Swiss Competition Commission ("**COMCO**") might benefit from a full immunity from fines.

Companies under supervision by sector-specific authorities might be subject to specific requirements. This applies in particular to the reporting duty towards the Swiss Financial Market Supervisory Authority ("**FINMA**") in the financial sector.

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11. Are there certain other immediate measures that have to be taken in your country or would be expected by the authorities in your country once an investigation is started, e.g. any particular immediate reaction to the alleged conduct?

Employers are subject to a duty of care towards their employees. If the alleged conduct leads to any threat or damage to employees' interests, immediate measures to protect other employees might be required under Swiss employment law. Suspension of employment is possible at any time under Swiss law. It might be advisable to suspend certain employees on full pay.

No general duty to prevent criminal behaviour exists under Swiss law. Nonetheless, companies are under an express duty to take reasonable and sufficient preventative measures against certain offences, namely money laundering, bribery and terrorism financing. In view of the rules on corporate criminal responsibility and general principles of corporate governance, companies are generally recommended to enact and uphold an effective compliance programme.

Regardless of the nature of the (alleged) offence, companies are recommended to take immediate measures aimed at the discontinuation of any discovered or suspected criminal conduct by employees. Specialist legal advice might be required to determine the nature and scope of such measures to prevent prejudice to the investigation's outcome (or a premature admission of employer negligence).

Measures aimed at limiting the company's financial damage might also be advisable with a view to future damage claims against perpetrators. A general duty to mitigate damages exists under Swiss law.

In the case of a limited number of offences (namely money laundering, bribery and terrorism financing), companies can be fined regardless of any individual's responsibility, if they failed to take reasonable and sufficient preventative measures.

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12. Will local prosecutor offices generally have concerns about internal investigations or do they ask for specific steps to be observed?

In general, public prosecutors and other authorities encourage and reward internal investigations. The conduct of a thorough internal investigation might lead to a considerable mitigation in case of criminal or administrative sanctions.

With a view to future criminal or civil proceedings, it is advisable to observe basic procedural requirements when conducting an internal investigation. Even then, interview transcripts will generally not suffice the strict requirements for evidence in official proceedings. They might, nonetheless, serve to give authorities indications as to how to establish the relevant facts in the course of their investigation.

As soon as a criminal or civil procedure is imminent or opened, contact to (potential) witnesses might be problematic. Complex, largely unwritten, rules apply. Thus, professional advice is highly recommended in this regard.

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13. Please describe the legal prerequisites for search warrants or dawn raids on companies in your country. In case the prerequisites are not fulfilled, may gathered evidence still be used against the company?

Although search warrants must be issued in writing by the prosecutor, oral warrants are admissible in urgent cases. Searches can be conducted against the will of the occupant of the premises if evidence is expected to be found. Sealing of any seized items or (electronic) records can be demanded. The prosecutor will subsequently have to file a request for removal of the seal.

In principle, any unlawfully obtained evidence is inadmissible. Exceptions to this rule are, however, granted routinely if the evidence could have been obtained legally and if its use considerably furthers the establishment of the truth. The "fruit of the poisonous tree" doctrine is not applicable under Swiss law.

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14. Are deals, non-prosecution agreements, or deferred prosecution agreements available and common for corporations in your jurisdiction?

Public prosecutors have limited discretion regarding the opening of an investigation against a certain subject. Nonetheless, self-reporting and maximum cooperation might be beneficial at this stage.

With regard to criminal prosecution, a guilty plea can enable an abbreviated procedure, leading to a summary judgment which is drafted by the prosecutor and approved by a court. Abbreviated procedures are only possible for penalties up to five years imprisonment, in cases where the defendant fully acknowledges the facts of the case and recognises, in principle, any civil claims brought in connection with the offence.

Minor offences can lead to a punishment order, provided the defendant acknowledges the facts. Such cases are resolved without the involvement of a court.

FINMA and COMCO conclude their procedures with formal decisions. Self-reporting and cooperation by the subject of the investigation is taken into account when deciding upon sanctions. Prior to the opening of a formal procedure, maximum cooperation may lead to the abandonment of the investigation.

A specific leniency application procedure applies in the case of cartel investigations. COMCO may grant full immunity from fines to the leniency applicant.

Specialist legal advice regarding self-reporting and cooperation is highly recommended, since detailed knowledge of the legal framework as well as experience in dealing with the authorities involved is essential when determining the best strategy for an impending official investigation.

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15. What types of penalties (e.g. fines, imprisonment, disgorgement, or debarment) may companies or its directors, officers, or employees face for misconduct of (other) individuals of the company?

In Swiss criminal law, the focus lies on the responsibility of the individual. Directors, officers or employees may face monetary penalties and imprisonment. Additionally, criminal courts can impose professional bans or issue expulsion orders for foreign nationals.

The scope of corporate criminal liability is limited. Companies cannot be convicted as perpetrators of a crime. Rather, the law penalizes organisational shortfalls within the company. Thus, companies can be fined if a criminal offence by an employee or director cannot be attributed to an individual due to organisational deficiencies. In the case of a limited number of offences (namely money laundering, bribery, and terrorism financing), companies can be fined regardless of any individual's responsibility if they failed to take reasonable and sufficient preventative measures. Thus, the introduction of adequate and effective compliance procedures can serve to protect companies from criminal liability. The upper limit for fines imposed on companies is five million Swiss francs.

In COMCO proceedings, fines are imposed upon companies and/or individuals. Fines for companies can be calculated in proportion to their turnover.

In FINMA proceedings companies can be fined and individuals face fines or (rarely) imprisonment. Other possible sanctions include the revocation of a company's licence or occupational bans for individuals.

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16. Please briefly describe any investigations trends in your country (e.g. recent case law, upcoming legislative changes, or special public attention on certain topics)?

Internal investigations were not traditionally part of the Swiss legal landscape. This is still apparent in the lack of specific legislation for this field. In the last decades, however, internal investigations have rapidly become a much-practiced instrument. They are being recognised and encouraged by authorities.

The U.S. Department of Justice Program of 29 August 2013 led to a massive surge in internal investigations, since approximately 100 Swiss banks decided to investigate whether there were indications of past violations of U.S. tax laws.

Recent changes in anti-bribery legislation (tightening of laws against private-sector bribery) may lead to a further increase of the number of internal investigations conducted by Swiss companies.

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TABLE

	Corporate Liability	Public Bribery	Commercial Bribery	Extraterritorial Applicability of Criminal Laws	Adequate Procedures Defence
Yes	X Corporates cannot be criminally liable under Turkish law but may be liable under adminis-trative law.	X	X	X	X
No					

QUESTION LIST

1. Do any specific procedures need to be considered in case a whistleblower report sets off an internal investigation (e.g. for whistleblower protection)?

