COLLECTING EVIDENCE IN INTERNAL INVESTIGATIONS IN THE LIGHT OF PARALLEL CRIMINAL PROCEEDINGS

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I. INTRODUCTION

Over the last decade, it has become more and more common for companies in Germany to internally investigate any detected or alleged cases of misconduct of their employees. In fact, investigating compliance violations within the company, especially potential criminal offenses, bringing them to an end and sanctioning those who committed them are the three main duties of the company’s management with regard to “reactive” or “repressive” compliance. In some cases, an internal investigation is conducted parallel to pending criminal proceedings and sometimes, due to the misconduct of single employees, sanctions against the company and its management can be impending. The internal investigation then also becomes a means of defense. Obviously, such internal investigations are especially difficult as the collected evidence might at the same time have negative implications for the outcome of the criminal proceedings. The following article analyzes the challenges that companies face in conducting an internal investigation and collecting evidence parallel to ongoing criminal proceedings.

A. What are internal investigations?

The management’s duty to investigate all cases of suspected misconduct is widely accepted and deprived from corporate\(^1\) as well as administrative law regulations\(^2\). If the management of a company fails to investigate reliable information on potential misconduct it receives and does not stop and avenge any such detected behavior, it can become liable to the company for damages occurring from that misconduct. In the “Neubürger” decision, the District Court (Landgericht) of München I has explicitly defined the management’s omission to take appropriate measures to investigate cases of misconduct about which it had been informed as a breach of its duty to implement and monitor an effective compliance management system.\(^3\)

As there is a duty to investigate, this also means that a company is allowed to investigate on its own if suspicions of misconduct occur. Thus, it is not limited to rely on possible state investigations. In fact, both might take place parallel to each other.\(^4\)

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1 E.g. Section 93 Paragraph 1 1st sentence and Section 116 of the Stock Corporation Act and Section 43 Paragraph 1 of the Law on Limited Liability Companies.
2 In particular Section 130 of the Act on Regulatory Offenses.
The aim of an internal investigation usually is to gather information about any alleged facts, in order to evaluate whether any misconduct exists and in case of affirmation, who has done what, when, how and why. The company therefore may perform a number of investigative actions such as reviewing data and documents as well as interviewing employees. The results, usually summed up in an investigation report, form the basis for the evaluation of the risks at which the misconduct might put the company and for the decision about the next steps to be taken by the management.

While the term “internal investigation” has been common in other legal systems for decades, in Germany its occurrence has only risen over the last ten years. Furthermore, there is no codified special law with regard to the conduct of an internal investigation. The limits for any investigative action are hence the regulations of the applicable substantive civil and criminal law. In practice, a number of legal questions regarding the conduct but also the relation between private and state investigations remain yet open.

B. In what constellations are they conducted?

The initiation of an internal investigation often depends on the time when the alleged misconduct gets to the management’s attention and whether any third party, especially a prosecution authority, has knowledge of the suspicions in question.

Sometimes an internal investigation is merely conducted because of an internal hint or an irregularity detected in an internal audit, without any external knowledge of the facts to be investigated at all. In these cases, there is usually no external pressure on the conduct of the internal investigation. Thus, it is to some extent at the discretion of the company if an external criminal proceeding is performed. Only if the company decides to actively involve the authorities, the authorities will evaluate whether an initial suspension is constituted.

However, this condition changes as soon as there is a risk that the internal information will become public. That might be the case e.g. if there is a whistleblower who announces to give his information to the prosecution authorities or if an external audit, e.g. by the fiscal authorities, is about to take place. Finally, in other cases, state proceedings are already going on. Less critical constellations among them are those in which the person or whistleblower that has reported an offense to the prosecution authorities informs the company about the proceedings at the same time. That might be the case e.g. when the criminal proceedings are initiated parallel or prior to a pending civil law suit. Sometimes the company is also informed by reports in the media or can conclude that proceedings are ongoing or expectable, because it gets to know that a competitor is already under investigation. Again, in these cases the company has the chance to proactively contact the prosecution authorities before any compulsory measures are undertaken, and offer to cooperate and investigate the allegations internally.

Depending on the case and the expected involvement of the management and the com-
pany itself, the prosecution authorities might sometimes also contact the company in advance with regard to ongoing proceedings against one of its employees.

