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A practical cross-border insight into corporate investigations

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General Chapters:

Country Question and Answer Chapters:

Netherlands

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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?

The Netherlands does not have a statutory framework that prescribes when or how to conduct internal investigations. However, investigating potential wrongdoing is considered an integral part of an adequate risk management and control system. Larger companies must annually report in writing to the supervisory board on risks and internal controls. Corporate governance codes, when applicable, require management boards to report in their annual statement on the effectiveness of the design and the operation of their internal risk management and control systems. Investigating wrongdoing is also essential for financial institutions given their statutory obligation to report any 'integrity incidents'. Lastly, external accountants must report internal fraud and withhold approval of the financial statements, unless irregularities are properly investigated and effective compliance measures prevent reoccurrence. Ignoring indications of wrongdoing may lead to civil or criminal liability of the entity or its directors, especially if it allowed incidents to reoccur. Immediate and effective action may avert liability and/or an investigation or report of fraud by the external accountant. Presenting a plan for an internal investigation may in some cases also prevent enforcement agencies from starting their own – intrusive – investigation and positively impact the handling of the case by the authorities (see questions 2.1 and 2.2).

During internal investigations, Dutch privacy, data protection and labour law rules should be observed (see sections 6 and 7). Violation of these laws may give rise to civil liability and administrative and/or criminal sanctions.

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?

An employer for whom 50 people or more work is obliged to have an internal reporting procedure for abuses under the Whistleblowers Authority Act. Corporate Governance Codes also require listed companies and companies in specific sectors (e.g. the cultural, healthcare or education sectors) to have reporting procedures. This procedure sets out how whistleblowers can report, what happens with that report and what protection is given to whistleblowers. In any case, an employee who makes a report of an abuse in the correct manner may not be disadvantaged for that reason. Complaints by the whistleblower of being disadvantaged may warrant an investigation by the Whistleblowers Authority, civil liability and administrative fines.

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?

In internal investigations, the entity itself is usually recognised as the client. Instructions to outside counsel can be given by a representative body of the entity, which may also elect a contact person to oversee the internal investigation. The client, the scope of the work and to whom outside counsel reports should be identified in the engagement letter. All persons connected to the incident under scrutiny, who could potentially be implicated for any wrongdoing, should be excluded from involvement in the internal investigation.

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?

There is no legal provision that provides that voluntary self-disclosure may lead to immunity from prosecution, reduction of penalties or leniency measures. However, voluntary self-disclosure may be interpreted as cooperation with the authorities, which may positively affect the decision whether or not to prosecute, offer an out-of-court settlement or reduce the penalty. The authorities will take into consideration all facts and circumstances of the case, including the seriousness of the acts committed, the type of organisation, criminal intent and/or knowledge at management

or board level, cooperation with the authorities, subsequent introduction of compliance measures, disciplinary sanctions, changes in the organisation and/or management and other relevant circumstances, such as a significant lapse of time.

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?

Entities themselves may decide if and when to report their findings to the authorities. If possible, it is preferable to disclose after the facts have been established, disciplinary sanctions have been taken and effective compliance measures have been introduced, as this may prevent enforcement agencies from starting their own intrusive investigation, curtail negative media exposure and positively impact the handling of the case by the authorities (see question 2.1). However, the entity may require the investigative powers of enforcement agencies to establish the facts or find the perpetrator. In such cases, management may weigh the interest of the entity in finding the perpetrator *versus* the disadvantage of potential criminal or administrative sanctions and reputational damage from self-disclosure.

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?

There is no legal framework for the format in which the findings have to be reported. A written report – especially when substantiated and provided with attachments – is more manageable than a sole oral statement and therefore more likely to be followed up on. This may be a disadvantage if the entity itself is at risk of sanctions. However, it is an advantage if the entity wishes the authorities to take action against another legal or natural person. For the overall advantages and disadvantages of written or oral reports, please see question 8.1.

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?

An entity is not required to liaise with state (local or governmental) authorities before starting an internal investigation. It is advisable only to liaise with the authorities if the entity can benefit from a cooperative attitude towards the authorities. Cooperation may facilitate and expedite a criminal investigation and ultimately lead to sanctions for the entity. Also, informing the authorities of an ongoing internal investigation without ultimately disclosing the findings may negatively impact the entity's reputation and goodwill.

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?

There is no right to help define or limit the scope of a government investigation. By presenting a plan for a thorough internal investigation, companies may prevent enforcement agencies from starting their own investigations. Additionally, entities may try to influence the scope of the authorities' activity informally by liaising with the enforcement agencies and/or restricting their cooperation to certain incidents or activities.