There is no specific Turkish legislation providing whistleblower protection. The position is governed by general employment law principles. As such, an employee cannot be dismissed on the ground that they have reported misconduct or suspected misconduct. However, a dismissal of the employee with immediate effect may be justified if the employee discloses trade secrets to authorities or the public without having a genuine suspicion or knowledge of actual misconduct (e.g. where the employee's report is untruthful and/or vexatious). Under Turkish law, the company does not have a duty to investigate a whistleblower report, although it will generally be good practice to do so. At the end of an internal investigation, if any offence is detected, the company should report the offence to the prosecution authorities if it is on-going at the time of the investigation (subject to the right to avoid self-incrimination under the Turkish Constitution).

2. Do the following persons/bodies have the right to be informed about an internal investigation before it is commenced and/or to participate in the investigation (e.g. the interviews)?

a) Employee representative bodies, such as a works council

b) Data protection officer or data privacy authority

c) Other local authorities

What are the consequences in case of non-compliance?

a) Many companies in Turkey have labour unions and an associated collective bargaining agreement between management and employees. An employee representative from the labour union has the right to be informed about and/or to participate in the investigation if this was agreed in the collective bargaining agreement. In the absence of such an agreement, the employee representative body has no automatic statutory right to be involved in an investigation.

b) There is no specific provision in the applicable Turkish Data Protection legislation giving the data protection officer or data privacy authority the right to be informed about and/or to participate in the investigation.

c) Where the relevant misconduct being investigated is also an offence regulated under the Turkish Criminal Code, this Code provides that the offence must be reported to the prosecution authorities if it is on-going at the time of the investigation. In general, even if the relevant misconduct is deemed an offence under Turkish Criminal Code, if the offence is not being committed at the time of the investigation, there is no reporting obligation. However, in some circumstances, money laundering offences uncovered as a result of an internal investigation should be reported to the relevant authority (see question 9 below).

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3. Do employees have a duty to support the investigation, e.g. by participating in interviews? If so, may the company impose disciplinary measures if the employee refuses to cooperate?

In general, employees have the labour law duty to cooperate with an internal investigation as far as the facts to be investigated relate to activities conducted or matters known to them as part of their employment. They must answer work-related questions truthfully and completely. If the matters under investigation are unrelated to the employee's work or position in the company, a balancing of interests has to be performed to determine if a duty to cooperate exists.

Where an employee is required to participate, the employee's refusal may be regarded as a breach of duty and such misconduct may justify dismissal.

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4. May any labour law deadlines be triggered or any rights to sanction employees be waived by investigative actions? How can this be avoided?

The legal period under Turkish labour law for dismissal for cause is six working days following the date the employer becomes aware of the relevant misconduct giving rise to the dismissal. In case an investigation is carried out, this six working day period will in general not commence until the investigation is finalised and a report is provided to the relevant person/body within the company in charge of employee dismissals. If a claim for unfair dismissal is brought before the courts, the burden is on the employer to prove that the termination is justified.

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5. Are there any relevant data privacy laws, state secret laws, or blocking statutes in your country that have to be taken into account before

a) Conducting interviews?

The Law of Protection of Personal Data which entered into force on 7 April 2016 applies to processing of data. This includes securing, collecting and reviewing data, as well as the creation of work products such as interview file notes and final reports. Therefore, it is very important to perform an early assessment of the applicable data privacy laws and to document the steps taken.

b) Reviewing emails?

Private communications are protected under Turkish law. Reviewing private emails of employees may even constitute a criminal offence if data privacy requirements are not observed. Provided that a general disclaimer is provided to the employee, stating that his/her business related communications (including work emails) could be monitored by the company at any time, then the work emails of the employee can be reviewed. This disclaimer should be signed by all employees at the start of their employment contract.

c) Collecting (electronic) documents and/or other information?

As with emails, all other forms of documents containing personal data or private communications will be protected by Turkish law.

d) Analysing accounting and/or other mere business databases?

There is no specific regulation in this respect, unless the relevant databases contain personal data, in which case the Law of Protection of Personal Data will apply.

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6. Before conducting employee interviews in your country, must the interviewee

a) Receive written instructions?

There is no general statutory obligation that the employee to be interviewed should receive written instructions. Nevertheless, it is considered that explanations are ethically required and advisable. In general, this includes a brief description on the background of the investigation and the subject matter. For documentation purposes, it is advisable to provide these instructions in written form to be countersigned by the interviewee.

b) Be informed that he/she must not make statements that would mean any kind of self-incrimination?

There is no legal requirement to inform the employee in this regard.

c) Be informed that the lawyer attending the interview is the lawyer for the company and not the lawyer for the interviewee (so-called "Upjohn warning")?

There is no legal requirement to inform the employee in this regard. However, where the investigation may have a U.S. context, an Upjohn warning would be advisable.

d) Be informed that he/she has the right that his/her lawyer attends?

There is no legal requirement to inform the employee in this regard. However, should the employee request the presence of his/her lawyer, it is advisable to allow the lawyer to represent their client at the interview.

e) Be informed that he/she has the right of a representative from the works council (or other employee representative body) to attend?

Where there is a labour union in the workplace and there is a provision to such purpose in the collective bargaining agreement, then the employee representative would have the right to be informed about and/or to participate in the interview.

f) Be informed that data may be transferred cross-border (in particular to the United States)?

The employee should be informed and his/her explicit consent should be requested before their data is transferred outside Turkey. Under Turkish data privacy law, transfer of data to a foreign country is permissible if explicit consent for such transfer is given.

g) Sign a data privacy waiver?

According to Turkish data privacy legislation, the employee needs to consent to the company's use of their personal data. Where the personal data of the interviewee might be used for other purposes in the future, (such as in possible court proceedings), a data privacy waiver signed by the interviewee can be very helpful.

h) Be informed that the information gathered might be passed on to authorities?

Although there is no legal obligation in Turkey in this regard, this should be included in the interview instructions as a matter of good practice.

i) Be informed that written notes will be taken?

For reasons of transparency, the fact that the information provided in the interview will be recorded (e.g. for reports and potentially for disclosure) should be explained. It is also advisable to have a copy of the written notes signed by the relevant employee and maintained in the investigation records. However, there is no legal obligation under Turkish law.

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7. Are document hold notices or document retention notices allowed in your country? Are there any specifics to be observed (point in time/form/sender/addressees etc.)?

There is no specific law requiring that a document retention notice should be issued, but issuing such notices is advisable. Such notices should be clear, be sent to all potentially relevant addressees and be issued as early as possible. Before issuing the document retention notice, the company should consider which employee's documents should be retained and what types of documents should be sought (e.g. physical documentation, emails, documents contained on hard-drives and mobile devices). The document retention notice should briefly describe the terms of reference of the investigation, bearing in mind the need to maintain confidentiality.

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8. May attorney-client privilege be claimed over findings of the internal investigation? What steps may be taken to ensure privilege protection?

