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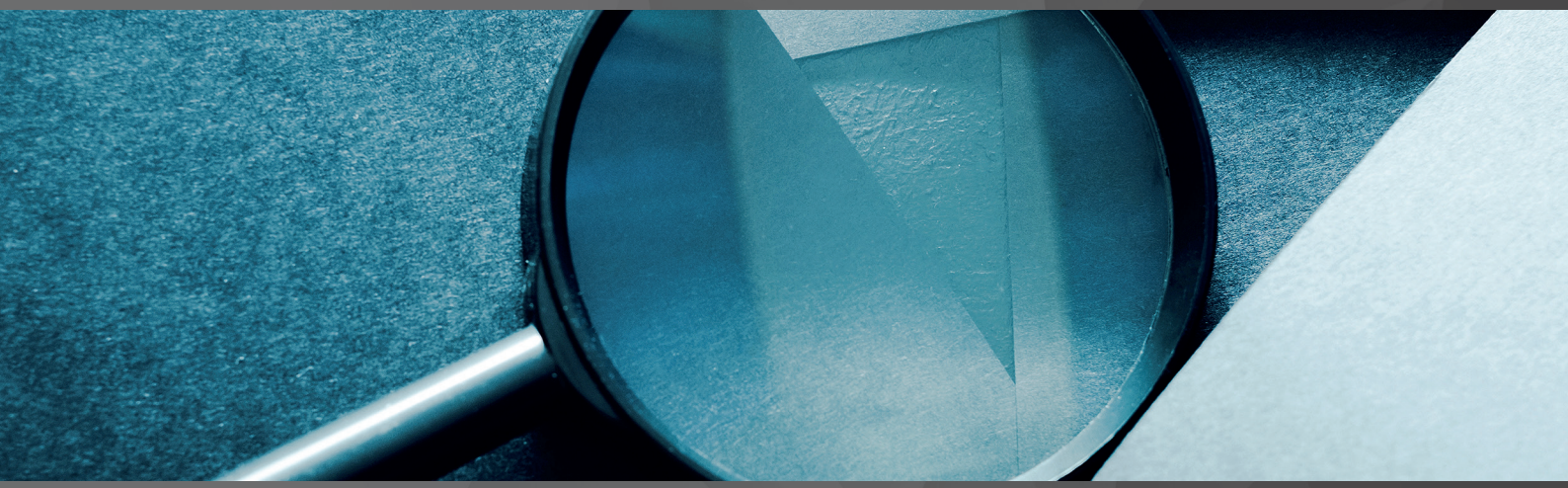

Corporate Investigations 2021

A practical cross-border insight into corporate investigations

Fifth Edition

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1 The Decision to Conduct an Internal Investigation

1.1 What statutory or regulatory obligations should an entity consider when deciding whether to conduct an internal investigation in your jurisdiction? Are there any consequences for failing to comply with these statutory or regulatory regulations? Are there any regulatory or legal benefits for conducting an investigation?

Belgian law does not provide for a specific legal framework for internal corporate investigations. However, general rules of human rights (such as privacy and fair trial) and internal domestic law (such as criminal law and employment law) may apply and govern certain aspects of an investigation, depending on the scope and circumstances of the investigation.

The legal test is to conduct an internal investigation that is "reasonable in all the circumstances". This means that the way in which the investigation is conducted should be "careful, balanced and thorough". A court will not impose its own view of what a reasonable investigation would comprise, but will have to decide whether the entity's actions were reasonable and in line with applicable legislation. In any case, a private company may never use force or violence during an internal investigation: only public authorities are allowed to use force or compulsory measures (such as detention or house search) to the extent permitted by criminal law.

Legal provisions aim to protect the rights of the persons involved in an internal investigation, especially in the context of the tools used to collect evidence. Privacy law in general and data protection rules (General Data Protection Regulation (EU) 2016/679, "GDPR"), in particular, regulate and restrict the use of certain investigation methods, such as screening of mailboxes, data mining, searching of hard disks, CCTV, recording of telephone conversations, body searches, etc.

Belgian employment law, in particular, protects employees involved in an investigation. Specific collective bargaining agreements ("CBAs") regulate monitoring and screening of online communication data (CBA 81), body search (CBA 89) and video surveillance (CBA 68). A breach of a CBA constitutes a criminal offence.

Moreover, specific procedures apply when it comes to disciplinary actions against employees, such as the deadline of three working days in which to terminate an employment contract for gross misconduct.

