Cross-Border Investigation from an European Perspective

Cross-Border Investigations Not at Cross Purposes

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I. Introduction:

At intervals that are getting shorter and shorter, we can read headlines in German and European newspapers about investigating authorities implementing supervisory or criminal law investigations against companies and their boards. The bandwidth of these accusations ranges from bribery/corruption through manipulation of financial markets to money laundering and breaches of environmental regulations.

A recent case in Germany concerns the investigation of the department of public prosecutions and the supervisory authorities against the DAX listed K+S group. The salt and fertilizer producer is accused of in the past having illegally disposed of waste. Although a permit existed, it should not have been allowed to be issued the way it was issued, however. In this connection, the investigations targeted both the group and the members of the executive board and the supervisory board.

The company said that they were cooperating fully with the authorities.

These developments are not a German or European phenomenon – they are global. In the era of global players, knowing the point as of which corporate wrongdoing has to be reported to the authorities and how internal investigations prior to this have to be conducted is imperative. The aim of this script is to shine a light on the legal prerequisites for internal investigations in Europe and to give recommendations on how compliance programs can be successfully integrated into the corporate structure. This way, preventative measures can be taken to ensure that a well-functioning contact point exists where whistleblowers can report breaches. This way, both civil and criminal law risks can be minimized.

II. Corporate wrongdoing & self-reporting

Malfeasance by managers attributed to corporate entities exposes companies not only to the risk of civil liability, but also to criminal or administrative liability. In multinational companies, wrongdoing do not stop at the specific state border.

As a result, prosecutors in different jurisdictions are increasingly working together in relation to the same matter, either with a view to pursuing parallel prosecutions in their respective jurisdictions or with a view to collecting evidence in one jurisdiction for use in the other.

In Europe, the investigations are carried out by the respective state authority both against the company and the individuals involved. In this connection, the state has an investigative monopoly and also the power to finally impose sanctions.

Regarding the latest developments in multinational companies and the efforts of the state authorities to curtail white collar crimes, companies must expect an increase of enforcement activities, in particular, in the sectors of financial service provision. International authorities have committed themselves to increasing efforts to take legal action against insider trading, money laundering, corruption and the manipulation of markets.

For companies in Europe, however, the applicable rule is that there is no general obligation of companies' and their management to report their own corporate wrongdoing to the competent public authorities.

This follows the general principle that no-one can be obliged to incriminate himself. However, there are few exceptions that may vary throughout the EU. Statutory obligations to "self-report" wrongdoing may occur within the areas of tax fraud, capital crimes (e.g. murder), money laundering, terrorist funding, insider trading & market manipulation.

The so-called business judgement rule (BJR) does not constitute an express duty to act. According to the rule, company management must act such that the company will not be exposed to harm and that decisions are made in the company's best interests. Following assessment and taking into account the available information, this also includes making unpopular decisions if harm is being done to companies due to the fact that its management failed to follow the BJR, the administrative committees of the companies are encouraged, or obliged, to assert such damage against the management[1]. For the company management, this constitutes grounds for giving a lot of thought to the issue of whether corporate wrongdoing should be reported to the competent authorities or not.

However, one may also choose to report an offence voluntarily to obtain leniency, immunity or a settlement. In many countries of the EU, leniency – especially in competition law – is granted on a first-past-the-post basis. The disclosure and the report must be full and frank and must allow the prosecutor to have access to witnesses and details of any internal report. If a cartel is broken up, only the person who first cooperates in full will, as a general rule, not have a fine imposed on him. So if a company or association of companies wishes to obtain full immunity from fines, it must be the first to submit information and evidence enabling the competition authority to carry out a targeted inspection or to establish an infringement. A company that does not qualify for full immunity can apply for a reduction of the fine if it provides evidence that represents significant added value to the evidence already in the Competition Authority’s possession. In most cases, however, this procedure concerns only the outcome and the investigations in antitrust proceedings. In other areas of corporate wrongdoing, there is no guarantee that the report will have a beneficial effect, since there is no general obligation to report wrongdoing. Another benefit of turning oneself in is that it demonstrates good governance, because voluntary disclosure will probably make a better impression on the public than a dawn raid.

Besides that, investigative proceedings are usually triggered by:

- findings in the course of regular or specific audits or monitoring
- reporting obligations (e.g. on faults in chemical companies)
- incidents with external effects (e.g. water pollution)
- criminal complaints by disgruntled employees, shareholders, investors or competitors.

[1] German Federal Court of Justice (ARAG-Garmenbeck-Decision of 1997).

As a penalty, companies can only be subject to forfeiture or a fine under criminal law. Unlike the proceedings in the US, the turnover generated by the unlawful act is subject to forfeiture after tax has been taken into account. Forfeiture under regulatory law is discretionary but also applies to turnover. Corporate fines can be imposed up to the amount of the proceeds of the unlawful act after expenses and other deductions have been taken into account.