The most unappreciative cases, however, are usually those in which the proceedings are disclosed by compulsory measures against the company, in particular by a search. In these cases, the company’s leeway in decision making is much narrower and cooperating with the prosecution authorities often becomes inevitable. Additionally, the company does not have the knowledge advantage it has when it is the first to become aware of the suspicions, but instead has to catch up with what the accusations are and what the prosecution authorities know or presume to know.

C. What are the typical accusations that are investigated?

There are basically two main categories of accusations that can be differentiated.

First, there are cases, in which the company is supposed to be a victim, i.e. has been betrayed by its employee without benefiting from the employee’s actions. Examples are that an employee has accepted bribes from a supplier to contract with him although the products are of minor quality in comparison to those of other competitors or that an employee has committed fraudulent actions and transferred company funds to his private accounts.

The second category comprises constellations, in which the company might or does benefit from its employee’s misconduct. Typical offenses are such that are committed in the assumed interest of the company, such as active bribery, often by using slush funds, tax evasions or fraud against a third party. In practice, those constellations are highly relevant in which these offenses were enabled by a violation of organizational or supervisory duties by a company’s executive (Section 130 of the Act on Regulatory Offenses).

D. How is the company involved in the investigated accusations?

The risks imposed on the company obviously differ with regard to the two aforementioned categories.

In the vast majority of cases of the first category, the fronts are clear: the employee did act to the disadvantage of the company and thereby committed an offense, while the company – from a legal point of view – did nothing wrong, i.e. unlawful. Therefore, the company will usually not be at risk to be additionally sanctioned for what the employee did. Even more, the companies and any prosecution authority’s interest will be concurrent, i.e. both will have the interest to hold the employee liable for what he did.

However, though any possible criminal proceedings occurring from that misconduct might not put the company at risk, the prosecutor’s investigation itself and any compulsory measures accompanied by it might do so. For example, a search might be likely to
attract public attention and also the mere disclosure of what happened might include the risk of severe reputational damages, especially in cases where the misconduct discloses a weakness in the company’s internal control system.

It should also be noted that even in these cases, depending on the facts of the single case, a prosecution authority might take another point of view and investigate a possible liability of the company or its management. That might in particular be the case, if the employee’s offense was enabled by a significant lack of adequate compliance procedures and controls due to an omission of the company’s management (cf. Section 130 of the Act on Regulatory Offenses).

Thus, then the same situation as in the second category would exist: In these cases, there is a risk of severe sanctions against the company and the members of its management themselves. The main risk in such cases under German law – besides reputational and other immaterial risks – is a fine under Section 30 of the Act on Regulatory Offenses, especially in connection with Section 17 Paragraph 4 of the Act on Regulatory Offenses. Sanctions can be up to EUR 10 Mio and significantly higher in cases where any benefits the company has gained are skimmed. Additionally, the exclusion from public tenders or civil claims from business partners may ensue.

The members of the management might be subject to personal fines of up to 1 Mio EUR (Section 130 of the Act of Regulatory Offenses), labor law consequences and, as the already mentioned “Neubürger” decision shows,5 substantial civil claims for damages.

In cases under foreign law, e.g. the FCPA, or where an international body, such as the World Bank, is involved, even higher financial sanctions or more severe sanctions of another kind, e.g. exclusion from any World Bank project, might be impending. In any case, defining the role of the company with regard to the alleged misconduct and by that determining the risks the company might face, belongs to the most important tasks to be performed by the company’s compliance function.6 The question whether a company is just a victim or whether it might be subject to sanctions itself can significantly influence the process of the internal investigation and the way it is conducted.

E. Why do companies conduct internal investigations?

6 Cf. Sascha Süße, Der Compliance Officer im Fokus behördlicher Ermittlungen, NEWSDIENST COMPLIANCE 71004 (2015).
As the constellations, in which internal investigations are conducted, differ, the same applies to the reasons why they are performed.\(^7\) However, one basic aim underlies all internal investigations: To keep the negative impact arising from the misconduct or breach of law as little and low as possible for the company and the members of its management.