Attorney-client privilege exists under Turkish law, although there are no specific rules in relation to its application in internal investigations. The documents relating to the findings of an internal investigation may be subject to attorney-client privilege protection if they have been prepared by an independent attorney and to the extent they concern the client's defence rights. Accordingly, to protect and render such documents out of the scope of the public investigation, it is recommended to mark these documents as "Confidential, Privileged, Attorney-client Privileged" and "Relating to Defence Rights".

Prosecutors may search company offices, although they will need a warrant to do so and the search must be done in the presence of a public prosecutor. It is recommended to have a lawyer present at the company offices during a raid. During such a raid, it is important to object to the seizure of any privileged documents and to ensure that this objection is documented in the minutes of the raid. Such objections will be considered by the public prosecutor or relevant judge when assessing the claim for privilege. Where the claim for privilege is successful, the public prosecutor or judge shall return these documents to the company.

Prosecutors may also search an attorney's office, but will need a court warrant to do so, and the search must be done in the presence of a public prosecutor. In case of a raid at an attorney's office, the attorney and/or the bar representative present at the raid may claim during the raid that a document, which is about to be confiscated, is related to the client's defence rights. In this case, the document is put in a separate envelope and the envelope's flap is sealed. The evaluation of attorney-client privilege status of the document is done by the magistrate in cases of criminal investigation, and by the criminal judge in cases of prosecution, in each case within 24 hours. If it is decided that the document falls under the scope of attorney-client privilege, it is immediately returned to the attorney and the correspondence relating to the document is destroyed. Therefore, in order to ensure privilege protection, it is advisable to keep the important documents relating to an internal investigation at the office of an outside counsel rather than on company premises, and to write "Confidential/Attorney-client correspondence" and "Relating to defence rights" on them.

Under the Criminal Procedure Code, upon a judge's warrant, a public prosecutor may seize computers and/or computer files. It is important to obtain a copy of the seized computer files and raise written objections with respect to potentially privileged documents during the raid. A claim for privilege may also be raised following the raid, but, where possible, it is advisable to object during the seizure proceedings, since these objections may be taken into account during the search of the copies of computer files by the relevant authorities.

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9. Can attorney-client privilege also apply to in-house counsel in your country?

Attorney-client privilege does not apply to in-house counsel. A recent decision of the Turkish Competition Board held that correspondence with an independent attorney will fall within the scope of attorney-client privilege. It was implicit in this decision that, as in-house counsel are employed by the company, they are not considered independent attorneys.

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10. Are any early notifications required when starting an investigation?

a) To insurance companies (D&O insurance etc. to avoid losing insurance coverage)?

As far as circumstances arise which could give rise to a claim under an insurance policy, (for example, under a D&O policy in relation to conduct of company directors), the company should make a notification of circumstances to the insurer. Each individual policy should be reviewed to ensure notification requirements are met.

b) To business partners (e.g. banks and creditors)?

Duties to inform business partners may arise from contractual obligations between the company and the business partner, particularly where the matter under investigation may have implications for the business partner. Even if there is no explicit provision in the relevant contract, there may be an obligation to notify a business partner of an internal investigation, where that information is highly significant to the business partner and relevant to its contract with the company. The interests of the business partner need to be evaluated against the legitimate interests of the company. Therefore, it depends on the individual case whether and when the business partner needs to be notified.

c) To shareholders?

Potential reporting duties towards shareholders compete with the company's requirements to maintain business confidentiality. Such reporting duty would play an essential role in companies, since certain investigations may require a mandatory disclosure under law (for example, companies listed on the BORSA Istanbul stock exchange will be required to disclose an investigation if it is deemed a material event). As well as statutory disclosure obligations, the company has to evaluate on a case by case basis if there is an *ad hoc* duty to report to the shareholders. If the internal investigation affects the market price significantly and fulfils certain criteria (e.g. relating to the risk, scope, and suspects involved in the internal investigation) an obligation to disclose exits.

d) To authorities?

In general, there is no duty to inform the prosecutor about an internal investigation or potential misconduct within the company. However, there are exceptions where certain types of serious misconduct are uncovered during an investigation. For example, under the Regulation on Suspension of Transactions within the scope of Laundering Proceeds of Crime and Financing of Terrorism, certain companies (e.g. financial and insurance institutions, lawyers and accountants) are required to notify the Turkish Financial Crimes Investigation Board if a serious indication exists which shows that a suspicious transaction has been performed or attempted. Even where no statutory duty to report exists, a cooperative approach with the local prosecutor may prevent adverse and unexpected measures by the authorities.

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11. Are there certain other immediate measures that have to be taken in your country or would be expected by the authorities in your country once an investigation is started, e.g. any particular immediate reaction to the alleged conduct?

The company has to minimise damages, stop any on-going misconduct and try to prevent new cases of misconduct. Additionally, the company may have to reevaluate its compliance system, especially its compliance policies (such as its Code of Conduct) and the related training provided to the employees, in order to eliminate potential deficits and to improve its existing system. Further, the company may impose sanctions on the concerned employees including termination, in order to show that misconduct is not tolerated inside the company. Depending on the individual investigation and the industry sector concerned, notification to certain regulators may be advisable for strategic, risk management reasons.

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12. Will local prosecutor offices generally have concerns about internal investigations or do they ask for specific steps to be observed?

Internal investigations are not very common in Turkey and usually Turkish subsidiaries of global companies conduct such investigations. As of today, the findings of such investigations are reported to the authorities in rare cases, therefore the case law on the matter is very limited. However, where criminal misconduct is found in an internal investigation, a detailed internal investigation report of such misconduct would be helpful to the prosecution office (although there are no provisions under Turkish law relating to self-disclosure by the company to the prosecutors).

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13. Please describe the legal prerequisites for search warrants or dawn raids on companies in your country. In case the prerequisites are not fulfilled, may gathered evidence still be used against the company?

A search of company premises can be carried with a judge's warrant, or by the prosecutor's warrant in urgent cases. The search warrant should detail the suspected criminal act to which the search relates, the person(s) to be searched, the address, the property to be searched and the duration of the warrant. In principle, the prosecutor should be present during the search. However, where this is not possible, the search can be made in the presence of two aldermen or neighbours. ("Aldermen" are elected government officials who act as neighbourhood representatives, and a "neighbour" is someone who lives in the same neighbourhood and who agrees to be a witness during a search).

In case of non-compliance with the rules on search warrants, the evidence gathered in the search cannot be used in court proceedings. Furthermore, anybody whose rights are violated by a non-compliant search can claim pecuniary and non-pecuniary damages.

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14. Are deals, non-prosecution agreements, or deferred prosecution agreements available and common for corporations in your jurisdiction?

Deals and non-prosecution or deferred prosecution agreements are not available under Turkish law. However, the prosecutors have discretionary powers whether to commence criminal action under certain circumstances. For criminal acts which require filing of a complaint and are punishable by maximum one year of imprisonment, if the defendant has no criminal past, the prosecutor can defer the criminal case for five years. If the suspect does not commit any crime during this five year period, the prosecutor may decide not to commence any criminal proceedings.

