



IGLIG

The International Comparative Legal Guide to:

Corporate Investigations 2018

2nd Edition

A practical cross-border insight into corporate investigations

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General Chapters:

1	Introduction – Keith D. Krakaur & Ryan Junck, Skadden, Arps, Slate, Meagher & Flom LLP	1
2	Multi-Jurisdictional Criminal Investigations – Emerging Good Practice in Anglo-French Investigations – Matthew Cowie & Karen Coppens, Dechert LLP	4
3	Standard Issues in Corporate Investigations: What GCs Should Know – Carl Jenkins & Norman Harrison, Duff & Phelps LLC	8
4	Bribery and Corruption: Investigations and Negotiations Across Jurisdictions – Aziz Rahman, Rahman Ravelli	13

Country Question and Answer Chapters:

5	Australia	Clayton Utz: Ross McInnes & Narelle Smythe	18
6	Belgium	Stibbe / Baker Tilly Belgium: Hans Van Bavel & Frank Staelens	25
7	Brazil	André Fonseca & Marina Lima Associates, OAB/SP: André Gustavo Isola Fonseca & Marina Lima Ferreira	32
8	Canada	Blake, Cassels & Graydon LLP: Paul Schabas & Iris Fischer	37
9	China	Kirkland & Ellis International LLP: Tiana Zhang & Jodi Wu	44
10	England & Wales	Eversheds Sutherland: Jake McQuitty & Adam Berry	51
11	Finland	Krogerus Attorneys Ltd: Juha Pekka Katainen & Thomas Kolster	59
12	France	Norton Rose Fulbright: Christian Dargham & Caroline Saint Olive	65
13	Germany	Debevoise & Plimpton LLP: Dr. Thomas Schürle & Dr. Friedrich Popp	70
14	Ireland	Arthur Cox: Joanelle O’Cleirigh & Jillian Conefrey	75
15	Netherlands	De Roos & Pen: Niels van der Laan & Jantien Dekkers	82
16	Nigeria	Bloomfield Law Practice: Adekunle Obebe & Olabode Adegoke	88
17	Norway	Wikborg Rein: Elisabeth Roscher & Geir Sviggum	93
18	Poland	Sołtysiński Kawecki & Szlęzak: Tomasz Konopka	101
19	Scotland	Pinsent Masons LLP: Tom Stocker & Alistair Wood	107
20	Singapore	Allen & Gledhill LLP: Jason Chan	114
21	South Africa	Norton Rose Fulbright South Africa Inc: Marelise van der Westhuizen & Andrew Keightley-Smith	119
22	Spain	De Pedraza Abogados, S.L.P.: Mar de Pedraza & Paula Martínez-Barros	127
23	Switzerland	Bär & Karrer Ltd.: Andreas D. Länzlinger & Sarah Mahmud	135
24	Turkey	ELIG, Attorneys-at-Law: Gönenç Gürkaynak & Ç. Olgu Kama	143
25	Ukraine	Zavadetskyi Advocates Bureau: Oleksandr Zavadetskyi	149
26	UAE	Morgan, Lewis & Bockius LLP: Rebecca Kelly	156
27	USA	Skadden, Arps, Slate, Meagher & Flom LLP: Keith D. Krakaur & Jocelyn E. Strauber	162

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Turkey

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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?

Under Turkish law, there are no obligations or regulations that require companies to conduct internal investigations or to submit the findings of these investigations to the public authorities. Thus, internal investigations are not technically used as mitigating tools during a criminal investigation. However, companies may, in practice, adopt internal procedures to minimise risks relating to corruption and corporate crime. As a general rule, internal investigations must comply with the provisions of Turkish labour law and privacy laws. Pursuant to Article 5 of the Turkish Labour Code No. 4857 (“TLC”), the employer has an equal treatment obligation towards its employees. This means that employers should not discriminate against their employees due to their language, race, colour, gender, disability, political view, philosophical belief and religion. For instance, investigating only female employees will be deemed a violation of the equal treatment obligation. Therefore, the employer should execute an internal investigation providing that it adheres accordingly to the said components which are stipulated in the TLC.

As such, if execution of an internal investigation, leading to termination, actually violates the provisions of the labour law, then the employee may initiate a re-employment lawsuit within one month of the termination date, with the claim that the termination that relies on an investigation violating labour law is therefore invalid, subject to the proof of the conditions that (1) he or she has been employed for more than six months, (2) there are more than 30 employees in the relevant workplace, and (3) the employee is working under an indefinite employment agreement.

If the employer violates the principle of equal treatment in the execution or termination of the employment relationship, the employee may request compensation of up to four months’ salary plus other benefits of which he/she has been deprived. Additionally, as per Article 99 of the TLC, acting contrary to the obligation to equal treatment, employers or their representatives shall be imposed with an administrative fine amounting to TL 155.00 (approximately 40 US dollars) for each employee who is exposed to the unequal treatment.