The scale of fines in the EU is increasing although fines are still fall far lower than those ensuing from authorities in the US.

III. Internal investigations

Irrespective of whether a company is obliged to report certain offences to the state authorities or whether state investigations are already being carried out, it can be an advantage for the company to internally inspect and clarify certain grievances.

A company may conduct its own internal investigations. Internal investigations at the instigation of management or other relevant bodies are not a "doubling" or "privatization" of state investigations. However, an internal investigation may encounter state investigations in different constellations and stages or even trigger same.

There are several ways for a company to perform an internal investigation, notably interviewing the relevant employees and auditing their paper and electronic files.

A company's internal investigation must comply with rules regarding privacy and employee protection, arising from various provisions from employment law, telecommunication law and privacy law. Those may be the reasons why internal investigations are carried out relatively rarely in France since they face practical as well as legal impediments and are not widely accepted. European law as such is hostile to sharing certain personal data, particularly outside the EU.

However, internal investigations are usually advantageous to both the corporate body and the prosecution.

Even though companies may conduct their own internal investigations, there is no statutory obligation in principle to carry out internal investigations. Depending on the country and the company structure, managers should carry out internal investigations to satisfy corporate governance, compliance requirements and to minimize the risk of liability. This may also be an effective way of preventing further wrongdoing. There are only few specific obligations under statutory law where companies - mostly in the financial services sector - must institute internal inquiries.[2]

[2] For Example, sec. 25a of the German Banking Act.

If there is sufficient initial suspicion of compliance violations, management is therefore urged to initiate internal investigations.

IV. Conducting internal investigations

1. National investigation

When conducting internal investigations, there are some relevant points that need to be heeded:

- Proper planning and identifying the scope of investigation
- Timing
- Hiring the right external resources
- Effectively utilizing internal resources
- Managing expectations of senior management
- Having a detailed investigation plan
- Effective communications throughout the course of the investigation

There is no European "Investigation Code" and no national "Investigation Code" in continental Europe. The method of conducting internal investigations depends on what is needed to satisfy legal requirements and is determined by the purpose served by the internal investigation. Such a decision may be guided by the BJR if no strict legal instructions are in place; taking the cost–benefit ratio into account is legitimate.

It is not always advisable to record statements word by word and have them authorized by the interviewees, but depends on the case.

Moreover, the employee concerned must be informed that investigations are being conducted against him.

The employees themselves are the primary source of information about internal grievances. External lawyers often conduct these interviews. As far as Germany is concerned, there are four fundamental issues in this connection that must be considered and known:

1. Employees' obligation to make a statement
2. No works council during the interview
3. Employee not entitled to be provided with a lawyer
4. Codetermination right of works council in terms of the content/structure of the interview and the investigations

Under German criminal procedure law, the accused has a right to remain silent in criminal proceedings[3]. According to statute, the accused may not be forced to incriminate himself. Towards the employer, however, he has a duty to make comprehensive statements on issues that are directly connected with the employee's personal field of work. This enforceable right exists even to the extent that the employee may incriminate himself for having committed misconduct. In subsequent criminal proceedings against the employee who must accept being accused of criminal conduct, the results of the internal investigations can be used forthwith because questioning within the framework of an internal interview is not a hearing in terms of criminal procedure law.

In this connection, the works council is only entitled to be informed about the employee who is being interviewed. This can be done either before or after the interview.

During the interview, it can also be useful to ask questions referring to documents. This is often the best option for understanding structures and correlations within the company. In this connection, the internal investigation faces the problem of permissibility in terms of data privacy protection law. It is necessary in this regard to take account of the national data privacy protection statutes governing collection, processing and use of employee data in each case.

In this context, the issue of what questions the employees may be asked during the interview often arises. Attention should be paid in this respect not to ask questions concerning the employee's private life or that have a potentially discriminatory element.
Furthermore, it must be taken into consideration that the interview – unlike in Great Britain – must not begin without the witness's/accused's explicit consent.

The employee is not entitled to have a member of the works council attend the interview. The codetermination right of the works council in this connection only covers the preparation of a questionnaire if such a questionnaire is intended to be used for several interviews. The employee is generally not entitled either to bring a lawyer to the interview unless the employee exclusively avails himself of an external lawyer for the execution of the interview.

Nor is the presence of a lawyer necessary in all cases, all the more because there are also examples of companies offering the employees amnesty programs and thus waiving compensation and dismissal if, in return, the employee actively participates in complete clarification of the breach of compliance.[4] This can contribute to the success of the investigations and also foster harmony in the workplace.

