WARDYŃSKI & PARTNERS

Internal investigations

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Internal investigations: An alternative for law enforcement authorities?

Janusz Tomczak

Internal investigations conducted by enterprises in-house when irregularities are suspected offer many advantages to businesses compared to initiatives undertaken by public law enforcement authorities.

Internal investigations represent just a small segment of the legal and consulting services market in Poland, and in practice are used mainly in large companies whose corporate culture and internal organisation are derived from Western business culture or shaped by regulations from countries in Western Europe or North America.

Many lawyers practising in Poland would probably find it difficult to define what an internal investigation is. Some would seek analogies in disciplinary proceedings, while other might be unaware of the notion.

This is partly because internal investigations are not recognised in generally applicable legal regulations in Poland, and the procedures were developed through practices in Western countries.

So what is an internal investigation? Typically it is an initiative undertaken within the structure of an enterprise with the immediate purpose of clarifying suspected serious irregularities, evaluating the identified irregularities from a legal perspective, and drawing the relevant consequences. Such procedures can also help prevent further abuses and minimise the risk of liability on the part of the business.

Internal investigations for the most part involve commercial abuses, although investigations concerning sensitive areas such as employee mobbing and sexual harassment are more and more often observed.

Even though these investigations are "internal," external advisers should be involved in them: lawyers, forensic accountants, and IT specialists commissioned by the enterprise to take actions to identify and clarify irregularities. The advisers who are retained will interview employees, analyse data, assess the legal consequences, and so on. This approach helps insure the impartiality and professionalism of the actions taken in the investigation.

One essential difference should be pointed out between internal investigations in Poland and those conducted in North America or certain countries of Western Europe. In Western legal systems there is an established legal framework and instruments enabling enterprises to limit their criminal responsibility. In Poland, because the criminal responsibility of enterprises does not function in practice, the main engine driving such investigations here is either instructions from the Western parent company or a corporate culture that demands explanations and condemns improprieties involving individual employees, managers and business partners. A less-frequent motivation is regulatory risk connected with administrative liability in proceedings conducted by regulators.

Legal conditions

Although, as mentioned, there are no generally applicable regulations in Poland governing internal investigations, such investigations clearly touch on a number of legal issues which must be complied with under existing regulations. These include for example authority to act within the corporate structure, protection of confidentiality, relations between employer and employee, professional secrecy and attorney-client privilege, data protection, trade secrets, and the ability to use the findings from the internal investigation, and the evidence gathered, in other proceedings, e.g. before the courts, the prosecutor's office, and regulators.

Assuming that internal investigations in Poland are conducted chiefly with respect to commercial abuses qualifying as criminal offences, the following issues should be considered.

Competitive with criminal proceedings?

The great majority of offences, including commercial offences, are prosecuted publicly. This means that any reliable information demonstrating that an offence has been committed may serve as grounds for prosecutors to commence proceedings, regardless of the wishes of the injured party.

At the same time, the law requires notification of law enforcement authorities if a citizen has sufficient information to determine that a crime has been committed (i.e. a social obligation to provide notice of a crime). This may lead to a situation where law enforcement authorities begin an investigation, for example after receiving a private complaint, before a decision has been taken within the enterprise to commence an internal investigation.

A rational assumption in practice is that one of the main goals of an internal investigation is to determine the course of events—what actually happened. Only after the facts are determined can it be decided whether there is sufficient information to suspect that a crime has been committed and hence to notify law enforcement authorities, or there was merely employee misconduct which can be adequately dealt with using the measures available under employment law or civil law.

In many instances, notwithstanding circumstantial evidence of criminal dealings, firms do not decide to notify the public authorities but merely part ways with the offenders—for practical reasons, e.g. the small chance of actually repairing the harm or the high cost of further action. The matter then ends with firing of the employee, termination of the manager's contract, or the like.

Internal investigations should be conducted by lawyers with professional support of internal auditors and specialists in analysis and securing of computer data. This should ensure respect for the rights of the parties, prevent corruption of the evidence, and maintain the confidentiality of the data.