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?

It is common practice for Dutch enforcement agencies to cooperate and coordinate with other jurisdictions in cross-border investigations. Similarly, the defence should seek local counsel in each jurisdiction to confer effectively on strategy and potential issues.

4 The Investigation Process

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

The investigation plan should include a clear research question, the scope of the investigation, approach (including the collection of data and research methods), a timeline and estimated time investment. The plan should carefully weigh the entity's legitimate interest in investigating irregularities against employees' privacy concerns and substantiate the choice of research method.

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?

Outside counsel should be approached for advice on the investigative methods and in order to extend privilege to the internal investigation, so that the entity is not obliged to disclose its findings to enforcement agencies and/or injured parties. Outside resources should be engaged when cost- and/or time-effective or if there is a need for expertise in a specific field. Privilege is extended to outside professionals if engaged by and contacted through the attorney (see question 5.2).

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?

The Netherlands recognises attorney-client privilege in the context of internal investigations. Attorneys, their staff and the client (and his staff) have the right to refuse to give evidence and confidentiality may be invoked with regard to any correspondence or documents prepared by or for the attorney, both in criminal and civil proceedings. A lower court recently recognised an exemption when the attorney reported its findings as being purely factual and without any legal qualification, conclusion or advice. This decision met heavy criticism. However, as best practice, reports should always combine facts with legal advice and include a statement confirming this.

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)?

Attorney-client privilege extends to professionals engaged by the attorney. Work product and correspondence with the law firm within the scope of engagement is confidential and subject to attorney-client privilege. However, direct correspondence between the client and the third party is not privileged. Therefore, any correspondence between the client and third parties should be routed via the attorney. It is under debate whether it is sufficient to copy the attorney in on correspondence ("cc") or if all correspondence must be addressed to the attorney in his capacity as legal advisor.

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

Under Dutch law, legal privilege applies equally to all attorneys, whether in-house or outside legal counsel. However, the Court of Justice has not accepted full legal privilege for in-house attorneys in competition law cases, thus restricting their legal privilege in Dutch competition investigations. We note that privilege does not extend to lawyers that are not admitted to the bar.

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

It is recommended to mark all privileged correspondence as "privileged and confidential" and all documents/memoranda to or from attorneys as "attorney-client work product". Correspondence with third parties should be routed via the attorney. Also, it is recommended to keep attorney-client correspondence in separate folders marked as privileged, both physically and digitally. This facilitates the identification of the documents or correspondence as being confidential due to attorney-client privilege.

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?

If the results of the internal investigation are disclosed to law enforcement agencies, the findings will very likely become part of the investigation file and – eventually – the case file against the defendants. The Prosecutor's Office, the defendant, injured parties and third parties that demonstrate a legitimate interest in the particular documentation can be granted access to the files. The entity can object to disclosure of this part of the case files to injured parties and/or third parties. However, only in special circumstances will the interests of the company prevail. Although the case file itself is not available to the public, the content can become part of public record via the press when discussed in court.

6 Data Collection and Data Privacy Issues

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

Employees may have a reasonable expectation of privacy in the workplace. Unjustified violation of privacy may lead to civil (labour law) liability and high administrative fines by the Dutch Data Protection Authority. From 25 May 2018 onwards, all processors of personal data have to comply with the strict regulations for collecting, processing and transferring employees' personal data under the European General Data Protection Regulation ("GDPR"). Surveillance of employees with hidden cameras without any prior notice is not allowed and is punishable as a criminal act.

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?

Document preservation notices are only issued if the formal warning is unlikely to hamper the investigation, as they may backfire and implore perpetrators to destroy evidence. The notice is generally sent to all persons involved as well as the ICT and/or administrative departments that process such data, given possible expiration dates on preserving data.

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.)?

Data for the internal investigation should be collected according to the law of the specific jurisdiction. In transferring personal information outside the EU or the European Economic Area, the entity should observe the data protection provisions of the specific jurisdiction.

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

There is no general stance on which documents should be collected. In practice, all data that may reasonably be of interest for the investigators may be collected, including e-mails, and physical and electronic files.

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

Typically, a full back-up ("image") is made of all data on the entity's server/network, the desktop computers or tablets of the persons involved and their e-mail accounts. In addition, physical files and documents are collected based on markings with relevant key words, such as the person, project and/or time period to which they refer. Physical documents are usually digitalised to make them searchable. Often a data analysis and/or IT company is engaged by the attorney (in order to extend legal privilege) in order to help collect, store and search the files electronically.