Since criminal liability does not attach to companies, the deferment of prosecution would only be applicable for the company's related directors, officers, or employees.

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15. What types of penalties (e.g. fines, imprisonment, disgorgement, or debarment) may companies or its directors, officers, or employees face for misconduct of (other) individuals of the company?

Corporations are not subject to criminal responsibility under Turkish law. However they can be subject to sanctions such as administrative fines, cancellation of business, and permits or expropriation (i.e. taking possession of assets). This will depend on the type of the misconduct committed by their directors or officers.

Individuals who have supervisory duties may face sanctions not only for their own misconduct but also in relation to misconduct of other employees under their supervision. These may include imprisonment, fines, or official debarment from their profession.

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16. Please briefly describe any investigations trends in your country (e.g. recent case law, upcoming legislative changes, or special public attention on certain topics)?

Since internal investigations are not common and not widely conducted in the country, precedents are very rare, but as a result of the accession talks between Turkey and the European Union, there is a tendency for local corporations to follow the practices in Europe. Although the process for new legislation is slow, as long as the accession talks continue as planned, the legal environment in this regard would most probably evolve accordingly.

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She speaks English, German and Turkish and currently holds membership in Istanbul Bar Association since 2006.

Ukraine

Redcliffe Partners

Ario Dehghani

TABLE

	Corporate Liability	Public Bribery	Commercial Bribery	Extraterritorial Applicability of Criminal Laws	Adequate Procedures Defence
Yes	X	X	X	X	
No					X

QUESTION LIST

1. Do any specific procedures need to be considered in case a whistleblower report sets off an internal investigation (e.g. for whistleblower protection)?

General employment law principles apply to whistleblowers who are employees. They cannot be dismissed or otherwise penalised for making a report where that report relates to actual or potential suspicions of illegal behaviour or behaviour that is contrary to the public interest.

If the whistleblower report is made to law enforcement authorities (e.g. the prosecutor's office, the Police, the National Anti-Corruption Bureau, the National Agency on Corruption Prevention), the whistleblower can request the authorities to protect them and their families where there is a threat to life.

In addition, Ukrainian law provides that an internal investigation must be conducted in certain circumstances. In particular, the Law on Preventing Corruption provides that certain types of entities, including certain public authorities and public entities (which include state-owned and municipality-owned entities) must have anti-corruption programmes in place which should include the conduct of internal investigations.

Where a whistleblowing report is made to a law enforcement authority, the authority concerned is required to review anonymously filed whistleblower reports within 15 days (or maximum 30 days) and non-anonymously filed reports within one month (or maximum 45 days).

There is no specific procedure for reviewing whistleblower reports made to private companies. However, the Model Anti-Corruption Programme for legal entities, which applies to:

- Companies (including foreign-owned companies) which participate in the public procurement procedure for projects equal to or exceeding 20 million Hrywnja; and
- Public entities (as described above) and entities, where the state or municipality own 50 or more percent, and have 50 or more employees and an annual income exceeding 70 million Hrywnja

provides that relevant companies must have an anti-corruption programme in place which includes a procedure for internal investigations.

Where the internal investigation relates to potentially criminal conduct, all entities are obliged to notify law enforcement authorities about "serious" and "particularly serious" crimes. Failure to notify is considered a crime.

2. Do the following persons/bodies have the right to be informed about an internal investigation before it is commenced and/or to participate in the investigation (e.g. the interviews)?

a) Employee representative bodies, such as a works council

b) Data protection officer or data privacy authority

c) Other local authorities

What are the consequences in case of non-compliance?

a) Trade unions established within individual companies (so-called "primary trade union organisations") will only have the right to be informed about and/or participate in an internal investigation when the investigation relates to accidents and/or occupational diseases of employees (i.e. a disease that occurs as a result of work or occupational activity). Violation of this right can result in a small fine.

b) Companies have the obligation to notify the data protection authority in Ukraine (the Ukrainian Parliament Commissioner for Human Rights) about the processing of sensitive personal data, not related to employment issues, within 30 days after the start of processing. This obligation also applies to internal investigations where such data is being processed.

Non-compliance with this obligation can lead to an administrative fine of up to 6,800 Hrywnja (approximately €200) for each violation and up to 34,000 Hrywnja (approximately €1,000) for repeated violations.

There are no obligations to notify the data protection officer(s) of the investigated company.

c) Where the company is public (as described in question 1), upon becoming aware of any corruption incident or after receiving information about a possible corruption incident, the heads of public body and their departments must take measures to stop the violation and immediately inform the responsible anti-corruption state authorities.

Financial institutions (e.g. banks and insurance companies), stock exchanges and other companies conducting financial monitoring have to notify the State Financial Monitoring Service of Ukraine and the respective law enforcement authorities within a day when a financial transaction conducted or monitored by them is, or may be, related to a crime.

Private companies are not obliged to notify law enforcement authorities or involve them in internal investigations.

However, the company must notify the law enforcement authorities about the results of the investigation if a corruption offence was determined. Besides, Ukrainian law foresees a notification obligation for individuals and potential criminal liability in cases where an individual becomes aware of conduct pertaining to certain serious and/or particularly serious crimes.

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3. Do employees have a duty to support the investigation, e.g. by participating in interviews? If so, may the company impose disciplinary measures if the employee refuses to cooperate?

There is no explicit obligation under Ukrainian law for employees to support an internal investigation. However, the employee is obliged to fulfil any lawful order of the employer. This can also include an order to support an internal investigation. Not supporting the investigation can trigger disciplinary penalties, including dismissal.

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4. May any labour law deadlines be triggered or any rights to sanction employees be waived by investigative actions? How can this be avoided?

There are no labour law deadlines triggered or any rights to sanction employees waived by investigative actions. However, disciplinary actions against an employee under labour law can only be conducted within a certain time limit of up to six months after the violation took place. This time limit only affects labour law actions against the employee.

5. Are there any relevant data privacy laws, state secret laws, or blocking statutes in your country that have to be taken into account before

a) Conducting interviews?

The provisions relating to personal data are contained in the law "On Personal Data Protection". Personal data includes all information which can be used to identify an individual. If a company or its representatives collect personal data of individuals during an internal investigation, the company is obliged to inform the respective data subjects about the purposes of the collection, the respective processing actions (e.g. transfer, retention, and use of the data), the persons involved in the processing actions, the data subject's rights and potential transfers of the data to foreign countries.

We suggest obtaining a waiver of data protection rights from the interviewee beforehand and/or asking to sign a commonly used privacy notice.

Ukrainian law prohibits the transfer of personal data from Ukraine to outside Ukraine, if the relevant country does not reflect an adequate level of data protection compared to the one based on Ukrainian law. Under Ukrainian law, "safe" countries to transfer data to are, in particular,

- Member States of the European Economic Area;
- Signatories of the ETS No. 108 Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data; and
- Countries with a data protection regime approved by the Government of Ukraine (no such approval published yet).