It is hard not to notice that such a team of people may potentially duplicate the work of public law enforcement authorities. One of the main rules of criminal procedure in Poland is "immediacy," meaning that evidence must be taken directly before the authority conducting the proceeding. Therefore it may easily be imagined that law enforcement authorities would be unhappy to find that actions are being taken in an internal investigation which—if done in an unprofessional manner—could potentially result in evidence tampering, improper influence over witnesses, or loss of the

element of surprise which is so important in criminal cases.

Hence it is worth stressing the obviously essential task of the persons conducting an internal investigation to proceed cautiously, avoid interfering with the evidence, and rely on experienced forensics experts who know how to adequately secure electronic evidence.

Summary

An undoubted advantage of internal investigations is the speed with which reliable findings can be made using state-of-the-art methods for analysis of digital data. Compared to the realities of actions taken by the state law enforcement authorities, who are reluctant to take up matters involving the private sector, internal investigations allow enterprises to respond quickly to any irregularities that are uncovered, and moreover are conducted in the enterprise's own interest and under its control, which colloquially speaking allows the enterprise to avoid airing its dirty linen in public. The company can put its own house in order without the interference of state authorities.

Although the immediate costs of internal investigations are undoubtedly higher for the enterprise than allowing the prosecutors and courts to handle matters in their own time, the results for the enterprise can be more advantageous. An internal investigation can also enable state criminal proceedings to be conducted much more effectively, because the evidence gathered in an internal investigation typically proves to be of great help in proceedings supervised by the prosecutor's office. Internal investigations are therefore an important weapon in combating abuses and are becoming an alternative for state law enforcement authorities.

When the management board does not function properly

Łukasz Śliwiński

The Commercial Companies Code provides an extensive set of rules governing internal controls in Polish companies, from the general rules for conducting and controlling the company's affairs by the management board to oversight of the management board's actions.

The body specifically responsible for the activity of any company in Poland is its management board. Under Art. 201 of the Commercial Companies Code, the management board conducts the affairs of the company and represents the company, and this authority extends to matters before courts and elsewhere (Art. 204 §1). Conducting the affairs of the company includes more specifically taking organisational and commercial decisions within the company.

Because management board members may be held liable for the obligations of the company (Art. 299 §1), including obligations arising from improper acts by employees, management board members can and indeed should

take up internal investigations to clarify suspected irregularities which have been discovered by the management board or brought to its attention. To this end, the management board may enter into a cooperation agreement with external advisers—lawyers, forensic accountants and IT specialists. Such measures are designed to minimise potential further costs arising out of the identified irregularities and to restore the company to proper order.

But sometimes the management board decides not to conduct the appropriate internal controls despite evident improprieties in the company. One reason for this can be that the internal irregularities at the company are due to actions not only by staff, but by management board members themselves. Although persons appointed to this position are usually professional managers and enjoy the trust of the company's shareholders or supervisory board which appointed them, it may turn out that they are not properly performing their duties, are exposing the company to losses, or are acting in a manner that is objectively improper or of doubtful integrity.

In such situations, pursuant to the relevant provisions of the Commercial Companies Code, the persons authorised to conduct internal procedures at the company are the shareholders or the supervisory board.

Inspection of company operations by shareholders or supervisory board

Under Commercial Companies Code Art. 212 §1, every shareholder of a limited-liability company has the right of inspection. To this end, the shareholder, alone or accompanied by a person appointed by the shareholder, may at any time review the company's books and records, prepare a balance sheet for the shareholder's own use, or demand explanations from the management board. The shareholder may retain an external adviser of its choice for this purpose.

A shareholder may exercise the right of inspection personally or together with an authorised person, which means that it is not permissible for an inspection to be conducted only by an authorised person without the participation of the shareholder. The scope of the right of inspection as defined in Art. 212 §1 is very broad. More specifically, the shareholder may demand any explanations from the management board, and review the company's documents, including financial reports prepared by the company and other financial documents. The shareholder (alone or with an authorised expert) may also use the books and records to draw up a balance sheet for the shareholder's own use.