Furthermore, in the case of violation of privacy laws during the internal investigation, the company may be faced with penal and administrative sanctions. As for corporate disputes that may arise during internal investigations, Turkish corporate governance rules should be followed.

In general, internal investigation procedures must be in harmony with the legal climate of the country. Such an investigation would prove beneficial to the company, as during an official investigation the company would already know the facts and may choose to disclose information to public authorities as it deems strategic.

1.2 What factors, in addition to statutory or regulatory requirements, should an entity consider before deciding to initiate an internal investigation in your jurisdiction?

Given the possible international nature of corruption investigations due to the spillover effect, the most important consideration before an internal investigation, aside from the legal concerns, is the strategic one. Namely, the findings of the internal investigation or any disclosures to press about this process may find its way into another jurisdiction’s official investigation file. Therefore, companies should carefully consider the possible spillover effects of an internal investigation both before and during the investigation. Further, from a practical point of view, the company should also consider what effects, if any, the internal investigation will have on its business processes and if it may lead to a decrease in the profitability of the company. In the face of such business risks, both the management and the legal team can come together to find constructive ways to both continue with the internal investigation and not undermine the business targets.

1.3 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?

Turkish legislation does not provide statutory protection to whistleblowers or require companies to have whistleblower procedures in place. When an employee reports suspicious conduct within the company, the company’s response to these employees will be evaluated under the general principles of employment law. As such, if an employee were to speak up in order to report an irregularity, this can in no way be a cause for dismissal of the whistleblower or imposition of any other sanction on the whistleblower for that matter. That being the case, employees are often reluctant when it comes to reporting an irregularity with the

concern that it could have adverse ripple effects on themselves. Therefore, entities are advised to adopt internal compliance policies and provide regulations for whistleblowing issues, such as anonymity and retaliation, just so employees can feel free to report irregularities without worry. As for non-credible complaints, such complaints usually arise from an angry ex-employee or an ex-business partner. Therefore compliance professionals are advised to assess the merits of such claims before jumping into large internal investigations.

1.4 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?

In general, the client is usually determined as the person who retains the law firm. As for the department within the legal person, the client would be deemed the highest management of the company. During internal investigations, conflicts of interest may arise between the client as the department that the outside counsel reports to and the department that is the subject of the investigation. Such risks whereby the outside counsel ends up investigating the actions of the individual(s) who has contacted the outside counsel may arise at any stage of the internal investigation, and the outside counsel should raise this issue to a hierarchically higher (and possibly impartial) department of the company, as soon as such risk arises. If the individual who is considered to be the client is potentially implicated in the investigated irregularity, the outside counsel should advise the higher department to allow for the exclusion of the implicated department.

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?

Under Turkish law, companies can be held liable civilly or administratively. The Turkish criminal law system does not impose criminal liability on legal persons. Further, there is no legislation or guideline that sets self-disclosure as a mitigating factor. Thus, whether a judge should consider voluntary disclosure of facts as a mitigating factor is a matter left to the discretion of the judge adjudicating the file.

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?

There is no legislation and guideline under Turkish law that mandates/advises self-disclosure for legal persons. Therefore, the issue remains unregulated under Turkish law.

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?

As explained under question 2.2, self-reporting for legal persons is not regulated under Turkish law. Regardless, if a company wishes to report the findings of its investigations to an official authority, such communication between private persons and official authorities is usually done in writing. Self-disclosure itself brings the risk of spillover to other jurisdictions. Therefore, companies should take the utmost care when communicating such sensitive information to public authorities.

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?

There is no requirement to liaise with the authorities before starting an internal investigation if the entity is aware that it is the subject or target of a government investigation under Turkish law. In the absence of such requirement and any regulation providing self-disclosure as a mitigating factor for legal persons, whether a company chooses to liaise with public authorities depends on strategic considerations of the company.

3.2 Do law enforcement entities in your jurisdiction prefer to maintain oversight of internal investigations? What level of involvement in an entity’s internal investigation do they prefer?

Since the issue of internal investigations is not regulated under Turkish law, investigations by the company and by public authorities are conducted as two separate processes.

3.3 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?

Aside from cases where law enforcement authorities are not complying with legal constraints, entities can only attempt to affect the scope of the investigation through their lawful statements. In cases where the law enforcement authorities are not respecting legal constraints imposed upon them, companies should use legal objection mechanisms in order to limit the scope of the actions of the authorities, thereby limiting the scope of the investigation.

3.4 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?