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?

The use of predictive coding techniques is not prohibited. In practice,

voluminous data is still largely reviewed manually, based on key-word searches. To save costs, a first review is often conducted by legal assistants or junior lawyers who mark the documents as relevant or irrelevant, followed up by a more detailed review of the relevant documents by senior attorneys.

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 Netherlands does not provide for a statutory framework with regard to conducting witness interviews in internal investigations nor an obligation to consult the authorities. In labour law disputes, it has been accepted that the interview should be fair and in accordance with the statutory responsibility to act as a good employer. The burden of evidence that the interview was fair is on the employer.

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 have a contractual duty towards their employer to act as good employees. Refusing to cooperate in an internal investigation may be grounds for disciplinary sanctions and/or 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?

There is no statutory or regulatory obligation to provide legal representation to witnesses. However, it may be in the interest of the entity to provide legal representation to employees suspected of criminal behaviour, both under the obligation to act as a good employer and given the risk that criminal acts may be attributed to the entity or damage its reputation. The legal advisor of the witness should be independent and have no relevant association with the attorney in charge of the internal investigation.

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

As best practice, witnesses are informed in writing of the date and time of the interview, the right to consult an attorney and/or bring legal representation at their own expense and the fact that their answers may be disclosed to the entity. The witness' testimony is recorded on audio-tape and in writing. A copy of the written testimony is provided to the witness and/or his attorney and may be reviewed and revised. The witness is requested to sign the statement for approval.

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

Dutch employees are generally direct and unnuanced in tone and manner, well-informed and unafraid to invoke their rights under Dutch labour and/or privacy law. At management level, employees are likely to engage legal assistance for witness interviews. Therefore, procedural mishaps are likely to be scrutinised and weaponised in court proceedings (e.g. in labour law or civil disputes). It is therefore advisable to seek experienced and specialised legal counsel when conducting internal investigations.

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

Companies may formulate their own internal reporting procedure that regulates how whistleblowers can report, what happens with the report and what protection is given to whistleblowers. An employee who does not correctly follow the internal reporting procedure cannot claim protection against disadvantage nor request help from the Whistleblowers Authority. Therefore, companies can uphold the rights of a whistleblower while safeguarding their own interest by setting up a carefully thought out reporting procedure.

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

There is no statutory framework that provides for a right to review or revise statements by employees. However, it is common practice to allow employees to review and revise the statement before signing it. Employers often prefer collecting a signed statement as it will have more evidentiary value in court; for example, to corroborate grounds for a dismissal. It is preferable to also record the interview on audio-tape and note the exact wording of the witness if the content of the statement is challenged.

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

There is no statutory or regulatory obligation to provide or allow legal representation for witnesses. However, it is common practice to allow employees to have legal representation present during witness interviews for internal investigations. Since the attorney conducting the interview is engaged by the entity, the witness is not regarded as a client and his/her answers may be disclosed to the entity.

8 Investigation Report

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

The investigation report should be clearly marked as privileged. It should address the scope of the internal investigation (research question), the investigation process and limitations. The report should present the facts of the case in an objective manner, with reference to the source of the information, and provide a legal analysis concluded by a clear answer to the research question. In consultation with the client, recommendations on improving compliance measures may be provided to offer management a clear guideline on possible compliance measures that can satisfy their duty to prevent reoccurrence. It may be preferable to report recommendations separately or orally, as the authorities may treat a lack of follow-up on a par with taking insufficient action to prevent further incidents/misconduct. Access to the report should be monitored closely, since the

confidentiality disappears if the report is openly disclosed to third parties (not engaged by the attorney). If preventing disclosure of the report is a priority, it is possible to only allow reading access at the law firm or solely report in oral form (with or without a visual aid for future reference).

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De Roos & Pen Law Firm is a *Legal 500* tier 1 firm and was established in 1984. Consequently, it is one of the oldest criminal law firms in the Netherlands.

De Roos & Pen specialises in financial economic and criminal tax law and is recognised both internationally and within the Netherlands as an authority in this field. As a result, the office has a great deal of expertise and experience in handling complex fraud cases.

Additionally, De Roos & Pen conducts internal investigations, mainly on behalf of the financial sector, and offers advice about compliance and corporate governance. As a result, De Roos & Pen frequently serves international (often American) companies with interests in the Netherlands or elsewhere in Europe.

Thanks to our scale, De Roos & Pen is regarded as a (medium) large criminal law office – we are always ready to put together a reliable team of attorneys for every acute criminal law problem.

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