Nonetheless, under Art. 212 §2 management can sometimes refuse to provide explanations to the shareholder or deny the shareholder access to the company's books and records. A necessary condition for refusal is a justified concern that data and information concerning the company may be used for a purpose contrary to the interests of the company, exposing the company to a potential loss. Such concern might for example arise from the fact that the shareholder is directly or indirectly involved in activity competitive with the company, which clearly could result in exposure of trade secrets to a competitor. The management board may also refuse to provide explanations or access to documents if continual requests of this kind by the shareholder disrupt the work of the company, or if the shareholder is an adversary of the company in litigation, and thus providing information to the shareholder could unfavourably impact the company's litigating position in the dispute with the shareholder.

If the shareholder is refused access to the company's books and records, the simplest solution would be to remove the uncooperative member or members of the management board. But this solution cannot always be achieved, particularly when dismissal of management board members requires the consent of other shareholders. In that situation, under Art. 212 §§ 3 and 4, the shareholder may request that the matter be decided by a resolution of shareholders. The resolution should be adopted within one month after the request is made. If the request for a resolution is denied, the shareholder may apply to the registry court for an order requiring the management board to provide the shareholder explanations or access to the company's books and records. The application must be filed within 7 days after the shareholder is notified of adoption of the shareholder resolution, or 7 days after the end of the one-month period if no resolution is adopted during that time.

The right of inspection by shareholders of a limited-liability company may be limited or excluded by the articles of association if a supervisory board is appointed (Commercial Companies Code Art. 213 §3). Whether or not the shareholders' right of inspection is limited or excluded, ongoing supervision over the activity of the company is the right and obligation of the supervisory board. For this reason, the supervisory board bears responsibility for supervision and control. Thus under Art. 219 §§ 4 and 5, in order to perform its duties the supervisory board may examine any of the company's documents, demand reports and explanations from the management board and employees, and review the state of the company's assets. Any member of the supervisory board may exercise the right of supervision independently unless other provided by the articles of association. Unlike in the case of shareholders, the management board may not deny members of the supervisory board the right to conduct inspections, and therefore it is recognised that the shareholders' right of inspection is more of a right only to obtain information about the company, and only the supervisory board is vested with a full right of inspection. The supervisory board exercise its rights with the assistance of external experts.

It should also be pointed out that upon request of one or more shareholders representing at least one-tenth of the share capital, after calling on the management board to provide a statement the supervisory board may appoint an entity authorised to review the financial reports for the purpose of examining the company's accounting and operations (Commercial Companies Code Art. 223). This provision provides shareholders (particularly minority shareholders) an additional opportunity to exercise effective oversight of the company's operations.

Pursuant to Commercial Companies Code Art. 382 §4, the supervisory board of a joint-stock company enjoys the same entitlements as the supervisory board of a limited-liability company. However, in a joint-stock company the shareholders do not enjoy a full individual right of inspection, but at most partial rights such as the right to review the ledger of minutes and resolutions of the general meeting, the share ledger, the list of shareholders, and informational documents prior to the annual general meeting. Denial of specific rights of inspection to shareholders in a joint-stock company is designed to protect the activity of the management board, particularly in companies with a large number of shareholders, who could effectively frustrate the operations of the management board by filing constant requests for inspection.

Oversight of the supervisory board

Pursuant to Commercial Companies Code Art. 219 §3, the supervisory board is required to submit an annual report to the shareholders' meeting on the results of its review of the financial reports and the management board's report on the business of the company. Through separate bylaws or relevant provisions in the articles of association, other duties, including reporting obligations, may be imposed on members of the supervisory board. Then the correctness of their performance of these duties may be monitored using external experts. It should be pointed out, however, that the persons appointed to the supervisory board should be highly trustworthy. If their behaviour appears to be objectively improper or raises doubts as to their integrity, as a rule the only solution for the shareholders is to immediately replace some or all of the members of the supervisory board. Subsequently, the actions of the dismissed members of the supervisory board can be examined and the findings potentially used in judicial proceedings against them.