Furthermore, internal business conduct policies or IT policies may contain restrictions in case of an internal investigation. For independent contractors, such as service providers and freelancers, the contract clauses might include reporting duties and investigation rights. This is up to the parties' contractual freedom.

As a general principle under Belgian law, evidence which is obtained in breach of the abovementioned legal provisions is unlawful. A court may nevertheless accept such evidence in legal proceedings, civil or criminal, provided that: (i) the evidence has not been obtained in breach of formalities that are legally sanctioned with nullity; (ii) its reliability is not adversely affected by the breach; and (iii) the use of the evidence does not prevent the right to a fair trial. In practice, this means that the judge will balance the breach of protective law, on the one hand, and the gravity of the irregularities or fraud on the other hand. Based on this assessment, the judge will decide whether or not the unlawfully obtained evidence is admitted as evidence.

1.2 How should an entity assess the credibility of a whistleblower's complaint and determine whether an internal investigation is necessary? Are there any legal implications for dealing with whistleblowers?

There is no clear (legal) rule to assess the credibility of a whistleblower. The specific circumstances will determine this assessment. The credibility of a whistleblower's complaint, and the decision on whether or not to conduct an internal investigation, must always be assessed on a case-by-case basis. The position of the whistleblower within the entity, the detail of the complaint, reference to concrete situations and the existence of "*prima facie*" evidence to support the allegations are such elements to consider in the assessment. Guidelines and best practices in a whistleblower policy are in this context very useful.

Belgian law currently does not provide for a general legal framework for whistleblowers. However, legislation exists for certain industry sectors, such as:

- The Act of 15 September 2013 on the reporting of an alleged breach of integrity in the national administrative authorities by its staff members. This Act, which only applies to federal public authorities, offers protection to civil servants and employees who report irregularities and abuses ("whistleblowers"). Sanctions affecting their careers are prohibited. Similar rules apply to regional public authorities.
- Belgian credit institutions are obliged to set up an appropriate internal whistleblowing procedure to report breaches of rules and codes of conduct of the institution (Article 21, §1, 8° of the Act of 25 April 2014 on the status and supervision of credit institutions).
- Several legal instruments provide for a whistleblowing structure in the insurance sector, such as the insurance distribution Directive ("IDD") ((EU) 2016/97) and the Packaged Retail and Insurance-based Investment Products ("PRIIPs") Regulation ((EU) No 1286/2014). The Market Abuse Regulations and Solvency II Law provide for similar procedures.

Furthermore, the Belgian Data Protection Authority issued a recommendation in 2006 setting forth guidelines for companies on how to establish an internal whistleblowing procedure or hotline in accordance with the Belgian Data Protection Act ("BDPA") (Recommendation 01/2006 of 29 November 2006).

At European level, a Directive on the protection of persons who report breaches of Union law ("the Whistleblower Directive") was approved on 7 October 2019. The Whistleblower Directive aims to protect whistleblowers across the various countries within the European Union. Member States (including Belgium) must implement the Whistleblower Directive in national law by the end of 2021. The Whistleblower Directive has a very broad scope of application, as it applies to any breach of Union law in general and it covers civil servants, employees, self-employed individuals and board members. On the basis of this Directive, Member States are required to take all necessary measures to prohibit any form of retaliation against whistleblowers.

1.3 How does outside counsel determine who "the client" is for the purposes of conducting an internal investigation and reporting findings (e.g. the Legal Department, the Chief Compliance Officer, the Board of Directors, the Audit Committee, a special committee, etc.)? What steps must outside counsel take to ensure that the reporting relationship is free of any internal conflicts? When is it appropriate to exclude an in-house attorney, senior executive, or major shareholder who might have an interest in influencing the direction of the investigation?

This depends on the scope and specific circumstances of the internal investigation. In principle, the decision to conduct an internal investigation should be taken by the board of directors, or a person duly authorised by the board to make such decision. The board (or the person to whom such decision is delegated) also decides on the person(s) or team conducting the investigation, including legal counsel. In case of suspicion of involvement in irregularities against board members, the decision to investigate and to appoint external counsel may be taken by the shareholder, but this should be confirmed afterwards by a valid board decision.

The entity is free to decide on the members of the investigation team. This will obviously depend on the nature of the allegations. Normally the lead will be taken by an internal specialist of the entity (loss prevention team, compliance manager), supported by financial and/or technical (IT) experts. The team members should sign specific non-disclosure agreements ("NDAs") (unless such NDA is included in their contracts). The person or body authorised to take (disciplinary) decisions should not be part of the team.