To prepare the talks and generally to clarify any misconduct of employees, it is often also necessary to examine electronic data. This is mostly about the employees' business e-mail correspondence. The works council is entitled to be provided with information also in this regard. It must additionally be given the possibility of verifying that data privacy protection is complied with during the examination also in this area. The works council is not entitled to

[3] See § 136 of the German Code of Criminal Procedure.
[4] E.g. Siemens.

any codetermination right regarding the examination of business-related documents over and above this. Such codetermination right only exists if it is intended to examine private documents of the employees.

Personal Data gleaned during the investigation and examination must be processed fairly and lawfully; collected for specified, explicit and legitimate purposes only; put out of context of an identifiable individual as soon as possible.

2. Cross-border investigations

In connection with international cross-border investigations, further practical and legal problems must be taken into account. In addition to the national particularities, the following "best practices" must be observed:

- Give Upjohn Warnings
- Form Channels for Cross-Border Data Transfers
- Comply with data privacy
    - Try to keep data within employing entity
    - Try to keep data within EU/EEC
    - Observe principles of data privacy (e.g. no excessive gathering of data)
- Consider pros and cons of delivering an oral vs. a written report

The principle of EU Data Privacy prohibits the transfer of personal information to countries outside the European Economic Area unless the country of destination provides an adequate level of protection. The US is not deemed to assure a sufficient level of protection. In order to transfer personal data or the relevant internal report to a parent company outside the EU/EEC, the company needs the consent of the employee.

3. Privilege

The company is not obliged to make the results of its internal investigation known to the authority. But companies must be aware that there is no absolute protection against seizure by government agencies of anything generated during the course of the investigation. As a matter of fact – under German law – the level of protection depends on where the files are stored. Communication between defendants and their defense counsel is largely protected. A court decision held that results of internal investigations by companies that are themselves exposed to risks under criminal and regulatory law are not protected from seizure.[5] A decision by another court in 2012 takes the opposite view, namely that all documents produced during and for the purpose of an internal investigation are protected in the professional's possession, including information obtained from persons not suspected.[6]

[5] Hamburg District Court, 608 QS 18/10 (15th of October 2010).
[6] Mannheim District Court, 24 QS 1712 (3rd of July 2012).

Correspondence with lawyer	Custody of lawyer	Custody of company
Before the beginning of proceedings	✓	**(-)**
After the beginning of proceedings	✓	**(-)**

Documents

- Correspondence
- Interviews
- Expert reports
- Data carriers
- Reports

Entire client-lawyer correspondence

H.M.: All documents that were generated within the fr

amework of and with reference to a concrete client-lawyer relationship (do not hide any documents).

V. Whistleblowers

According to a study, most discoveries of white collar crime can be traced back to open disclosures by people inside the company; after that, discoveries by chance and by disclosures through internal auditors. Discoveries through anonymous disclosures/ombudsman, on the other hand, make up a far smaller part.[7]

In Europe, the whistleblowing system – in comparison to the United States – has not yet gained acceptance in the public arena. For the public, the system of whistleblowing is largely still associated with denunciation. As a further aspect in addition to this is the fact that disclosing parties in Europe do not enjoy effective protection from detrimental impacts. One

[7] KPMG Survey on White Collar Crimes, 2014.

of the biggest impediments is that negative consequences in the job will have to be reckoned with along with the expectation that nothing will change anyway.

Especially in Italy and France intra-company whistleblowing procedures are especially very poor. Most companies in these countries have only installed a whistleblowing system because they were obligated to do so under SOX.

Companies in the EU are not obliged to establish whistleblowing hotlines, unless they fall under SOX or have signed up to do so under the German Corporate Governance Codex. This is also associated with only little protection for the whistleblower. Since there is poor specific legislation on whistleblowing, the level of protection varies widely within the EU.

In comparison to the US Dodd-Frank award, no payments is to be made to whistleblowers in the EU. This contradicts with the continental EU principle to seek internal remedy first. Under Belgian competition law, individuals may seek immunity and they can also get some kind of reward. Firing those whistleblowers under Belgian law might hinder the leniency process of the company because evidence may no longer be available.

Recent legislation in France has been adopted that gives whistleblowers some degree of protection in the case of retaliation. However, this law is likely to lead to compensation for retaliation.

The UK has the only statutory protection for those in the workplace who blew the whistle under the Public Interest Disclosure Act (1998). To attract protection, the individual must have a reasonable belief that one or more of the following has occurred, is occurring or is likely to occur: a criminal offence; a failure to comply with a legal obligation; a miscarriage of justice; the endangerment of health and safety; damage to the environment; or deliberate concealment of any of these. The disclosure must be made in good faith. Compensation is payable for any victimization which has taken place as a result of the disclosure.