Summary

The management board, the supervisory board and the shareholders of a company may exercise rights of supervision and inspection vested in them by the Commercial Companies Code. These entitlements may prove particularly valuable in situations where the actions of employees or other company authorities raise objective doubts as to their correctness or integrity. In exercising these entitlements, they may cooperate with external experts such as lawyers, forensic accountants and IT specialists.

The company as prosecutor

Aleksandra Stępniewska

Can evidence from an internal investigation be used in court?

Internal investigations are an element of compliance management systems. Internal investigations are conducted when irregularities in the operation of the company are discovered, including actions by persons associated with the company in violation of applicable regulations and procedures, such as disclosure of trade secrets, corruption, or mobbing.

The main purpose of an internal investigation is to determine whether irregularities have actually occurred, and if so, who committed them, when, why and how. In order to make these findings, which will subsequently be used to justify remedial measures, including disciplinary or judicial action, evidence must be gathered.

Therefore an internal investigation is intended not only to explain what happened, but also to gather evidence for the purposes of potential legal action. This could mean employment litigation if an employee disputes a disciplinary termination, civil proceedings if the company has suffered a loss, administrative proceedings if for example someone inside the company has made unauthorised use of confidential information, or penal proceedings if irregularities also constitute a criminal offence.

The evidence gathered in internal investigations typically includes documents, digital data, computer printouts, objects, video monitoring, and reports from testimony by witnesses or persons suspected of improprieties. Sometimes evidence is taken from unannounced inspections—"dawn raids"—when offices are searched and computer data are secured.

When an internal investigation is launched, the company, the employer, or the special team appointed to examine the situation become investigators. However, there are no specific regulations governing the procedure to be followed or how evidence is gathered, as there would be in the case of proceedings before public authorities where compliance with the rules is necessary for the evidence to be admissible.

In this context, the question arises whether evidence gathered during an internal investigation can later be used in civil, administrative or criminal proceedings. Although the regulations in force in Poland do not directly address this issue, certain general conclusions can be drawn.

Evidence depends on type of proceeding

In civil proceedings, there is no doubt that private evidence, which would include evidence gathered in an internal investigation, can be admitted and used. In civil proceedings, it is the task of the parties to conduct the dispute, including the presentation of evidence. The court is only an observer of the adversarial contest. Nonetheless, it is ultimately up to the court to rule on admission of evidence and to decide on its credibility.

The Civil Procedure Code indicates specific forms of evidence that can be used to prove factual allegations, but it is not a fixed catalogue. This means that the parties can also submit other forms of evidence to the court which are not mentioned in the code but are made possible by advances in technology. Nonetheless, when seeking evidence in an internal investigation the company should be careful not to violate the law. The Civil Procedure Code does not expressly prohibit the use of illegally obtained evidence, but the practice of the courts can vary, as demonstrated for example by rulings excluding evidence from recordings of conversations when one party did not know that the conversation was being recorded. Moreover, evidence can always be excluded if it was obtained in a manner violating specific prohibitions or evidentiary privileges. An example might be the transcript from interrogation of a witness who had a right to refuse to testify or to present a document because it could be self-incriminating.

In administrative proceedings, anything can be evidence if it helps clarify the matter and is not contrary to law. Again, there is a broad range of evidentiary means available to the non-institutional party (generally a private party). However, the Administrative Procedure Code expressly excludes evidence that was unlawfully obtained, but without specifying particular regulations.

The strictest provisions on admissible evidence are found in the Criminal Procedure Code. The authorities conducting the criminal proceeding as well as the parties are permitted to seek introduction of evidence. The catalogue of permissible evidence is expressly defined, although non-institutional parties may seek to introduce other forms of evidence. Nonetheless, the manner in which the evidence referred to in the code is taken is strictly defined. For example, testimony of witnesses may be taken only by the prosecutorial authority, and the substance of the testi-

mony must be contained in the minutes prepared by the authority and may not be replaced by notes. Moreover, at the present time private documents created for the purpose of a criminal proceeding are not relevant as evidence. This means that minutes from testimony by a witness as part of an internal investigation may be deemed inadmissible as evidence in a criminal proceeding. In order to use the knowledge obtained during an internal investigation, it is necessary to request that the witness be interrogated, indicating the facts to which the witness should testify.