If the company is a victim with regard to a single employee’s misconduct, the internal investigation aims to define any damage that might have occurred and to allow the management to determine how successful any reclams against the employee or involved third parties might be. In such cases, the company will initiate all necessary sanctions against the employee, which might include charging a criminal offense. The latter might be particularly necessary if there are strong indications for the alleged misconduct, but the last and convincing evidence cannot be retrieved by the company without the help of a state agency, such as the evidence of an incoming payment to or a withdrawal from the employee’s private bank account, to which the company has and can get no access, but a prosecutor might. Additionally, in cases of complex economic contexts or where large amounts of data and information have to be reviewed and processed, it might be in the company’s interest to properly prepare the data for the prosecution authorities in order to catalyze preliminary proceedings or to ensure that the case is not closed because of a lack of factual understanding by the prosecutor.\(^8\) Cooperating with the prosecution authorities might in these cases be inevitable, not least in order for the management to fulfill its duty to secure all civil claims the company might have.

In cases where criminal or administrative proceedings against the company itself and/or its organs or other top-level management are pending, conducting an internal investigation is a means of cooperation with the prosecution authorities. This cooperation is not compulsory, since none of the parties is – in principle – legally obliged to cooperation or disclosure.\(^9\) However, in this cooperative-scenario, the company usually undertakes

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\(^8\) For details see Helmut Görling, *Compliance und Strafrecht*, in *Compliance Aufbau – Management – Risikobereiche* Chapter 6, 454 ff., No. 22 ff. (Helmut Görling et al eds., 2010).

\(^9\) Tine Golombek, *Pflichten von Geschäftsleitung- und Überwachungsorganen bei Verdacht auf Unregelmäßigkeiten im Unternehmen*, *Journal der Wirtschaftsstrafrechtlichen Vereinigung* 165, 169 (2012); for an obligation to disclose to public authorities, if there is a case in which there arises an obligation to correct a fiscal declaration pursuant to Section 153 of the Fiscal Code, cf. Oliver Sahan, *Korruption als steuerstrafrechtliches Risiko*, in *Recht-Wirtschaft-Strafe*, FS Erich Samson, 605 f. (Wolfgang Joekes et al. eds., 2010); Björn Krug & Christoph Skoupil, *Die steuerliche Korrekturpflicht nach § 153 AO bei im Rahmen von Inter-
some or even the major part of the (internal) investigative work and commits to forwarding the (essential) results of the internal investigation to the public authorities. In exchange, the company is able to exercise at least some or more influence on the course of the investigation. This cooperation also aims at reducing the risk for the company to be exposed to compulsory measures such as searches. Usually, the prosecution authorities will accept to refrain from such measures only as long as they are convinced that the company’s internal investigation is conducted proper and transparent. Furthermore, cooperating with the prosecution authorities and supporting them with information and evidence might be considered as a mitigating factor by the prosecution authorities in cases where the company faces a fine, and thus reduce the monetary burden imposed on the company.

Finally, there are constellations, in which the cooperation between company and prosecution authority goes even further and the internal investigation is conducted by the company, respectively its criminal lawyers, on behalf of the prosecution authority. In these cases, all investigative actions are usually closely coordinated between the two.

It should be noted that especially in cases where international, i.e. US-, authorities are involved, a cooperation as described regularly constitutes the only factual option if the company wants to walk out of this crisis safe and sound, and that the expectations regarding the company’s willingness to disclose all kinds of misconduct is distinctively higher.

Secondary, but nevertheless often equally important, further intentions when conducting an internal investigation are getting information about the company’s compliance and internal control system, getting to know the truth, collecting the information for

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any claims the company might have or it needs to recover assets as well as internally stressing that the company does not tolerate misconduct and thereby strengthening the compliance management system.

F. Who precisely performs them?

Internal investigations are performed by the company which has an interest in clarifying certain facts related to any potential misconduct of its employees or management or simply by the company that has to defend itself. The principal or, speaking in terms of internal processes, the owner of the internal investigation usually is the management, i.e. the executive board. In certain constellations, e.g. when the accusations under investigation are raised against one or several members of the executive board, the supervisory board may initiate the internal investigation. The investigation as a whole is regularly delegated to one function below the management level, often to the general counsel or to the compliance officer, whose responsibility it is to coordinate and ensure the adequate, efficient and compliant conduct of the investigation. In larger companies, detailed processes are determined with regard to the steps that have to be taken, the company functions that have to be involved and the external expertise that has to be obtained. However, in practice, especially in medium sized or small companies or in companies which put their focus on repressive compliance for the first time, one very often realizes that these processes do not exist or are not clearly defined with regard to the assignment of competences. Especially in those cases where parallel criminal proceedings exist, these shortcomings can lead to a number of negative consequences.