It is recommended to involve the legal team from the beginning to avoid evidence being collected in breach of protective legislation. If no internal legal team exists, or if the legal team is not experienced with this type of investigation, it is recommended to appoint immediately a specialist outside counsel, whose role is to ensure that the investigation is properly conducted and evidence can be used in (disciplinary) proceedings and recovery actions afterwards.

In principle, it is for the entity to determine who the client will be. The "client" ordering the internal investigation and instructing outside counsel may obviously not be someone who is a (potential) witness, or who is (in-)directly involved in the department under investigation. An outside counsel may assume that no conflicts of interest exists unless it turns out otherwise pending the investigation. A signed engagement letter prior to starting the investigation is important; this engagement letter should include the client for the mandate, the scope of the investigation and the way of reporting.

2 Self-Disclosure to Enforcement Authorities

2.1 When considering whether to impose civil or criminal penalties, do law enforcement authorities in your jurisdiction consider an entity's willingness to voluntarily disclose the results of a properly conducted internal investigation? What factors do they consider?

Yes, they can. The voluntary disclosure of the results of an internal investigation can be regarded as a mitigating circumstance when imposing a penalty.

A voluntary disclosure might prevent the entity from prosecution; it can be argued, depending on the circumstances, that the criminal intent, required for the conviction, is absent. In any event, it will generally be taken into account when setting the importance of the fine/penalty imposed.

2.2 When, during an internal investigation, should a disclosure be made to enforcement authorities? What are the steps that should be followed for making a disclosure?

Under Belgian law, only a public entity, public officer or civil servant that becomes aware of a criminal offence in the performance of his or her duty has the duty to report such to the public prosecutor's office. Also, a judge dealing with a civil matter who notices/becomes aware of a criminal offence has such a duty.

Hence, no general obligation to disclose criminal offences exists – although an exception is made for those who have witnessed an assault against public safety or against a person's life or property.

Further, it should be noted that no one can be obliged to incriminate oneself.

In addition to these general principles, some specific sector/transaction-related laws impose reporting duties. For example, certain reporting must be done under the money-laundering legislation to the Financial Intelligence Processing Unit. A further specific arrangement exists in the disclosure of breaches of competition law, i.e. a specific arrangement for leniency for whistleblowers.

Finally, both in criminal and civil proceedings, the judge or the acting magistrate can order to submit and transfer certain information, including an internal investigation report.

2.3 How, and in what format, should the findings of an internal investigation be reported? Must the findings of an internal investigation be reported in writing? What risks, if any, arise from providing reports in writing?

The law does not prescribe the format for an internal investigation report. However, it is recommended to describe the findings in a written report. Indeed, as both criminal and civil proceedings are based on documentary evidence filed with the court or included in the criminal file, the report should be in writing for evidence purposes. While the court can summon witnesses, for example the investigators, the court generally relies on the documentary evidence for its judgment.

An internal investigation report has no specific evidentiary value. The judge will freely assess this value. It is always possible that in the context of a criminal investigation, the investigation judge appoints other (external) experts to perform additional (technical) investigations. A civil court may also appoint external experts in case one of the parties challenges the validity or correctness of the investigation.

Having said that, a written report can be used against the entity as it might describe shortcomings within the entity related to the criminal offences. To mitigate this risk and to be able to assess it before issuing a report, it is advisable that outside counsel acts as an intermediary. All his/her correspondence during the investigation is protected by professional secrecy. This professional secrecy prevents, to a certain extent, the disclosure of business-sensitive information from the written report.

3 Cooperation with Law Enforcement Authorities

3.1 If an entity is aware that it is the subject or target of a government investigation, is it required to liaise with local authorities before starting an internal investigation? Should it liaise with local authorities even if it is not required to do so?

No, it is not. Generally, the entity will not be aware that it is the subject or target of a government investigation.

However, as indicated above, sharing information of an internal investigation might have a beneficial impact on the entity's own position. The decision to have the matter investigated by the public prosecutor's office, by filing a complaint, is an imprecise art. This will depend on the intent of the client, the gravity of the facts, and the specific circumstances of each case. In the case of serious fraud, it may be useful to file a complaint because the public authorities obviously have greater powers to conduct a full investigation (including home search, wire-tapping, etc.). A civil litigation is suspended during a criminal investigation ("*le criminal tient le civil en état*").