In Germany, in principle, employees must initially report alleged illegal activities in the first instance to their employers[8]; they are only allowed to report to external authorities or bodies if making such reports could be deemed 'unreasonable' by employees. Infringing these principles or even reporting recklessly or deliberately falsely constitutes a violation of duties under the labor contract, which can lead to warnings or even termination of employment. Pursuant to a ruling of the German Federal Labor Court, the employee will be in breach of his/her contractual duty of consideration (*Rücksichtnahmepflicht*) if his charge against the employer or its representative constitutes a disproportionate reaction to their conduct. Both the justification of the charges pressed and the motivation of the party pressing charges or the lack of an in-company pointer to the reported grievances can thereby argue as evidence of a disproportionate reaction of the employee pressing charges. This applies all the more as there is also the existing contractual obligation of the employee to protect the employer from impending losses caused by other employees.[9]

[8] e.g. sec. 17 II German Working Conditions Act.
[9] German Federal Labor Court, 2 AZR 235/02 (3rd of July 2003).

If the whistleblower violates this principle, he may be subject to disciplinary sanctions. Even if the employee reports corporate wrongdoing via an internal channel, he may be subject to disciplinary sanctions, although he may be protected from discrimination.[10] In case of termination, the internal whistleblower bears the burden of proof in court actions.
In this case, namely, the employee has to prove that the major reason for the company's discriminatory measure was the admissible exercise of a legal right.

VI. Compliance Management System (CMS)

Apart from companies in the financial sector, European companies are not required to have an appropriate CMS.

Nevertheless, companies have spent money on compliance programs in recent years and have sought to have them recognized as a defense or at least a mitigating factor. The problem is that the mere existence of a CMS does not automatically constitute a mitigating circumstance. Conversely, the authorities may deem anything that suggests that a companiy ignored obvious risks to be an aggravating factor.

The ECJ[11] follows the European Commission's stance that the existence of a CMS cannot be considered a mitigating factor – or even a defense – as long as the necessary mind-set is not deeply enough enshrined in the overall corporate culture.[12] The idea behind this is that ineffective compliance measures are not supposed to be rewarded on top.

However, in Portugal an efficient CMS may serve as a defense or mitigate the penalty.
But a whole CMS or even special measures may be relevant in terms of liability of managing directors and can facilitate immediate cessation of any potential infringing conduct. An effective CMS can lead to earlier detection of any potential infringement.

Should a CMS fail and should it come to punishable misconduct within the company, an existing CMS may accelerate clarification. This will make it possible for the company, particularly in the case of antitrust violations, to obtain a reasonable advantage in the race for fine reductions in the context of immunity or bonus arrangements. In this respect, a CMS makes sense. The CMS mostly consists of putting an ombudsman, a whole compliance organisation and a whistleblower hotline in place.

One of the main components of a CMS is the clarification of the already perpetrated misconduct:

Prevention	Clarification	Reaction

[10] Sec. 612a German Civil Code.
[11] European Court of Justice.
[12] ECJ, C-501/11P (18th of July 2013); "Schindler"

Good governance message Compliance organisation Training IT tools Creating awareness	Ombudsman WB hotline Internal investigations E-mail screening Amnesty program	Sanctions for misconduct Early disclosure Evaluation of mechanisms

When compliance measures are implemented in Europe, however, special regulations have to be taken into account. In particular, the putting in place of whistle-blower hotlines and the setting up of ethical guidelines for the implementation of a CMS contain the obligation to take the codetermination rights of the works council and data privacy protection into consideration.

EU-wide principles for the implementation of a CMS are that the CMS must be designed for exceptional cases (e.g. serious risks to the company relating to accounting, financial auditing, bribery), confidentiality of processing operations must be ensured, aims of the CMS must be included in Code of Conduct and the employees must be informed about the means of the CMS.

Both the implementation of the Code of Conduct and the CMS itself are subject to co-determination rights of the works council. The question to what extent the works council or the employee himself needs to be consulted and granted a co-determination right is subject to national legislation. The members of the EU each have their own system. For example, French companies need to consult with employee representatives before the implementation of a Code of Conduct. The opinion rendered by employee representatives are not binding. Companies are allowed to implement the code despite the contrary opinion. But the terms/conditions cannot be imposed upon employees without an agreement.

VII. Conclusion/Outlook

Most members of the EU cooperate to a large extent with the law enforcement or prosecutorial authorities of other countries. Several authorities have established institutions to facilitate the exchange of information and cross-border prosecution. Today, multinational companies are facing more and more risks of liability for corporate wrongdoing. Investigating authorities are now pressing companies to conduct internal investigations. For that reason, it is indispensable to have competent councils who can help to maneuver the companies and its managing directors through the turmoil of cross-border investigations in order to minimize civil and criminal litigation and other liability risks.