The coordination function will need support by a number of other company functions, such as internal audit, human resources, finance, IT, public relations and the operative units such as senior management of sales and distributions or research and development. Additionally, especially in cases of parallel criminal proceedings, the involvement of a lawyer specialized in corporate criminal law will be mandatory. In international cases, foreign lawyers are often needed as further support. Depending on the evidence that has to be retrieved and the amount and availability of the company’s in-house know how, an external IT-Forensic expert has to be involved. In some cases, the supplementary expertise of an accounting firm or a forensic department of such might be valuable. However, it should not be overseen that with a growing number involved, the coordination task becomes more complex and, from the point of view of a prosecution authority, also the number of potential informants rises.

G. What is done?

First of all, the hypotheses which will be investigated by the company have to be determined and precisely defined. In the course of the investigation these might be amended or adjusted due to further knowledge gained in the meantime. However, especially where the suspicion of a committed crime is investigated and parallel criminal proceedings are pending, working with hypotheses is important in order to focus the investiga-
tion on what is relevant and not to waste time on maybe interesting, but legally irrelevant facts.

One main task for those conducting the internal investigation is to collect evidence for justifying the hypotheses defined and for supporting or defending against any accusation under investigation by the prosecution authorities. The collecting of evidence itself must certainly be compliant with all applicable laws, i.e. must not violate any criminal, data protection or labor laws. Also, it must be defined for what purposes the evidence is collected, i.e. for defending the company, for bringing criminal, labor or civil charges against the employee, for recovering assets etc. Such usage also stresses the importance of properly gaining any evidence, because otherwise, its utilization in a later court hearing might be at risk.

All evidence collected is usually put together to draft the story line of what has happened, and summed up in a report on the results of the internal investigation, which will usually be discussed and agreed upon with the compliance or legal function within the company, and finally presented to the management as the basis for deciding about the further measures to be taken.

II. COLLECTING EVIDENCE

As described, collecting evidence is one of the main tasks while conducting an internal investigation. Basically, in practice one can differentiate between three kinds of evidence: First, written evidence, both digital and hard-copy, such as e-mails, letters, notes, and also accounts, invoices or other supporting documents; secondly, oral evidence, which is provided to the internal investigators by employees or the management; and thirdly, evidence gathered from background researches, such as information from databases or public registers.

There are several ways to collect these evidences, with e-mail searches, interviewing employees, reviewing documents and performing background researches being the most important ones.

A. E-mail searches

Today, communication via e-mail has become the most important way to exchange
information, also in business.\textsuperscript{14} Therefore, e-mail searches are an important source of knowledge for the purposes of internal investigations, while at the same time, they are very often considered a substantial impairment of rights by employees and work councils. Though several questions regarding the preconditions for the permissibility of e-mail searches are still controversially discussed,\textsuperscript{15} these preconditions are usually met in the context of criminal offenses, especially in cases where a concrete suspicion against a concrete employee exists and parallel state investigations are ongoing.\textsuperscript{16} Companies can also reduce possible risks relating to e-mail searches in advance by implementing a reasonable framework of internal regulations regarding the use of the company’s IT-systems.\textsuperscript{17}

With regard to the practical process, first of all the relevant data has to be determined, i.e. the hard and server drives as well as the accounts that have to be searched have to be collected and specified. Additionally, the investigation team needs to know when and how often back-ups are made. After a professional copying, time filters have to be implemented and the data has to be de-duplicated and cleaned before it can be searched. If no special in-house IT-expertise is at hand, external IT-forensic- respectively e-discovery-experts have to be involved. One crucial task that follows is the determination of search terms that ensure that the relevant documents and conversations are filtered and found. The hits produced by applying these search terms then have to be reviewed by the company or external lawyers.