Ukrainian law further prohibits the provision of data or information relating to state secrets or bank secrets, falling under a professional confidentiality obligation (e.g. doctor-patient, attorney-client), and specifically labelled as confidential information by the owning company. During the internal investigation, interviewees with access to such information are prohibited to disclose such information. Ukrainian law only allows the release of such information when such information is officially requested by public authorities. We suggest assessing beforehand if the information requested from the interviewee can fall into one of the above categories.

We suggest anonymising the collected personal data as far as possible to avoid any potential violation of Ukrainian Data Protection law and not to burden the investigating company with unnecessary notification obligations.

b) Reviewing emails?

Reviewing private emails without a court ruling can constitute a violation of the constitutional right for secrecy of correspondence and can be a criminal offence.

The potential obligations for the investigating company in relation to data privacy, state secrecy and confidentiality outlined above at question 5a also apply in relation to the collection and review and other use of emails of employees and/or third parties. The investigating company would have the obligation to inform each data subject about the processing actions and the purpose, as well as about safeguarding actions undertaken (e.g. in cases of data transfer abroad).

In this regard, we also suggest anonymising the collected personal data as far as possible.

c) Collecting (electronic) documents and/or other information?

The potential obligations for the investigating company in relation to data privacy, state secrecy and confidentiality outlined above at question 5a also apply in relation to the collection and use of other documents and information. In this regard, we also suggest anonymising the collected personal data as far as possible.

d) Analysing accounting and/or other mere business databases?

Accounting or business databases may contain personal data or information constituting state secrets or bank secrets. In such cases, the restrictions and obligations as outlined above at question 5a would also apply here.

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6. Before conducting employee interviews in your country, must the interviewee

a) Receive written instructions?

There is no obligation for a company to provide any instructions to its employees before interviewing them as part of an internal investigation.

b) Be informed that he/she must not make statements that would mean any kind of self-incrimination?

The right not to incriminate oneself is a constitutional right. An employee can assert it during any internal investigations.

There is no obligation on the employer to inform interviewed employees about this right.

c) Be informed that the lawyer attending the interview is the lawyer for the company and not the lawyer for the interviewee (so-called "Upjohn warning")?

There is no such concept in Ukrainian law and no obligations in this regard.

d) Be informed that he/she has the right that his/her lawyer attends?

There is no such obligation for the employer. Such an obligation only applies to public criminal proceedings, and not interviews conducted as part of an internal investigation.

e) Be informed that he/she has the right of a representative from the works council (or other employee representative body) to attend?

There is no general obligation for the employer to notify the interviewed employees about such right. Further, such right only exists where the investigation relates to accidents and/or occupational professional diseases of employees.

f) Be informed that data may be transferred cross-border (in particular to the United States)?

Yes. When transferring personal data outside of Ukraine, the employee must provide a prior general consent to the transfer and the receiving country must have an appropriate level of data protection (for countries with an appropriate level of data protection, see question 5a above).

When the receiving country does not have the appropriate level of protection (e.g. the United States), the employer can only transfer personal data to such country if one of the following exceptions is met:

- It has received an additional explicit consent from the data subject for the transfer; or
- To protect the public interest or perform legal requirements.

The law requires the employer to inform its employees that their personal data has been passed to third parties within ten days after the transfer. This can be done by the prior signing of a privacy notice. Notification is not required when such transfer is required by investigating authorities, or if the employee signed a waiver of notice.

g) Sign a data privacy waiver?

Ukrainian law does not require employees to waive their data privacy rights before conducting employee interviews. However, the employer can ask the employee to sign such waiver on a voluntary basis.

h) Be informed that the information gathered might be passed on to authorities?

Yes. The law requires the employer to inform its employees that their personal data has been passed to third parties within ten days after the transfer.

i) Be informed that written notes will be taken?

Ukrainian law does not provide such an obligation.

7. Are document hold notices or document retention notices allowed in your country? Are there any specifics to be observed (point in time/form/sender/addressees etc.)?

Yes. Although it is currently not common practice in Ukraine, we recommend to always use document-retention notices in connection with internal investigations and to include an adequately long period of retention. Such approach can be very helpful in case of later investigations conducted by law enforcement authorities (e.g. the prosecutor department).

8. May attorney-client privilege be claimed over findings of the internal investigation? What steps may be taken to ensure privilege protection?

Attorney-client privilege can be claimed in Ukraine and has no time limitation. However, attorney-client privilege covers only attorneys who have a special attorney licence and are independent (most of the lawyers in Ukraine are not licenced attorneys).

Attorney-client privilege covers client information, substantive advice, consultations, clarifications, documents drafted by the attorney, and other documents and information received from the client as part of the provision of legal advice. It also applies to information provided by a person who consulted an attorney but did not become a client.

We suggest trying to include as much as possible outside attorneys when conducting an internal investigation to secure the privilege rights, also with regard to foreign law regimes (e.g. the United States or the European Union).

In practice, Ukrainian public authorities occasionally still infringe the attorney-client privilege. However, there are court proceedings which can help to protect the privilege rights.

9. Can attorney-client privilege also apply to in-house counsel in your country?

Attorney-client privilege in Ukraine covers only attorneys who have a special attorney licence and are independent. Most lawyers practicing in Ukraine, including in-house counsel, do not have such a licence and are not required to have it. Furthermore, in-house counsel would not be seen to be independent. As such, attorney-client privilege does, at the moment, not apply to in-house counsel.

However, currently a draft law is being prepared which would allow, as an exception, in-house counsel to act as attorneys for their employer. If this law is adopted, attorney-client privilege could also apply to in-house counsel.

Nevertheless, we suggest trying to include as much as possible outside attorneys when conducting an internal investigation to secure the privilege rights, also with regard to foreign law regimes (e.g. the United States or the European Union).

10. Are any early notifications required when starting an investigation?

a) To insurance companies (D&O insurance etc. to avoid losing insurance coverage)?

D&O insurance is generally not provided by Ukrainian insurance companies. For other types of insurance (e.g. professional insurance, third-party insurance, product liability insurance) notification obligations are set by individual insurance contracts.

b) To business partners (e.g. banks and creditors)?

Relations between business partners are usually regulated by contract. Notification obligations may be set out in such contracts.

c) To shareholders?

The law does not specify an express obligation to inform shareholders when starting an internal investigation.

However, under Ukrainian law, the director is in general obliged to act in the interests of the company, in good faith and reasonably. This obligation can also include an upfront notification of shareholders before launching an internal investigation. Such an obligation should be assessed on a case-by-case basis.

There is an additional obligation of the director to provide information about the company's activity, also including an internal investigation, at the shareholder's explicit request.