3.2 If regulatory or law enforcement authorities are investigating an entity's conduct, does the entity have the ability to help define or limit the scope of a government investigation? If so, how is it best achieved?

The investigating authority determines autonomously the scope of its investigation. The elements submitted in the complaint or in the report will, however, be a guide to the investigating authority. If a complaint (i.e. combined with a civil claim for damages) is filed before the investigating magistrate, an investigation must be conducted. The scope and the way in which this is done is at the investigating magistrate's discretion.

A party to the criminal proceedings is, however, at specific timings, entitled to request additional inquiries; for example, the hearing of a (specific) witness. Once more, it will be the investigating magistrate who will grant or refuse such a request.

3.3 Do law enforcement authorities in your jurisdiction tend to coordinate with authorities in other jurisdictions? What strategies can entities adopt if they face investigations in multiple jurisdictions?

Yes. There exist many forms of international cooperation between law enforcement and investigating authorities, both within the European Union and with non-European jurisdictions, based on bi- and multilateral treaties. This includes joint investigating teams, letters rogatory and other means of mutual legal assistance.

When faced with an internal investigation or government investigation covering multiple jurisdictions, the entity should appoint a coordinating outside counsel to liaise with the several jurisdictions and to keep track of the questions raised and answers given to the different investigating authorities. Such outside counsel is well placed to liaise with local counsel on strategy and local laws.

4 The Investigation Process

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

To ensure a fair, balanced and thorough investigation, the investigation plan typically includes the following steps:

- Determine the scope and approach – it is important to identify: (i) the irregularities (data) to be investigated; (ii) the persons potentially involved and their inter-relations; and (iii) the methods of collecting evidence that will be used.
- Preserving and securing evidence (both documents and electronic/digital data). In certain cases, it may be advisable to make secured copies of mailboxes or laptop hard drives, for which IT forensic specialists may be required. It may also be recommended to secure or restrict access to the company's building, confidential data, internet and bank accounts.
- Hidden actions, which may be undertaken without alerting people.
- Interviews with (potential) witnesses and, at a later stage, suspects.
- Analysis of data collected (such as financial data).
- Drafting of the investigation report (see further below question 8.1).
- Contradiction: submit the findings of the report to suspects/people involved for comments.
- Assess disciplinary actions: if the findings of the investigation might result in disciplinary actions (dismissal of employees or termination of management contracts), the process (e.g. need for a disciplinary hearing) and legal timings (deadline to proceed with dismissal) should be determined.
- Reporting and decisions: submit the report to the internal person or body authorised to make final decisions on (disciplinary) actions.

4.2 When should companies elicit the assistance of outside counsel or outside resources such as forensic consultants? If outside counsel is used, what criteria or credentials should one seek in retaining outside counsel?

Companies should seek the assistance of outside counsel as soon as possible to ensure that the investigation process is compliant with legal requirements and that its result can be used as evidence in a litigation. Professional secrecy of external counsel is also useful. Forensic consultants such as IT consultants (for e-discovery) or auditors (for financial analysis) will also be important to involve. The entity should ensure that audit by external partners also complies with the requirement of a fair, balanced and thorough investigation.

5 Confidentiality and Attorney-Client Privileges

5.1 Does your jurisdiction recognise the attorney-client, attorney work product, or any other legal privileges in the context of internal investigations? What best practices should be followed to preserve these privileges?

Yes. Article 458 of the Criminal Code obliges attorneys to

maintain professional secrecy. This provision prohibits attorneys from making any disclosure of information that is protected by the attorney-client privilege. A breach of this obligation can be criminally sanctioned. The obligation covers the communications between a client and the attorney and between the attorney and third parties in view of advising the client. Further, all information (fee notes/invoices, and working papers) that the attorney obtains in his/her professional capacity and in the performance of his/her profession is covered, such to the extent that the client has an interest in the confidential nature of such information.

This privilege prohibits the attorney from disclosing the information. It applies in civil and in criminal matters. The public prosecutor is therefore not entitled to seize those documents, in principle.

Exceptions do, however, exist. An attorney will not be sanctioned if he/she discloses information covered by professional secrecy to a judge or in a parliamentary committee of inquiry or if the law allows him to speak. In those situations, the attorney will have to balance the competing interests and decide him/herself to set aside the duty of secrecy.

If the attorney is as a party implicated in a criminal offence, the privilege will be set aside.