Criminal procedure amendment

But the situation with respect to evidence in criminal proceedings will change fundamentally upon entry into force of reforms in Poland's criminal procedure in July 2015. The changes will give parties to criminal proceedings, such as the injured party and the suspect, greater possibilities, or even require them to participate actively in gathering evidence and presenting evidence to the court. "Private evidence" will be expressly permitted, including evidence created or gathered for purposes of the criminal proceeding, as well as privately prepared expert opinions.

The existing rules will continue to impose certain basic limitations on the scope of evidence-gathering, however. Certain evidence will continue to be expressly inadmissible, such as testimony by the accused which was provided at a time when he or she was regarded only as a witness.

It is clear that evidence gathered during internal investigations will gain in importance in criminal proceedings as a result of the amendment. Indeed, presenting such evidence will become practically a necessity to properly secure the interests of the company as an injured party or as a party that could potentially be liable under the Act on Responsibility of Collective Entities for Punishable Offences, if an offence is committed by a person affiliated with the company.

Internal rules for evidence-gathering

The rules for admissibility of private evidence differ depending on the field of law. But it may be pointless to establish different rules for gathering evidence in internal investigations depending on the nature of the improprieties and the potential legal implications, particularly since the same behaviour will often lead to consequences in several different sphere at the same time. To ensure the effectiveness of the evidence gathered during internal investigations, it would be more valuable to establish certain basic rules for gathering evidence within the organisation.

First and foremost, evidence should be gathered in internal investigations in a manner that respects the fundamental rights of individuals, including the right to privacy and the confidentiality of communications, and also complies with applicable legal regulations.

In the context of interrogating witnesses in internal investigations, the company should bear in mind the general principle that a person has a right to remain silent if his or her statement could expose the person to consequences. As an employer, the company may request that employees provide information and clarifications, regardless of the degree of their possible involvement in improprieties, citing Art. 101 §2(4) of the Labour Code, which establishes a duty of loyalty to the workplace. Nonetheless, the record of explanations obtained in this manner may not be admissible as evidence if in the specific instance there is a prohibition against use of the evidence under the rule that

no person can be required to testify against himself.

To ensure the effectiveness of evidence gathered during internal investigations, it is essential that the evidence be secured against any tampering or loss. This applies in particular to data stored in digital form. It is essential to ensure that data seized in digital form remain unaltered until they are presented as evidence in court, and to demonstrate that the method of securing the evidence protects the data against any alteration. For this purpose it is often necessary to use the services of forensic experts. And if criminal proceedings are considered, the secured evidence will then have to be turned over to law enforcement authorities.

Protection of personal data in internal investigations

Agnieszka Szydlik, Katarzyna Żukowska

Poland's data protection regulations do not directly address internal investigations, but that does not mean they do not apply. In fact they can play a major role in drawing the line between lawful and unlawful investigative measures.

A necessary element of internal investigations is analysis of documents and correspondence of persons working in the company or other organisation being investigated. Depending on the purpose for which it was decided to launch the investigation, the scope of documents may be broad enough to cover not only documents in the traditional sense of the term but also data stored in servers and in individual users' computers (including email), as well as data from company-owned phones and other mobile devices.

Unavoidably, such data sets contain a range of personal data, from the names of individuals to the IP addresses from which they logged onto the company server.

The general rules that must be complied with for personal data to be processed in accordance with the law also apply to processing of personal data in internal investigations, regardless of whether the investigation is preventive in nature or is carried out due to the existence of an actual incident posing a threat to the organisation. Personal data may be processed only when at least one of the conditions set forth in Art. 23 of the Personal Data Protection Act is met (or Art. 27 with respect to sensitive data, i.e. data related to individuals' health, criminal record, religious affiliation, or several other categories of information identified in the act).