Turkey is a party to many bilateral and multilateral mutual legal assistance treaties and coordination with other authorities is conducted through these treaties. Facing investigations for the same

issue in multiple jurisdictions is a critical issue for companies, as information provided to one authority may quickly find its way into the investigation file in the other jurisdiction by way of mutual legal assistance. Accordingly, companies should use a multi-dimensional strategy, knowing that investigations in different jurisdictions are closely connected to each other.

4 The Investigation Process

4.1 What unique challenges do entities face when conducting an internal investigation in your jurisdiction?

Once employees become aware of the existence of the investigation and the questions posed during the employee interviews, keeping the relevant information confidential may become one of the challenges faced by companies during internal investigations. In order to mitigate this, the employees should be made aware of the seriousness of the issue of keeping the existence of and the information pertaining to the investigation confidential. Nevertheless, the risk of disclosure to peers remains and the interview questions may not have the targeted shock effect on employees following the first interview.

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

In conducting the investigation, the company and its advisors should first determine the scope of the investigation, i.e. the facts the company would like to explore. The investigation plan would then typically involve a review of preliminary documentation such as relevant agreements and the corporate structure of the company, employee interviews, if they are deemed necessary, document review and prescription of next steps for the company.

4.3 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 typically revert to outsourcing the investigation when the investigation at hand requires the expertise of outside counsels who are knowledgeable about the local law and culture and who would be able to coordinate the investigation *vis-à-vis* government officials, as well as with different jurisdictions. Also, outside counsels are hired when a company's resources are insufficient when compared with the size of the investigation. This usually depends on the number of the employees to be interviewed and the size of the document to be reviewed. Outside counsel should also be retained in cases where the company does not have a local legal department. In such a case conducting the investigation through outside counsel would be efficient and more result-oriented, as the local outside counsel would have the expertise regarding the local regulations, as well as an understanding of the local culture. As for outsourcing the forensic part of the investigation, most companies outsource this step as they do not have the expertise to handle such a technical process.

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?

Turkish law recognises attorney-client privilege. According to Law No. 5271 on Criminal Procedure, offices of lawyers can only be searched upon a court decision and in the presence of a public prosecutor. The president of the Bar, or any lawyer who is a member of the Bar, must also be present. When they decide to seize an item in the office of a lawyer and the lawyer, president of the Bar or the lawyer's representative objects to the situation on the grounds that the item relates to the lawyer's professional relationship, then these will be collected separately in a sealed envelope and the courts will be authorised to decide on the situation of the relevant item. If the court decides that these belong to the professional relationship between a client and a lawyer, then these will be returned immediately. In addition, according to Attorney's Act No. 1136, it is prohibited for lawyers to disclose the information they found out in the scope of their work. The Supreme Court and Turkish Competition Authority also have the same approach. Documents can be marked as "privileged and confidential" in order to preserve attorney-client privilege.

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)?

There is no precedent or legislation which can be applied to interactions between the client and third parties engaged by outside counsel during the investigation. The "confidentiality principle" is applied between attorney and client.

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

There are no specific provisions setting out whether the attorney-client privilege applies equally to internal or outside counsel under Turkish law. However, Turkish Competition Board's Dow Turkey decision (2 December 2015, 15-42/690-259) stipulates that correspondences with an independent attorney fall into the scope of attorney-client privilege and shall be protected. Thus, the attorney-client privilege would be applicable for independent attorneys who do not have an employment agreement with their client. Accordingly, correspondence with and documentation prepared by the in-house counsel may not be subject to attorney-client privilege even if they relate to defence rights.

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

According to the general principles applicable to attorney-client privilege, a document is deemed to be privileged if it has been prepared by an independent attorney and to the extent it concerns the client's defence rights. Accordingly, to render such material

out of the scope of the discovery it is recommended to mark the documents as “confidential, privileged” and as relating to defence rights. It is further recommended to have a lawyer present in the company offices during a raid. According to the Dow Turkey decision of the Competition Board (2 December 2015), (Dow Turkey), if the case handlers intend to obtain a document protected under legal privilege, all objections should be raised in the course of the dawn raid and these objections should be put in writing in the on-site inspection minutes, if possible.

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?

There is no legislation regulating whether public authorities should keep the outcome of an internal investigation confidential when it is voluntarily provided to them. However, as per Article 170 of Law No. 5271 on Criminal Procedure, public prosecutors are to initiate investigations when there is reasonable doubt showing that the entity committed a crime.

6 Data Collection and Data Privacy Issues

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

Turkey’s first Law on Protection of Personal Data (“Privacy Law”) entered into force rather late, on 7 April, 2016. However before that, protection of personal data was a principle stipulated in Article 20 of the Turkish Constitution (“*everyone has the right to ask for protection of their personal data*”), and several crimes were determined relating to obtention and recording of personal data without consent and non-deletion. Accordingly, during internal investigations, companies should abide by the Privacy Law and if they do not, are subject to administrative fines stipulated in the legislation. Further non-compliance with general principles of data privacy law could result in the imprisonment of the relevant real persons as per the Turkish Criminal Code.