Next to professional privilege, all correspondence between attorneys in Belgium is, in principle, confidential based on the ethical rules. Without the consent of the President of the Bar, such correspondence may not be disclosed. However, some exceptions exist; for example, for official letters between attorneys.

The best practice to preserve these privileges is to instruct an outside counsel from the beginning of an internal investigation, who will act as an intermediary between the entity and outside consultants. Because of this intermediation, all communications will be covered by professional secrecy.

5.2 Do any privileges or rules of confidentiality apply to interactions between the client and third parties engaged by outside counsel during the investigation (e.g. an accounting firm engaged to perform transaction testing or a document collection vendor)?

No privileges or rules of confidentiality apply.

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

In-house counsel is also bound by professional secrecy under the conditions that the in-house counsel is an employee (in the sense of being subordinate to an employer) and is registered with the Belgian Institute of In-House Counsels. It applies to any in-house counsel's advice that has been given for the benefit of this counsel's employer and within the framework of his/her position as legal counsel.

If the advice does not normally require the intervention of a legal professional, it will not be protected by this legal privilege.

As a result, privileged advice may not be inspected, copied or seized. It is the competent magistrate who decides whether or not to include the documents for which confidentiality is invoked in his criminal investigation.

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

See question 5.1 above.

5.5 Do enforcement agencies in your jurisdictions keep the results of an internal investigation confidential if such results were voluntarily provided by the entity?

No. If used in litigation, it must be subject to the contradictory debate.

6 Data Collection and Data Privacy Issues

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

Internal investigations often imply the processing of personal data or electronic communications (which also enjoy protection for privacy reasons and will often be included in internal investigations). In this respect, the following laws and regulations should be adhered to (where applicable):

- the GDPR;
- the Belgian Act of 30 July 2018 on the protection of natural persons with regard to the processing of personal data (BDPA);
- the Belgian Act of 13 June 2005 on Electronic Communications (Articles 124, 125 and 145) which prohibits everyone, save he/she who obtained the consent of all the persons directly and/or indirectly involved, from: (i) intentionally obtaining information about the existence of any information that has been sent by electronic means and that is not personally addressed to him/her; (ii) intentionally identifying persons involved in the transmission of the information and the content thereof; (iii) intentionally obtaining information concerning electronic communication and concerning another person; or (iv) modifying, deleting, disclosing, conserving, or using otherwise the information, identification, or data that have been obtained intentionally or not. A breach of this prohibition can lead to fines up to EUR 400,000;
- the Belgian Criminal Code (Article 314*bis*), which prohibits persons from intentionally, without the consent of all those taking part in the communication, intercepting or causing to be intercepted, taking note or causing to be taken note of, recording or causing to be recorded, non-publicly accessible communications in which one does not participate or to knowingly retain, disclose, disseminate to another person or use otherwise the content of communications that are not accessible to the public and that are unlawfully intercepted or recorded or which have been unlawfully taken note of. A breach of this prohibition can lead to fines of up to EUR 160,000;
- CBA 68 of 16 June 1998, which allows the use of security cameras at the workplace to the extent that it, amongst others: (i) only serves for (one of) the purposes listed in said CBA; (ii) limits interference with the privacy of employees to a minimum; and (iii) happens transparently; and
- CBA 81 of 26 April 2002, which allows the monitoring of electronic online communication data of employees to the extent that it, amongst others: (i) only serves for (one of) the purposes listed in said CBA; (ii) limits interference with the privacy employees to a minimum; and (iii) happens transparently.

Moreover, the Belgian Data Protection Authority has provided recommendations that could be useful, such as: Recommendation 8/2012 of 2 May 2012 on the employer's supervision of the use of electronic means of communication in the workplace; and Recommendation 1/2006 of 29 November 2006 on whistleblowing systems.

6.2 Is it a common practice or a legal requirement in your jurisdiction to prepare and issue a document preservation notice to individuals who may have documents related to the issues under investigation? Who should receive such a notice? What types of documents or data should be preserved? How should the investigation be described? How should compliance with the preservation notice be recorded?

Under Belgian law, there is no obligation to prepare or issue a document preservation notice to individuals who may have documents related to the issues under internal investigation. However, there are several legal duties to retain certain types of information for a specific minimum term (e.g. accounting documents, tax documents, corporate documents, social documents (personnel), medical data, etc.). In this context, it can, of course, be useful to issue a preservation notice to individuals who may have documents related to the issues under investigation, in particular if the retention period is coming to an end and the deletion of the data would be automatic. This will generally depend on practices in the relevant sector.