It may be recognised that two of the conditions in these regulations for processing of personal data also apply in the case of internal investigations. The first is the requirement of the consent of the data subject (except for deletion of data, for which consent is not required). Consent must be given voluntarily. The second condition is that the processing of data must be necessary to achieve legally

justified purposes of the data controller, without infringing the rights and freedoms of the data subjects.

Obtaining the consent of all the interested persons can be difficult from an organisational point of view. Asking for consent may also compromise the element of confidentiality essential for the investigation and allow some to eliminate traces of unlawful behaviour. An additional issue arises out of the special nature of the relationship between employer and employee. Consent to processing of personal data given by an employee, regarded as the weaker party to the employment relationship and in a position of dependence on the employer, throws into question the employee's freedom in this respect, and hence the legality of the processing of the employee's personal data based on such consent. Theoretically, if the employee has complete freedom in deciding to give consent and could refuse to give consent without facing any negative consequences, such consent could sanction the legality of processing of the employee's personal data. (A similar view has been taken by the European Commission's Art. 29 Working Party on Data Protection and in rulings by Poland's administrative courts.) In practice, however, if a dispute arises it may be difficult to prove that the employee freely consented to processing of his or her personal data in this context.

In addition, there is a use limitation principle in force which requires the data controller to obtain consent also in the event that consent was given before but the purpose originally given for collecting the data did not include internal investigations. In that case it is recommended to obtain consent of the data subjects for the change in the purpose of the data processing.

An alternative basis for processing of personal data in an internal investigation could be derived from the legally justified purposes pursued by the data controller. The Personal Data Protection Act provides two examples of legally justified purposes: direct marketing of the data controller's own products and enforcement of claims arising out of the data controller's own business. However, the concept of "justified purpose" as such is not defined in the act.

In practice, the concept of a legally justified purpose of the data controller is interpreted broadly. In employment aspects, it is cited as the basis sanctioning monitoring of employees in the workplace, including monitoring of employees' use of IT systems and devices belonging to the employer (as the data controller).

Lawfully introduced monitoring of employees may prove to be an incredibly valuable tool when it becomes necessary to conduct an internal investigation, particularly when time is of the essence. Employee monitoring must not only be conducted in compliance with the law (including the Personal Data Protection Act), but must also meet the requirements of a justified purpose and the principle of proportionality. It must also fulfil the requirement of transparency. This means that employees should be aware that they are subject to monitoring, and under what rules, and the rules must be defined in detail. Conducting monitoring of staff without informing them in advance—even if there is a legally justified purpose—will violate the employee's right to privacy, and in consequence the personal data will be processed without a proper basis.

In some industries internal investigations are already standard

Internal investigations are becoming increasingly common, but individuals who face consequences as a result may attempt to undermine the findings or challenge the procedures followed in the investigation — including through seeking the protection of the courts.

How do employers find out about improprieties within their company?

Dominika Stępińska-Duch: This still happens thanks to whistleblowers reporting to the person acting as the compliance officer at the company—or through internal communications channels established especially for this purpose, which should allow employees to remain anonymous at least initially. There could also be signals from competitors, customers or suppliers.

In such instances, management—essentially the employer—not wishing the company's problems to be aired publicly, may decide to conduct an internal investigation. The purpose is first to determine the facts, without an emphasis on drawing consequences. Such an investigation will help catch any irregularities and prevent such events from being repeated in the future.

As demonstrated by examples reported in the media, measures aimed at clarifying matters are often perceived positively by employees, business partners, and public opinion. From the point of view of the company's image, confirmed or suspected problems cannot be left without a response.

Janusz Tomczak: The model just described is an ideal model but also frequently encountered in practice. The management board is vested with the right and obligation to pursue the interests of the enterprise they are responsible for. The need to determine the nature and causes of irregularities and prevent them from happening again falls within the scope of the management board's duties.

Problems arise when suspicions fall on members of the management board or other authorities of the company. Getting to the bottom of the matter requires discretion, while actions must be taken within the bounds of the law. These are complex matters requiring a flexible approach to the situation.

How is an investigation conducted?

