

Workplace Investigations

Contributing Editors

Phil Linnard at Slaughter and May
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21. How do you handle a parallel criminal and/or regulatory investigation?

Germany

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In principle, workplace investigations and criminal or regulatory investigations are not dependent on each other and can therefore be conducted in parallel. German public prosecutors have an ambivalent view of internal investigations. On the one hand, they are to some extent sceptical about workplace investigations. They fear that evidence will be destroyed and facts manipulated. On the other hand, they often do not have the resources to conduct investigations as extensive as the companies do. In any event, due to the principle of official investigation that applies in Germany, the investigating public prosecutor's office will usually reassess the results of an internal investigation and conduct independent investigations.

Regarding whether internal investigations reports and material have to be shared with or can be seized by the public prosecutor, please see question 14.

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Switzerland

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The actions of the employer may carry through to a subsequent state proceeding. First and foremost, any prohibitions on the use of evidence must be considered. Whereas in civil proceedings the interest in establishing the truth must merely prevail for exploitation (article 152 paragraph 2, Swiss Civil Procedure Code), in criminal proceedings, depending on the nature of the unlawful act, there is a risk that the evidence may not be used (see question 27 and article 140 et seq, Swiss Civil Procedure Code).

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25. Who can (or must) the investigation findings be

disclosed to? Does that include regulators/police? Can the interview records be kept private, or are they at risk of disclosure?



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At the end of the workplace investigation, the results are presented to the company's management bodies so that they can make a decision. This may be a mere summary of the facts, or it may contain a legal assessment and recommendation for action.

There is no general obligation to report compliance violations to the police or public prosecutor's office. For some violations, there are statutory disclosure requirements. For example, data protection violations must be reported to the responsible supervisory authority (article 33 and 34, DSGVO), violations in connection with money laundering must be reported to the Central Office for Financial Transaction Investigations (section 43, Anti-Money Laundering Act), unlawful claiming of subventions must be disclosed to the subsidy-providing authority (section 3, Subventions Act), and incorrect information in the tax declaration must be reported to the tax authority (section 153, Tax Code). Additionally, in listed companies, criminal acts may constitute insider information in individual cases, and this must be disclosed within the framework of ad hoc publicity following market abuse regulations.

Also, there may be cases where reporting to the authorities should be considered for corporate policy and tactical reasons (eg, to avoid or mitigate negative consequences for the business).

Pursuant to section 17 paragraph 2, HinSchG, feedback will need to be provided to the whistleblower within three months of confirmation of receipt of the report or, if the receipt has not been confirmed to the whistleblower, within three months and seven days after receipt of the report. This includes the communication of planned and already taken follow-up measures as well as their reasons. Feedback to the whistleblower may only be provided to the extent that it does not affect the workplace investigation and does not prejudice the rights of the persons who are the subject of the report or who are named in the report.

For the question of whether internal investigations reports and material need to be shared with or can be seized by the public prosecutor, please see question 14.

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Switzerland

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The employer is generally not required to disclose the final report, or the data obtained in connection with the investigation. In particular, the employer is not obliged to file a criminal complaint with the police or the public prosecutor's office.

Exceptions may arise, for example, from data protection law (see question 22) or a duty to release records may arise in a subsequent state proceeding.

Data voluntarily submitted in a proceeding in connection with the internal investigation shall be considered private opinion or party assertion.^[1] If the company refuses to hand over the documents upon request, coercive measures may be used under certain circumstances.^[2]

[1] Oliver Thormann, Sicht der Strafverfolger – Chancen und Risiken, in: Flavio Romero/Claudio Bazzani (Hrsg.), *Interne und regulatorische Untersuchungen*, Zürich/Basel/Genf 2016, p. 123.

[2] Oliver Thormann, Sicht der Strafverfolger – Chancen und Risiken, in: Flavio Romero/Claudio Bazzani (Hrsg.), *Interne und regulatorische Untersuchungen*, Zürich/Basel/Genf 2016, p. 102 et seq.

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