The Model Anti-Corruption Programme establishes an obligation to notify shareholders if a corruption violation has occurred or is suspected. Although this obligation is only obligatory for companies which participate in a public procurement procedure for projects exceeding 20 million Hrywnja, and only for the time participating in the specific tender procedure, state authorities recommend that other companies also should use such approach.

Corporate governance rules in this regard are not well developed on a legislative level, although usually companies develop detailed internal regulations. An obligation to notify the shareholders might, therefore, also be based on the individual charter or policy of the respective company.

d) To authorities?

The Model Anti-Corruption Programme provides an obligation for shareholders and the head of the company to notify the respective public authorities about an administrative or criminal corruption offence known and discovered within an internal investigation. The anti-corruption programme is obligatory for companies participating in a public procurement procedure for projects exceeding 20 million Hrywnja and only with regard to the specific tender procedure. However, state authorities recommend that other companies also should adopt this approach.

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11. Are there certain other immediate measures that have to be taken in your country or would be expected by the authorities in your country once an investigation is started, e.g. any particular immediate reaction to the alleged conduct?

Private companies have no obligation to take immediate measures with regard to an internal investigation. However, as a matter of practice, the company should try to stop any on-going misconduct and consider remediation measures.

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12. Will local prosecutor offices generally have concerns about internal investigations or do they ask for specific steps to be observed?

There are no concerns or specific steps required by prosecutors regarding internal investigations.

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13. Please describe the legal prerequisites for search warrants or dawn raids on companies in your country. In case the prerequisites are not fulfilled, may gathered evidence still be used against the company?

Searches can be conducted only within open criminal investigations. They are based on the mandatory decision of the investigating judge. The initiators can be a prosecutor, or an investigator together with a prosecutor.

The court decision must be provided to the company. The scope of the search must be within its outlined purpose. When the search is at a company's premises, the search record is provided to the head of the company.

Dawn raids without the prior approval of the investigating judge can be conducted by the investigator in exceptional cases, such as to save people's lives or when chasing a suspect. Even in this case, the dawn raid must be authorised by the investigating judge retrospectively. If the dawn raid is not subsequently authorised, its results are considered invalid and inadmissible.

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14. Are deals, non-prosecution agreements, or deferred prosecution agreements available and common for corporations in your jurisdiction?

Ukrainian law does not provide for deferred prosecution agreements or non-prosecution agreements. However, in criminal proceedings there is the possibility to conclude:

- A settlement agreement between the victim and the accused for minor crimes and crimes deemed to be of average weight; and
- A plea agreement between the prosecutor and the accused for:
  - Minor crimes, crimes with average weight, and serious crimes; and
  - Particularly serious crimes investigated by the National Anti-Corruption Bureau (in relation to corruption related offences by public officials), when the accused reveals other suspects in committing the similar crime which can be proven by evidence.

Criminal liability can also apply to companies. In such cases, a settlement agreement or a plea agreement cannot be concluded.

A plea agreement requires the prior consent of the person whose private interests have been damaged. The agreement has to be approved by the competent court. Such agreements are common in Ukraine.

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15. What types of penalties (e.g. fines, imprisonment, disgorgement, or debarment) may companies or its directors, officers, or employees face for misconduct of (other) individuals of the company?

Under Ukrainian law, directors of public and private companies cannot be penalised for violations by other company employees. However, directors can face liability claims from shareholders based on improper management which causes damage to the company. This is based on the director's obligation to act in the best interests of the company.

Criminal liability for the company can be based on employees' misconduct benefitting the company. These offences may include, for example:

- Bribery of public officials or private companies; or
- Money laundering.

Criminal liability for private companies can include a fine up to 1,275,000 Hrywnja (approximately €40,000). The private company also has to compensate all losses, and, in case of a corruption offence, the amount of illegal benefit received or which could have been received as a result of the offence.

Public bodies, public entities financed from state or local budgets, or by international organisations are as legal persons exempted from certain criminal liabilities. However, their public officials and executives can, as individuals, be penalised for committing corruption offences, including potential imprisonment of up to 12 years.

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16. Please briefly describe any investigations trends in your country (e.g. recent case law, upcoming legislative changes, or special public attention on certain topics)?

The number of internal investigations is increasing. For example, the dismissal of the Vice-President of the state-owned Ukrtransgaz in August 2017 was a result of an internal investigation.

The largest Ukrainian bank, Privatbank, has also recently conducted an internal investigation due to inconsistencies with its prior audit and risk assessment results.

Finally, Ukrainian subsidiaries of global companies have recently become subjects of FCPA investigations relating to activities in Ukraine. The most notable examples are ADM, Teva, and IBM.

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Ario's track record includes a vast experience of over ten years in compliance due diligence, implementing and auditing internal compliance systems, conducting compliance investigations on a national and international level (including FCPA and UK Bribery Act issues), and delivering customised training for clients.

Before joining Redcliffe Partners, Ario was a lawyer for almost eight years with Hogan Lovells' Munich office, from where he supported and advised clients worldwide.

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TABLE

	Corporate Liability	Public Bribery	Commercial Bribery	Extraterritorial Applicability of Criminal Laws	Adequate Procedures Defence
Yes	X	X	X	X	X
No					

QUESTION LIST

1. Do any specific procedures need to be considered in case a whistleblower report sets off an internal investigation (e.g. for whistleblower protection)?

An employee or worker can claim whistleblower protection if he complains about a criminal offence, a failure to comply with a legal obligation, a miscarriage of justice, health and safety risks, damage to the environment or a "cover-up" of any of the above matters. The employee must have a reasonable belief that the disclosure is made in the public interest and it must be made to an appropriate person (e.g. a lawyer or specified regulators).

If an employee or worker makes a protected disclosure, they are entitled not to be subject to any detriment for doing so. The fact that a whistleblower has triggered an internal investigation does not mean specific procedures have to be followed, but it is important to bear these employee protections in mind.

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2. Do the following persons/bodies have the right to be informed about an internal investigation before it is commenced and/or to participate in the investigation (e.g. the interviews)?

a) Employee representative bodies, such as a works council

b) Data protection officer or data privacy authority

c) Other local authorities

What are the consequences in case of non-compliance?

a) Employee representative bodies are not entitled as a matter of law to be informed about or to participate in an internal investigation. In the United Kingdom, there is no formal legal mechanism for on-going employee representation akin to a works council as seen in some other European jurisdictions.

b) The UK's data privacy authority, the Information Commissioner's Office ("**ICO**"), has published non-binding guidance stating that serious breaches of data security (e.g. loss, alteration, unauthorised disclosure of, or access to, personal data which results in significant actual or potential detriment to data subjects), should be notified to the Information Commissioner's Office. Personal data is any data which allows a person to be directly or indirectly identified (e.g. an email address, an employee number, or an IP address).

In the case of non-compliance, there are a number of tools available to the ICO, such as serving information notices requiring the company to provide information, serving enforcement notices and 'stop now' orders where there has been a breach, and conducting consensual or compulsory audits.