Dominika Stępińska-Duch: Typically the management board or other authorised body takes a confidential decision appointing a team which will report directly to that authority. Obviously, the actions taken by the investigating team must also be strictly confidential. The standard today is for the team to be made up of lawyers, IT forensics specialists, and possibly also forensic accountants. Without the ability to rapidly analyse computer data, under current business conditions the team's efforts would be doomed to

failure. It is also vital that the forensics team operate under the instructions of a firm of advocates. This is the only solution that guarantees that the entire procedure will be covered by the attorney-client privilege.

All data available to the enterprise or employer are analysed, particularly data found in devices entrusted to staff, such as mobile phones, laptops and pen drives.

Janusz Tomczak: So the standard is to conduct an internal investigation with the participation of external advisers. This is designed to ensure impartiality, and, given that sensitive information is involved which could impact various key aspects of the operations of the organisation, it also ensures confidentiality, including through use of attorney-client privilege attached to the lawyers involved in the investigation.

Sometimes the investigation will conclude with a report containing recommendations with respect to further measures, together with their potential benefits and problems, and so on. But sometimes no official final report is created.

How does such an investigation relate to the protection of employees' personal data and integrity?

Dominika Stępińska-Duch: That is a delicate issue. We have to be careful not to cross that thin line. The people conducting the investigation must be aware of the boundaries within which they can move. That is why is it important to have someone on the team who knows about employment regulations, data protection, and criminal law. In this aspect as well, the overall confidentiality of the investigation is vital. The chance of documents circulating around the company must absolutely be eliminated. Every person who is questioned in the investigation must be instructed that they have a duty to keep confidential the matters they were questioned about as well as the fact that such an investigation is being conducted at all. Obviously, this is hard. One must be aware that when an outside team comes to the company, even if people are instructed on the duty to maintain confidentiality it is human nature that somehow the news will spread. This can poison the working atmosphere. An investigation that is not handled skilfully can do more harm than good.

Do employees ever complain that their personal interests are being violated?

Dominika Stępińska-Duch: Yes, they do. That's why the way employees are approached in the investigation is so important. The staff should be brought closer together. If there is no reason to suspect that someone committed a violation, they must not feel that they are under attack. Employees should also, for example, be given the chance to delete private information from secured electronic devices. The people working with the secured material must not analyse private data.

Janusz Tomczak: This is a key issue, because unfortunately we must be aware that individuals who suffer consequences as a result of an internal investigation may attempt to dispute the findings. Both the handling of the investigation and the information and evidence gathered during the investigation can be examined in other proceedings conducted by legal authorities, such as investigations by prosecutors or disputes before the labour courts. Access to the findings of an internal investigation is one of the most debated issues. A person whose employment or managerial contract was terminated may for example claim that the internal investigation was aimed at finding

a scapegoat, while the real perpetrators remain untouched. And it cannot be ruled out that such cases do sometimes happen. Looked at from this angle, it is apparent what great responsibility we may bear.

Are many internal investigations conducted in Poland?

Dominika Stępińska-Duch: In some industries internal investigations are already the standard way to deal with a crisis in the company, a necessary element of the restructuring process.

Janusz Tomczak: But this is still the domain of big companies who can afford to hire specialists from different fields, including data analysts, whose fees can be high.

Can't a company use its own resources to identify the source of irregularities?

Dominika Stępińska-Duch: Outsourcing this activity helps maintain the objectivity of the process. The team entering the company must first familiarise itself with the company's business culture. We review all internal documents: statutes, bylaws of the board, and procedures. We need to be fully aware of the standards in force at the company and what the employees have really been required to comply with. Often there is a disconnect between what is provided for on paper and the actual views of the managers.

During the investigation we conduct a thorough analysis of the procedures. We interview people we trust, who can help us compare the reality with what is presented in the documents. The more sources of information, and more objective and accurate a picture we obtain.

What if the company has neglected to prepare precise procedures?

Dominika Stępińska-Duch: Then the guidelines for tightening the procedures and amending the current documentation are a positive outcome of the investigation. Such guidelines are indeed a regular feature of the closing report from the investigation. They help the company avoid losses in the future, even if other consequences can't be drawn in the specific situation.