B. Interviewing employees

Another essential source of knowledge to elucidate compliance-offenses is interviewing employees.\textsuperscript{18} The majority of tasks within a company are delegated to the employees

\textsuperscript{14} Sascha Süße & Ken Eckstein, Aktuelle Entwicklungen im Bereich „Interne Untersuchung“, NEWSDIENST COMPLIANCE 71009 (2014).


\textsuperscript{16} For the prerequisites see Section 31 of the Federal Data Protection Act; moreover LAG Berlin-Brandenburg, Urteil vom 16.2.2011 – 4 Sa 2112/10 = NZA-RR 342, 343 (2011) and for an overview of the relevant criminal and data protection law provisions see Jörg Eisele, Datenschutzstrafrecht, in Handbuch Criminal Compliance § 23, 764-798 (Thomas Rotsch ed., 2015).

\textsuperscript{17} Cf. details Tim Wybitul & Wolf-Tassilo Böhm, E-Mail-Kontrollen für Compliance-Zwecke und bei internen Ermittlungen, CORPORATE COMPLIANCE ZEITSCHRIFT 133, 133 (2015).

\textsuperscript{18} Sascha Süße & Ken Eckstein, Aktuelle Entwicklungen im Bereich „Interne Untersuchung“, NEWSDIENST COMPLIANCE 71009 (2014).
who generally have the highest factual proximity and consequently the best knowledge of the concrete business processes and thus the subjects of the internal investigation. Additionally, the typical compliance violations such as corruption and anti-trust breaches are covert and victimless criminal offenses. To find all necessary evidence in writing hardly ever happens, as the giving of a bribe or the concluding of a price agreement is usually done personally and/or orally. Therefore, in many cases the line of argument needs to be based on information provided by employees. Due to the fact that this kind of inquiry is highly sensitive and unpredictable, it is important to be well prepared. Time, location, interviewer and sequence of interview partners have to be determined at first. Furthermore, the interview structure and at least general questions should be pre-defined. Another important aspect is what kind of interview shall be conducted – will it just be an exploratory inquiry or is the interviewee a (potential) suspect? In any case, the interviewer needs to be able to react quickly and appropriately to new situations or topics coming up in the course of the interview. Further issues are the questions how to document the information,\(^{19}\) whether to present any protocol made to the interviewee and if a third person is allowed to be present, e.g., a member of the work’s council or a lawyer representing the interviewee. Finally, in practice one of the most important aspects is, if and to what extent the interviewed employee is under a legal duty to present evidence at all.\(^{20}\)

C. Review of documents

Besides interviewing employees and e-mail searches, there are usually documents in hard copy to be reviewed, as well. This includes organigrams, letters, contracts, financial documents, such as invoices and other supporting documents, and e-mails that have been printed, but do not exist digitally anymore. These documents can be found in different places of the company, for example in the office of the suspected employee, in his department or in the accounting department. Internal advice by other employees might be very helpful in this context.

D. Background researches

Background researches can focus on obtaining addresses or other contact details, information about businesses or companies owned or positions held by an employee, interre-


\(^{20}\) Infra III. D. 2. 2.
lations between employees and third parties or business partners, any former misconduct of the employee or even if a business partner might be listed on any index or even terror list.

Very often background researches are part of the preventive measures of the compliance management system, e.g. with regard to business partner screenings or the prevention of money laundering. Thus, the company might be able to revert to already used databases within the company when conducting an internal investigation. Additionally, even simple searches with common internet search engines and communication platforms might produce interesting information. Further, professional databases containing financial, personal and political information as well as public registers can be consulted.\textsuperscript{21} Especially in an international context it might be useful to mandate professional services that conduct research locally or even on-site.

III. RISKS OF PARALLEL CRIMINAL PROCEEDINGS FOR THE COMPANY

Conducting an internal investigation is a different task for any company, as it is regularly based upon accusations against employees or members of the management and often causes disturbance within the company. It becomes even more challenging, if parallel criminal proceedings are pending. In the following, the main risks occurring from parallel criminal proceedings shall be described, while a special emphasis is put on constellations where the company or its management might be held liable for the wrongdoing of employees.

