

## Anti-Corruption Internal Investigations as an Effective Compliance Tool



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**A**n internal investigation is an important compliance instrument for many companies residing in the U.S. and Europe. The main goals of such investigations are to assess any possible compliance violations, potential liability risks and to strengthen the compliance system already in place. With the help of this tool a company may also collect documents and evidence before an investigation is started by an authority.

In Ukraine, internal compliance investigations are mostly conducted by Ukrainian private companies acting on an international level and by Ukrainian subsidiaries of international companies, which are linked to the U.S., UK or other European countries. Many internationally acting companies are subject to foreign laws which can be also applicable for fulfilment in Ukraine. For example, the *Foreign Corrupt Practices Act* (the FCPA), the *UK Bribery Act*, and the *UK Criminal Finances Act*. All these acts can include significant fines for violating companies residing in Ukraine. Ukrainian subsidiaries of international companies often become subjects of investigations by foreign authorities relating to alleged conducts in Ukraine and are penalised by foreign authorities. However, Ukrainian companies and/or groups can also be in focus (e.g., the case of Dmytro Firtash).

### Requirements of laws

Ukrainian legislation does not prescribe any specific procedures or specific deadlines

<sup>1</sup> The model anti-corruption programme is obligatory for the companies taking part in public procurements, if the value of procurable services or goods is equal to or exceeds UAH 20 million; and legal entities more than 50% owned by a state or municipal enterprise that have more than 50 employees and a turnover for the most recent financial year exceeding UAH 70 million.

for conducting an internal compliance investigation in private companies. However, the model anti-corruption programme, the provisions of which are mandatory under certain requirements for private and public entities<sup>1</sup> contains a procedure for conducting internal investigations. This procedure

can also serve as a framework for internal investigations in private companies which do not fall within the scope of the programme.

Based on these rules, a compliance officer shall notify the management regarding each indication towards a corruption violation. The founders and management



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are obliged to take, e.g., the following measures:

- initiate an internal investigation;
- apply disciplinary measures on the basis of the results of an investigation;
- based on the results of an investigation to solve a negative effect on the company and identify preventive measures for future violations; and
- notify the authorities in the event of violations of corruption being found which are subject to criminal or administrative liability.

Nevertheless, private companies which do not fall within the scope of the model anti-corruption programme may develop their own procedures based on further needed risk mitigation steps and existing international best practices.

### **Data protection issues**

During an investigation the company will comply with the applicable personal data protection legislation. For example, Ukrainian legislation does not entitle an

employer to simply assess private emails of its employees. This can even lead to criminal liability and constitutes a violation of the constitutional right for secrecy of correspondence.

In general terms the consent of the data subject/employee would be necessary to collect and process its personal data during an internal investigation. These requirements also apply if the company uses outside counsels for the respective investigation.

If such consent was obtained beforehand, the law requires the employer, nevertheless, to inform the respective employee within ten days of the transfer that its personal data has been passed to third parties.

### **Phases of internal investigation**

In the majority of cases, and based on best practices, internal compliance investigations can be divided into three general phases:

- (1) Assessment and preparation phase;
- (2) Investigation phase; and
- (3) Shaping the future phase.

#### **(a) Assessment and preparation phase**

The documentation of every fact and first undertaken measures from the be-

ginning for reporting reasons towards the management and potentially in the future for the proof of evidence for the authorities, is recommended.

The authorities, for the determining of penalty fines, always also take into account the direct reaction right after the violation took place, including an effective internal investigation. These circumstances can directly influence the sum of the penalty fine imposed. Therefore, the company should make sure that no further compliance violations can occur. It should “stop the bleeding” immediately.

During this phase one responsible person should collect and assess all already known facts and allegations, potential liability risks should be evaluated straightaway, and potential notification obligations to stakeholders, insurances and authorities should be checked.

Regarding the following internal compliance investigation, the following actions may be helpful:

- Identification of one investigation leader who receives all necessary information and monitors the entire investigation;
- identification of the scope of the investigation;
- coordination with the relevant stakeholders and development of a sufficiently detailed investigation plan;
- list of documents that needs to be collected and assessed during the investigation;
- list of employees and outside persons that need to be interviewed within the investigation;
- potential necessities with regard to a forensic investigation;
- potential statute of limitations deadlines which can start after the knowledge of potential misconduct;
- potential notification deadlines based on public law or contract (e.g., insurance contracts) which might start with the knowledge of potential misconduct; and
- further information that needs to be collected.

#### **(b) Investigation phase**

The internal investigation itself requires careful and effective project management, with established goals and timelines, divided responsibilities and an adequate budget.

One investigation leader should outline the tasks in an investigation plan, track the progress of the investigation



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regularly on the basis of transparent deadlines and document every action taken. In addition to the investigation, the preparation of a draft reactive and pro-active external press statement and/or a Q&A form for communication with external sources, may also be recommended.

During the investigation, the data should be properly stored, and collected evidence kept in a structured form.

### (c) *Shaping the future*

After the investigation itself the outcome should be stated to stakeholders and/or insurances (if applicable) to mitigate any potential connected financial risks.

Retaliatory measures should be decided and also communicated (if necessary) internally, but also externally (e.g., to the public or to the authorities, if recommended).

According to applicable law it may also be necessary to introduce damage claims against the respective transgressing employees or other individuals transgressing

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the law in order to preserve the company's interests.

### ***Involvement of outside counsels***

The involvement of outside counsels may be recommended in cases where attorney-client-privilege can protect the company from sharing certain documents

with the authorities (particularly according to U.S. law).

It may also be helpful to include outside counsels to fully investigate and assess the violation from the viewpoint of an objective third party to avoid any influence from inside. In particular, it is better for critical internal investigations that require a lot of time and resources as well as proper documentation intended to be disclosed to the authorities to be conducted by outside counsels.

### ***Conclusion***

There are several reasons why Ukrainian companies doing business on an international level need to get more familiar with the instrument of internal compliance investigations. It can support strengthening or assessing the existing compliance system. It can also save real money when it comes to penalising a company from the authorities based on a compliance violation that took place in Ukraine.

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