The EU General Data Protection Regulation ("**GDPR**") will come into force on 25 May 2018. This requires every company that carries out the large scale systematic monitoring of individuals or large scale processing of special categories of personal data to appoint a data protection officer. The data protection officer shall (among other things) inform and advise data controllers of their obligations under the GDPR and monitor compliance with the GDPR. There is no obligation to notify data protection officers when commencing internal investigations.

c) Local authorities do not have the right to be informed about and/or to participate in the investigation (e.g. the interviews).

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3. Do employees have a duty to support the investigation, e.g. by participating in interviews? If so, may the company impose disciplinary measures if the employee refuses to cooperate?

Employees are under implied contractual obligations to follow the reasonable instructions of their employer. They may also be under express obligations to cooperate with the employer and to disclose any wrongdoing. Therefore, employees can be required to participate in interviews and assist an investigation. Failure to do so could result in disciplinary action being taken against them.

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4. May any labour law deadlines be triggered or any rights to sanction employees be waived by investigative actions? How can this be avoided?

There is no specific timescale in which an employer has to take action against an employee once an investigation has commenced and therefore failure to sanction an employee within a specific time will not constitute a waiver of the employer's rights. However, if an employer decides to take disciplinary action against an employee following an internal investigation, such action should be taken without undue delay.

In relation to claims arising as a result of investigative actions, the usual limitation periods under UK law will apply.

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5. Are there any relevant data privacy laws, state secret laws, or blocking statutes in your country that have to be taken into account before

a) Conducting interviews?

The provision of documents before an interview may give rise to data protection issues, particularly where multiple jurisdictions are involved. Careful thought should be given to whether personal data is being disclosed to or by an interviewee.

b) Reviewing emails?

Reviewing emails as a part of an investigation should comply with the safeguards set out in the UK Data Protection Act 1998. Employees' emails may typically be reviewed as part of the investigation, however, personal emails should be excluded from the review (subject to agreements between the employee and the company, such as the company handbook) and the collection of personal data must be kept to the minimum amount necessary. Although an employee's consent is generally not required to review their business emails, an employee should be given notice in most circumstances that email monitoring is taking place, as well as being given other generic information relating to the review. Individuals involved in an investigation have the right to copies of the data collected pertaining to them.

c) Collecting (electronic) documents and/or other information?

The collection of documents and/or other information is subject the data protection laws. These laws will apply when the documents collected contain personal information.

d) Analysing accounting and/or other mere business databases?

Data protection laws will apply to the extent that the databases contain personal data.

In general, in circumstances where (i) data is handled in a reasonable and proportionate manner (particularly where the data is held on the company's IT systems, and efforts are made to avoid personal data) and (ii) an investigation is conducted in the context of legal proceedings or where a company is seeking legal advice, data protection issues are unlikely to arise.

Often employment contracts and staff handbooks give the firm a right of inspection of documents which are created on or held on the firm's IT systems. Many organisations also have data protection agreements in place (also known as model clauses or an IGA) which permit the flow of information within an organisation.

The UK government has stated that the current UK law, (the Data Protection Act 1998), will be replaced by the new Data Protection Act which will implement most of the GDPR. This is notwithstanding that the United Kingdom will no longer by bound by the GDPR after leaving the EU.

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6. Before conducting employee interviews in your country, must the interviewee

a) Receive written instructions?

There is no specific legal requirement for the employee to receive written instructions about the matters the interview will cover.

b) Be informed that he/she must not make statements that would mean any kind of self-incrimination?

There is no specific legal requirement to inform the employee that they have a right not to incriminate themselves as part of an internal investigation. In practice, such a warning may be given.

c) Be informed that the lawyer attending the interview is the lawyer for the company and not the lawyer for the interviewee (so-called "Upjohn warning")?

There is no specific legal requirement to deliver an "Upjohn warning" at the start of an internal investigation interview that does not have a U.S. context. In practice, such warnings should generally be given.

d) Be informed that he/she has the right that his/her lawyer attends?

There is no specific legal requirement that an employee should be informed that he/she has the right to be accompanied by a lawyer, although employees cannot be prevented from attending with their lawyer.

e) Be informed that he/she has the right of a representative from the works council (or other employee representative body) to attend?

There is no specific legal requirement to allow an employee to be accompanied to an internal investigatory interview by a works council or other employee representative and it would be unusual for this to be permitted.

f) Be informed that data may be transferred cross-border (in particular to the United States)?

In all cases, care should be taken where a transfer of personal data outside the European Union is possible. Under UK law, a company cannot transfer data to countries outside the EEA unless that country ensures an adequate level of protection for the rights of data subjects when processing personal data. The United States has been held not to have adequate standards of data protection. Suitable procedures (such as a contract in the form of a data protection notice signed by the data subject) need to be put in place to make up for the lack of adequate standards before exporting any data outside the EEA.

There is no specific legal requirement to inform the employee that data may be transferred cross-border, assuming that one of the conditions for cross-border data transfers applies. It would be good practice to inform the employee of such transfers, although this information may already be included in the employee privacy notice.

g) Sign a data privacy waiver?

There is no specific legal requirement to ask the employee to sign a data privacy waiver before conducting an interview. As the employer will be processing the employee's personal data in the course of the investigation, one of the conditions for processing data (other than consent) is likely to be met.

h) Be informed that the information gathered might be passed on to authorities?

There is no specific legal requirement to inform the employee that information might be passed on to authorities (unless the investigation has a U.S. context), but it would be good practice to do so.

i) Be informed that written notes will be taken?

There is no specific legal requirement to inform the employee that written notes will be taken, but it would be good practice to do so.

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7. Are document hold notices or document retention notices allowed in your country? Are there any specifics to be observed (point in time/form/sender/addressees etc.)?

A company should take immediate steps to preserve all relevant evidence. A document hold notice should be sent to relevant custodians identifying the categories of document that should be preserved.

It is important that all documents identified as potentially relevant are isolated and remain secure throughout the investigation.

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8. May attorney-client privilege be claimed over findings of the internal investigation? What steps may be taken to ensure privilege protection?

The United Kingdom recognises the concept of legal advice privilege between a lawyer and client, which broadly reflects and is comparable to that of attorney client privilege in the United States. Legal advice privilege may apply to confidential communications between a lawyer and their client for the purpose of giving or obtaining legal advice. Legal advice privilege extends to documents which evidence such communications, including relating to the findings of the investigation.

When assessing legal advice privilege, the "client" is only those employees and officers charged with obtaining legal advice. Communications involving employees who have not been expressly tasked to seek advice are not protected, even if they are necessary in order to provide information to lawyers for obtaining such advice. As legal advice privilege does not apply to communications with third parties, communications with external parties such as forensic accountants are also not protected. Note in particular, file notes of investigation interviews may not attract legal advice privilege, even if taken by a lawyer.