A. Risk of the company’s premises being searched

The search of the company’s premises can be conducted pursuant to Section 103 of the Code of Criminal Procedure even if the company itself is not suspected. Such a search might be the starting point from which the company gets to know that official proceedings are pending. If, however, the allegations come up before and a cooperative relationship\textsuperscript{22} has been established, as it has become rather common and developed into a widely accepted model over the last years\textsuperscript{23}, the risk of such searches is considerably lower. Nev-


\textsuperscript{22} supra I. E.

ertheless, it should be noted that public authorities are not prevented from undertaking such additional measures, since they are even in the case of an extensively cooperative attitude of the company still legally obliged to determine the proceedings and critically scrutinize the cooperation and findings presented to them. However, in any case the prosecution authorities have to check the necessity of their actions with regard to the prohibition on excessiveness of state actions.\(^\text{24}\)

If the company and the public authorities did either not establish a cooperative relationship or the cooperation was established but ended, usually by the public authorities and most often due to doubts of the public authorities concerning the willingness of the company to fully cooperate,\(^\text{25}\) state investigation measures might be conducted without a (further) warning. This bears the risk to take the company by surprise, especially, if the cooperation is ended tacitly, that is without a notice to the company from the prosecution authorities.

One of the special characters of a search of the premises of a company is that it is regularly not only conducted by a higher number of officials compared to a search of an individual person’s habitation, but that it is also more likely to be accompanied by media coverage.\(^\text{26}\) In addition to these circumstances, the fact that typically a lot of documents and data will be searched and seized can often lead to severe interruptions in operating business processes.\(^\text{27}\) The search of a company can hence often bear economical risks for the company.\(^\text{28}\)

B. Risk of an employee’s habitation being searched

Another risk that is implied by criminal proceedings parallel to internal investigations is

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\(^\text{26}\) TIDO PARK, HANDBUCH DURCHSUCHUNG UND BESCHLÄGNAHME Nos. 854, 857 (2nd ed. 2009); Jürgen Taschke, Compliance-Sachverhalte und Ablauf eines Wirtschaftsstrafverfahrens, in Handbuch Criminal Compliance § 36, 1414, No. 6 f. (Thomas Rotsch ed., 2015).

\(^\text{27}\) TIDO PARK, HANDBUCH DURCHSUCHUNG UND BESCHLÄGNAHME Nos. 854, 857, 895 (2nd ed. 2009).

the risk that not only the premises of the company are searched but also the habitations of employees or the management. If the company becomes aware of the criminal proceedings for the first time due to a search of the company’s premises, it is very likely that at the same time individuals at the center of the allegations get to know it as well. In many cases, searches of the company’s premises and the habitations of the accused are performed parallel. The personal impact of such a compulsory measure is, as one can imagine, high, because even if the officials act carefully, it is very likely that neighbors or even the media might take notice of that measure which usually leads to rumors and (further) suspicions, thereby not only affecting the professional but also the private sphere of the accused.

In addition to those individuals under suspicion, some cases have shown that there is also a risk that the compliance function or any other function conducting or coordinating a parallel internal investigation for the company might be or come into the focus of the prosecution authorities and thereby become subject to a search of their private habitations.

The question if such a search is legal was the subject of legal proceedings before the German Federal Constitutional Court (Bundesverfassungsgericht). The background to these proceedings may be summarized as follows: In August 2010, a newspaper published an article made publicized criminal proceedings inter alia related to bribery charges against a company. Until then, these proceedings had been unknown to the concerned company itself. The later appellant was the authorized representative and the head of the legal department of the company and thereupon took measures to clear up the related circumstances in order to prepare a defense, such as copying relevant documents and briefing the directors regarding the results of the internal investigation and the actions of the legal department in anticipation of a search of the business premises.

After the latter had been performed at the end of 2010, the Regional Court (Amtsgericht) Stuttgart issued a second search warrant, this time with regard to the habitations of the appellant in November 2011. The court stated that the appellant was suspected of having undertaken actions to destroy, cover up or remove evidence for the non-compliant behavior that was the subject of the criminal proceedings. The suspicion