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?

During internal investigations it is common practice to issue a document preservation notice, although this is not a legal requirement. That said, a deed of consent in which the employee allows the employer to review his/her hardcopy and electronic documents is also advised, as the lack of such consent may result in the company’s non-compliance with the laws under certain situations. Once the scope of the investigation is determined, the company should identify the related employees so that their documents can be retained. This documentation could include any form of information from physical notes to electronic documentation. Within the document retention notice the investigation should be defined briefly, without any details due to confidentiality concerns. Compliance with the preservation notice should be recorded by the compliance officer or the in-house counsel of the company.

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.)?

An entity must consider data privacy and data transfer laws, as well as blocking statutes in other jurisdictions when documents are located in multiple jurisdictions. Where one authority requests a document on which another jurisdiction imposes a blocking statute, the entity is advised to inform the requesting authority about the blocking statute.

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

Enforcement agencies generally have the authority to request any documentation deemed relevant for their investigations, provided that they use their authority in compliance with the laws.

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

For internal investigations which require data going back a few years, the company’s backup system, if any, comes in handy. Aside from this, any documents/electronic documents are collected through forensic services, provided by third party firms.

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?

Generally, voluminous data is reviewed through computer software that is specifically designed for this purpose, so that a quicker, more targeted document review can be realised.

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?

The issue of interviews during internal investigations is unregulated under Turkish law. Therefore, interviews with employees, former employees and third parties are made on a consensual basis. Therefore, entities are advised to get the consent of the interviewees before interviews (for employees: if such consent is not already provided in the employment agreements). During and following the interviews, the entity should act in compliance with labour laws (for employees) as well as data privacy laws.

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?

As interviews are conducted on a consensual basis, employees are not obligated to participate in these interviews. However, in practice, employees generally do not refuse such call; both in terms

of not to have refused a request by the employer and not to look suspicious over the allegations. That being the case, there can surely be cases where an employee's input can be integral for the investigation to move along and in such cases; the employee can be deemed obliged to assist the employer in its investigation to the fullest extent possible since it is an employee's primary duty to be committed to the employer. Whether an employee can be deemed obliged to cooperate with an internal investigation depends on the unique circumstances of each case and how integral that particular employee's cooperation is to the investigation.

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?

Witness interviews are conducted on a consensual basis; therefore there is no requirement to provide legal presentation. In any case, the witness may participate in the interview accompanied by legal representation.

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

There are no guidelines, legislation or precedent regarding the best practice for conducting witness interviews. Entities must comply with data privacy laws and labour laws during employee interviews.

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

It is more efficient if the interview is conducted by someone who is accustomed to the local culture of the jurisdiction. This is because certain gestures and attitudes might be deemed disrespectful in the local culture and those would lead to unnecessary tensions during the interview. The interviewer might end up unnecessarily intimidating the interviewee leading to a less fruitful interview.

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

First and foremost, an anonymous whistleblower hotline would serve to protect the interests of the whistleblower. However, the protection of the interest of the company while upholding the rights of the whistleblower is a delicate balance and must be evaluated separately in each case.

7.7 Is it ever appropriate to grant "immunity" or "amnesty" to employees during an internal investigation? If so, when?

Immunity or amnesty is usually granted by companies when the company wants to disclose widespread corrupt conduct and would like to expedite the internal investigation process. The case for immunity and amnesty is stronger when the corruption attitude is top-down in the company and many of the acts have been committed through the encouragement of the top-level management.

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

There is no legislation or precedent for employees to review or revise their statements given in consensual interviews. However, when the interviewees request so, such request as well as the amended statements should be recorded in the investigation file as these would render the statements more dimensional and not including them would mean the company is ignoring certain facts.

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

No, it is not required to have enforcement authorities or legal representatives present during interviews in internal investigations.

8 Investigation Report

8.1 Is it common practice in your jurisdiction to prepare a written investigation report at the end of an internal investigation? What are the pros and cons of producing the report in writing versus orally?

Yes, it is common practice to prepare a written investigation report. However, in cases with the highest confidentiality sensitivities, the company may not wish such a report to be prepared, so that such a report never enters the records of the company. Preparing the report on the other hand, would allow the management to review the findings and re-evaluate the investigation where necessary.

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

The report should address the allegations and the findings regarding each allegation. Having an executive summary section is advised, as the top management of the company may not have the time to review the whole of the report, which sometimes consist of hundreds of pages. The report can also include the advice of outside counsel regarding the next steps the entity should take.



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