Janusz Tomczak: It's essential to be aware that under the Act on Responsibility of Collective Entities for Punishable Offences, a company can be held responsible for failing to have appropriate oversight mechanisms in place. The guilty party may argue that it was the lack of proper controls that was the source of irregularities or even crimes, which might for example be committed by third parties, such as long-term customers and suppliers of the company. This act is rarely applied, but the possibility does exist.

If the investigation is effective, what can the consequences be for the violators?

Dominika Stępińska-Duch: The consequences of an internal investigation can operate across many different levels. In the relationship between the specific employee and the employer, the employment may be terminated, whether by agreement of the parties or through a disciplinary firing. Claims for damages may be a further consequence. The employer could also file a notice of an offence with the prosecutor's office concerning the prohibited actions of the former employee.

In the relationship between the employer and the remaining employees, the preventive aspect looms large. They get a signal that behaviour conflicting with the interests of the company will not be tolerated. Another step in this area is often a change in procedures and intensive training for staff.

From the point of view of best practice in management, internal investigations allow companies to identify problem areas and change approaches that were not working, and take steps to eliminate the consequences of violations.

Janusz Tomczak: We must anticipate however that the procedure and consequences of internal investigations will be checked in subsequent proceedings—suits filed by fired employees or actions commenced during the internal investigation or as a result of the findings made in the investigation. This forces the team to act with special caution and concern for respecting the rights of the persons affected by the investigation.

Interview conducted by Justyna Zandberg-Malec

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Business Crime Practice

In view of the ever-growing involvement of criminal law in commercial dealings, Wardyński & Partners has set up a team specialising in white-collar criminal law.

Alongside experience in criminal cases, we have broad knowledge of how businesses operate and in various fields of commercial law, which enables us to provide a full analysis of issues related to business crime and to limit the risk of criminal liability.

We seek to provide businesses with full legal support in their contacts with law enforcement authorities, while preserving such values as trade secrecy, the security of commercial dealings, and proper functioning of corporate authorities.

We represent clients in all types of criminal proceedings and at all stages. In addition to representation by an *adwokat* we also coordinate the work of external experts and specialists retained by the law firm.

We advise on how to minimise the risks of criminal liability and mitigate the business impact of criminal offences.

We prepare internal compliance programmes designed to improve the functioning of businesses, maintain compliance with applicable regulations in their day-to-day operations, and assure that any irregularities are uncovered promptly.

We advise businesses in internal investigations to discover the causes for irregularities that may constitute criminal offences and to redress the effects.

We are also prepared to assure full legal support in the criminal law area in cross-border matters.

About Wardyński & Partners

Wardyński & Partners was established in 1988. Drawing from the finest traditions of the legal profession in Poland, we focus on our clients' business needs, helping them find effective and practical solutions to their most difficult legal problems.

The firm is particularly noted among clients and competitors for its services in dispute resolution, M&A, intellectual property, real estate and title restitution.

The firm now has over 100 lawyers, providing legal services in Polish, English, French, German, Spanish, Russian, Czech and Korean. We have offices in Warsaw, Kraków, Poznań and Wrocław.

We advise clients in the following areas of practice: agridesk, aviation law, banking & finance, bankruptcy, business crime, business-to-business contracts, capital markets, competition law, compliance, corporate law, difficult receivables recovery, employment law, energy law, environmental law, EU law, financial institutions, healthcare, infrastructure, insurance, intellectual property, life science, litigation, mergers & acquisitions, new technologies, outsourcing, payment services, personal data protection, private client, private equity, public procurement, real estate and construction, reprivatisation, restructuring, retail and distribution, sports law, state aid, tax, and transport.

We share our knowledge and experience through our web portal for legal professionals and businesspeople (www.inprinciple.pl), the firm *Yearbook*, and the "Law and Practice" series. We are also the publishers of the first Polish-language legal app for mobile devices (Wardyński+), available as a free download at the App Store and Google Play.

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