29 Silvia Ziebell, Unternehmensbezogene Auswirkungen und Einbettung in die Unternehmensabläufe, in Internal Investigations – Ermittlungen im Unternehmen Chapter 12, 331, No. 25 (Thomas C. Knierim et al eds., 2013).
30 Sascha Süße, Der Compliance Officer im Fokus behördlicher Ermittlungen, NEWSDIENST COMPLIANCE 71004 (2013).
31 Amtsgericht Stuttgart, Beschluss vom 7.11.2011 – Az. 28 Gs 1251/11.
was based upon an e-mail written by the appellant shortly after the publication of the newspaper article. In this e-mail, the appellant informed the directors that all IT-data of an employee, who was centrally involved in the circumstances which were subject matters to the criminal proceedings, had been stored to a hard drive, which had been given to an external law firm for review. Furthermore, he informed the directors that backup copies of all paper documents had been made and that these documents were stored under seal in the legal department. Finally, he informed them that the legal department was preparing model cases in consultation with the external law firm. The purpose of these model cases was to present them to the public authorities once the criminal proceedings were communicated directly to the company.

The court held that this e-mail gave rise to the suspicion that the appellant did not only undertake legitimate actions to prepare a defense and by this e-mail mainly informed the directors about these legitimate actions, but instead indirectly informed them about the measures undertaken to destroy, cover up or remove evidence for the non-compliant behavior concerned. The appellant contested the search warrant, but the District Court of Stuttgart held up the decision of the Regional Court.\textsuperscript{32} Thereupon, the appellant lodged a constitutional complaint.

The German Federal Constitutional Court dismissed the contested decision of the District Court on March 13\textsuperscript{th} 2014, ruling that the search warrant and the decision lacked sufficient findings regarding the constitution of an adequate suspicion against the appellant as required by Section 102 of the Code of Criminal Procedure, the legal basis for the search of the habitation of the appellant.\textsuperscript{33} The court argued that it was factually improper to base the suspicion against the appellant on actions that were well within the scope of actions objectively necessary to clear up the circumstances related to the criminal proceedings against the company. Moreover, the court held that the District Court had failed in taking into consideration that the appellant was also obliged to undertake the mentioned appropriate actions due to his position as authorized representative and head of the legal department of the company and therefore did not exceed or misuse his competences. More importantly, the court stressed that a legally adequate suspicion for a search warrant could never be based mainly on the fact that the person concerned had a factual proximity, knowledge and competence in relation to the subject of a criminal proceeding.

In conclusion, the decision of the German Federal Constitutional Court shows that a

\textsuperscript{32} Landgericht Stuttgart, Beschluss vom 29.3.2012 – Az. 17 Qs 14/12.

\textsuperscript{33} BVerfG, Beschluss vom 13.3.2014 – Az. 2 BvR 974/12 = NDCOMPLIANCE 21017 (2014).
search of the habitation of an employee of a company in the focus of the public authorities is not a mere formality, but instead has to be based on qualified facts that give rise to a suspicion against the employee himself. However, the decision shows that public authorities and courts tend to apply a particular critical position on the actions of employees in response or in apprehension of criminal proceedings against the company.

C. Risk of documents being seized

Nonetheless and as stated before, the search of the premises of a company or of the habitation of an employee is not an end in itself, but instead is ordered to gather evidence regarding the respective proceedings. In the absolute majority of cases in which a search is conducted, the question therefore arises, whether the ensuing seizure of documents was legal. This question has been standing at the center of a couple of decisions by German courts. In the following, three of them, which are directly related to the conduct of internal investigations, shall highlight the different approaches that have been taken by the courts.

In the first case, the supervisory board of a company assigned an external law firm with the conduction of an internal investigation to clarify the circumstances leading to the suspicion that members of the management board had been acting in a non-compliant way while making business decisions, which caused a significant financial damage to the company. The law firm took several actions to investigate the circumstances. In particular, members of the law firm interviewed former and present employees of the company, while promising the interviewed persons that the contents of their interview would remain confidential. At the end of the investigation, the law firm gathered the relevant information within a summarizing report. This report was forwarded to the prosecutor, with whom the company (principally) cooperated. After the law firm, which was in the possession of all the documents produced during the internal investigation, declined the prosecutor’s demand to surrender not only the interview protocols, but also all further minutes produced during the investigation, the Regional Court of Hamburg ordered that all relevant documents were a subject to legal seizure. The District Court of Hamburg affirmed this decision. Consequently, the legal finding of this case was that all relevant documentation of an internal investigation is a legal subject to seizure, if the documents were in the possession of an external law firm mandated by the company to conduct the internal investigation and therefore, so the court held, not in the possession