Finally, if someone is aware of documents essential to an internal investigation in the possession of another party, while that other party refuses to cooperate with such an investigation or could possibly proceed with the destruction of said essential documents, a court may also be seized to order the production of those documents or to prohibit the destruction thereof.

6.3 What factors must an entity consider when documents are located in multiple jurisdictions (e.g. bank secrecy laws, data privacy, procedural requirements, etc.)?

The entity must make sure that it complies with data protection legislation, in particular regarding the transfer of personal data within or outside the EEA. In general, data for the internal investigation should be collected in accordance with the laws of the jurisdiction where the documents are located.

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

This will depend on the circumstances, scope and purposes of the internal investigation. There is no general list of documents that should be collected. All documents that can be of interest for the internal investigation should be regarded as important. This may include email communication, accounting data, files (both hard copy and electronic), system logs, audit reports, presentations, etc.

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

The resources will depend on the documents that are to be collected. A backup of computers and email accounts of persons involved will require IT resources. Payment information will require accounting or finance resources.

6.6 When reviewing documents, do judicial or enforcement authorities in your jurisdiction permit the use of predictive coding techniques? What are best practices for reviewing a voluminous document collection in internal investigations?

Belgian law does not provide for any restrictions on using predictive coding techniques for reviewing a voluminous document collection during an internal investigation.

In practice, documents are often reviewed manually during due diligence. In doing so, physical documents are generally digitalised to convert them into searchable (PDF) documents.

7 Witness Interviews

7.1 What local laws or regulations apply to interviews of employees, former employees, or third parties? What authorities, if any, do entities need to consult before initiating witness interviews?

There are no specific legal requirements for interviews in the context of an internal investigation.

To ensure fair and impartial interviews, it is recommended to apply similar principles as for interviews in the context of a criminal investigation. This implies that at the start of the interview, the interviewee should be informed of the facts under investigation and that:

- he/she may be assisted by a legal counsel or person of trust;
- all questions and answers will be noted down in his/her owns words;
- he/she can ask for an additional investigation to be carried out;
- his or her statements can be used as evidence in court;
- he/she cannot be obliged to self-incriminate him- or herself;
- he/she can use supporting documents during the interview; and
- he/she has the right to revise, complete and/or correct the interview report.

7.2 Are employees required to cooperate with their employer's internal investigation? When and under what circumstances may they decline to participate in a witness interview?

Employees cannot be forced to cooperate, but this may be considered disloyal behaviour, which might qualify as cause for dismissal.

7.3 Is an entity required to provide legal representation to witnesses prior to interviews? If so, under what circumstances must an entity provide legal representation for witnesses?

No, the entity is not required to do so.

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

The requirement of a balanced, fair and thorough investigation should be respected during each stage of the investigation,

including interviews. It is also recommended to have two investigators present and someone to take notes. Recording of interviews is not common practice, but is possible with the explicit consent of the interviewee. At the end of the interview, the (summary of the) witness statement should be submitted for comments and approval. Ideally, the interviewee signs the interview report.

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

No specific factors or practices exist in this respect.

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

The same rules apply as for ordinary witness interviews. If an internal whistleblower policy exists, it must be ensured that procedures set forth in this policy are respected.

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

There is no legal obligation, but it is recommended to give employees the possibility to review and revise statements. Comments made by the interviewee should be mentioned in the statement as "additional comments".

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

No. However, the employee may be assisted by a trade union representative during the disciplinary meeting(s). The trade union representative can participate in the dialogue but cannot answer questions on behalf of the employee at the meeting.

8 Investigation Report

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

There is no specific requirement for the format or content of such a report and this will depend on the circumstances. However, a report may contain some or all of the following:

- Executive summary.
- Timeline of actions and investigation methods applied.
- "Cast list" of people involved and witnesses interviewed.
- Findings: this will be the main section of the report and will detail the findings on each topic investigated, including the facts and evidence presented, any inconsistencies found with explanations where applicable, reasons why certain evidence is preferred over others, any mitigating circumstances and any risks identified, as well as topics that could not be investigated and the reason why.
- Conclusion: it is crucial that the report is factual and impartial. It is not up to the investigators to draw conclusions or to qualify the facts as a (criminal) offence or breach of contract.
- Annexes: it is recommended to attach witness statements and relevant documentary evidence to the report.

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