A distinct category of legal advice privilege exists through litigation privilege. Litigation privilege can be claimed over any confidential communication between a client, lawyer and third party where the sole or dominant purpose of the communication is for use in actual, pending or contemplated litigation. It should be noted that litigation privilege will only apply in the context of an investigation if litigation is reasonably contemplated when the investigation begins, and any communication or document is created for the dominant purpose of that litigation. Litigation privilege is therefore unlikely to apply to purely internal investigations.

The state of English law in this regard is in flux and advice should be taken before creating written records of investigation findings.

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9. Can attorney-client privilege also apply to in-house counsel in your country?

Generally, both legal advice privilege and litigation privilege apply equally to in-house and external counsel, save for competition investigations by the European Commission in which internal advice is not considered privileged.

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10. Are any early notifications required when starting an investigation?

a) To insurance companies (D&O insurance etc. to avoid losing insurance coverage)?

It is likely to be a condition of certain insurance policies that the insurer is notified of issues which have given rise to an internal investigation. Each individual policy should be reviewed.

b) To business partners (e.g. banks and creditors)?

It is unlikely to be a condition of agreements with business partners that they are notified of issues which have given rise to an internal investigation. However, relevant agreements should be checked, particularly if the matters under investigation could impact or involve the business partner.

c) To shareholders?

If the allegations are serious and could expose the company or directors to liability or reputational damage, the board of the company ought to be notified but not necessarily shareholders.

Companies whose securities are admitted to trading on a market operated by the London Stock Exchange are subject to on-going disclosure obligations. Publicly listed companies must issue a market announcement (without delay) of any major new development that may lead to a substantial share price movement.

d) To authorities?

Advice should be taken before notifying any regulatory authority about an internal investigation
Generally there is no positive obligation to report crime. The main exception to this is where there is a suspicion of money-laundering. The extent of the obligation to report money-laundering (or a suspicion thereof) will depend on whether the person or company is in the 'regulated sector' (including, for example, Financial Conduct Authority ("**FCA**") regulated firms, solicitors and accountants). Companies or persons not within the regulated sector have an obligation to report money laundering if they think they might be involved in an arrangement or transaction related to the relevant criminal property. The obligations in the regulated sector are more onerous.

Advice should be taken if you perceive that money laundering or another criminal offence has been committed.

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11. Are there certain other immediate measures that have to be taken in your country or would be expected by the authorities in your country once an investigation is started, e.g. any particular immediate reaction to the alleged conduct?

It is a criminal offence to destroy, falsify, conceal, or dispose of relevant documents when a person knows or suspects an investigation of serious or complex fraud is already being, or is likely to be, undertaken by the police or the Serious Fraud Office ("**SFO**"). If unlawful conduct has ceased and the company was aware or suspected that it possessed funds obtained from the conduct, but it failed to take any action in respect of those funds, the company could commit a money laundering offence.

If a company failed to take any steps to address an allegation of bribery, it is unlikely that they would be able to rely upon the 'adequate procedures' defence in the event of a prosecution of corporate failure to prevent bribery under the Bribery Act 2010.

As such, a company should, as a first step, preserve all documents and material that may be relevant to any criminal investigation. A failure to stop offending behaviour or take preventative action leads to a risk of committing other offences.

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12. Will local prosecutor offices generally have concerns about internal investigations or do they ask for specific steps to be observed?

UK authorities do not generally object to internal investigations so long as they do not hinder a criminal investigation. To that end, the company conducting an internal investigation must take a thorough and forensically sound approach to data preservation and collection. The same applies to interviewing witnesses.

If a matter becomes known to an authority before an internal investigation has commenced, external advice should be taken on how to engage with authorities prior to beginning any internal investigation.

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13. Please describe the legal prerequisites for search warrants or dawn raids on companies in your country. In case the prerequisites are not fulfilled, may gathered evidence still be used against the company?

Authorities that investigate corporate crime in the United Kingdom may conduct dawn raids of business or residential premises under a search warrant issued by a court. When a raid is carried out under a warrant, the authority may use reasonable force to gain entry to the premises. The authority may only act within the scope of the warrant.

Legally privileged material cannot be seized unless it was created with the intention of the furtherance of a crime (the crime-fraud exception). If legally privileged material cannot be separated from non-privileged material, it can be seized but must be reviewed for privilege by an independent lawyer before it is examined by the investigating team.

Where the Competition and Markets Authority has reasonable grounds for suspecting that a cartel offence has been committed, it may conduct a dawn raid of business premises without a warrant.

If there are significant defects in the process of obtaining a warrant, authorising a raid or executing a raid, the raid can be challenged by judicial review in the courts. If it is rendered unlawful, the raid may be deemed a civil or criminal trespass. Any material seized during the raid could become inadmissible.

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14. Are deals, non-prosecution agreements, or deferred prosecution agreements available and common for corporations in your jurisdiction?

Non-prosecution agreements are not available in the United Kingdom. DPAs have been available in England, Wales and Northern Ireland since 2014. They are available to the Crown Prosecution Service and the SFO.

A prosecutor may invite a suspect into DPA negotiations where it determines that the full extent of the corporate offending has been identified and the public interest would benefit from a DPA. If it is possible to agree the terms of a DPA and a statement of facts, the company will be formally charged with the criminal offence(s). All DPAs must be approved by the court.

The criminal proceedings will be suspended for a period defined by the terms of the DPA. If there is full compliance with the DPA, the criminal proceedings will be formally discontinued at the end of the period. If there is a breach of the DPA which cannot be remedied, criminal proceedings will resume. At the time of writing, there have been four SFO DPA agreements.

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15. What types of penalties (e.g. fines, imprisonment, disgorgement, or debarment) may companies or its directors, officers, or employees face for misconduct of (other) individuals of the company?

Penalties include imprisonment for individuals, fines, disgorgement, and compensation orders. Individuals can also be disqualified from being a director of a company for up to 15 years. Companies may be debarred from public tendering for up to five years.

Certain regulatory authorities can impose additional penalties. For example, the FCA can prohibit authorised firms from undertaking specific regulated activities for up to 12 months and impose fines on firms and individuals.

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16. Please briefly describe any investigations trends in your country (e.g. recent case law, upcoming legislative changes, or special public attention on certain topics)?

In the United Kingdom, the SFO has become increasingly involved in internal investigations. David Green QC, the director of the SFO, has sought to assert the SFO's prosecutorial role. He has revised the SFO's policy on corporate self-reporting, meaning that any corporate seeking to avoid prosecution must show "genuine cooperation" from the outset of an SFO investigation.

Authorities have been taking an increasingly combative approach to claims to legal professional privilege in recent years. There are a number of pending cases before the courts in this regard.

The United Kingdom currently implements multilateral sanctions regimes through EU legislation. The UK parliament is currently considering how it can continue to impose, update and lift sanctions and AML regimes following Brexit.

The UK government is also consulting on the extension of corporate liability for economic crimes beyond bribery.

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