34 supra III. A.
36 LG Hamburg, Beschluss vom 15.10.2010 – Az. 608 Qs 18/10 ("HSH-Nordbank").
of the defense counsel of the accused individual as – in the courts opinion – required by Section 97 of the Code of Criminal Procedure.\textsuperscript{37}

In a second decision, the District Court of Mannheim came to a different verdict in a similar constellation, arguing that the revision of Section 160a Paragraph 1 of the Code of Criminal Procedure that had become effective on February 1\textsuperscript{st} 2011 had led to a strengthening of the privileged lawyer/client relationship. Consequently, the court ruled that the seizure of documents was illegal, if the documents had been produced in the course of an internal investigation and were in the possession of an external legal counsel mandated by a company to conduct an internal investigation in relation to circumstances giving rise to official proceedings against an individual associated with the company. On the other hand, the court held that documents in the possession of the company itself were still subject to legal seizure, since these documents would not be considered protected by the privileged lawyer/client relationship.\textsuperscript{38}

The court therefore examined the total stock of the seized documents and declared the seizure of documents illegal, if a relation to the mandate was recognizable, which was, the court held, the case for the report of the lawyers to the company and for all documentation collected for the lawyers with the intent to provide an informational basis for this report. The court then decided – against the ruling of the District Court of Hamburg – that this comprises even documents that contained statements of employees, who were essentially not part of the lawyer/client relationship, if these statements were answers to questions asked by the lawyers within their mandate, since such contents were regularly “inevitable commingled”.\textsuperscript{39} However, the court also stated that the prohibition of seizure would not stand, if other documents not falling in the given categories were improperly displaced to and stored at the premises of the lawyer with the intention to have them exempted from seizure.\textsuperscript{40}

In the third and most recent decision, the District Court of Braunschweig had to decide in a similar constellation, whether a search of the premises of the appellant and the ensuing seizure of documents with regard to administrative charges against a company were legal. Preceding the lawsuit, there had been a search of the premises of the appellant, conducted on Mai 14\textsuperscript{st} 2014, due to the criminal investigation against a person X, who


\textsuperscript{38} LG Mannheim, Beschluss vom 3.7.2012 – Az. 24 Qs 1, 2/12.

\textsuperscript{39} See Nos. 113-115 and 117-119 of the grounds.

\textsuperscript{40} See No. 116 and 122 of the grounds.
was associated with the appellant. 41 In response, the appellant engaged an independent external law firm to perform an internal investigation to clear up the related circumstances. On March 10th 2015, the authorities performed another search of the premises of the appellant, this time due to criminal tax procedures against a person Y, who was likewise associated with the appellant. 42 In the course of this second search, documents of the internal investigation of the appellant regarding the circumstances of the proceedings against X were found in the office of the chief financial officer of the appellant and later on officially seized. 43 Thereupon, the appellant contested the search and the seizure at the District Court of Braunschweig.

After deciding that the search itself was legal, the court evaluated whether the seized documents – or at least some of them – had to be classified as defense material pursuant to Section 148 of the Code of Criminal Procedure. In that case, their seizure, performed by the authorities pursuant to Section 108 Paragraph 1 of the Code of Criminal Procedure (chance discovery), would have been prohibited and consequently illegal. Since the court ruled that documents for defense purposes must be exempted from seizure, if they are in the possession of the incriminated person, the only argument against the classification of the concerned documents as defensive works was that there had been no proceedings against the appellant itself at the time of the internal investigation. Therefore, it was questionable whether the seized documents could nonetheless have been produced with the intent to use them for defense purposes.

The court however ruled that documents could also be worth being protected as documentation for defense purposes, if a person was apprehensive of future criminal or administrative proceedings and if the documents were, due to this apprehension, produced with the intent to prepare a defense. Considering the means of defense preparation, the court furthermore held that the conduction of an internal investigation could be qualified as a substantial means of preparing an effective defense, if its purpose was to gain information regarding an assumed criminal or administrative offense. Thus, the court ruled that documents produced during an internal investigation have to be treated as documents for defense purposes, if they have the recognizable corresponding objective to prepare a future defense.

Regarding the present case, the court found that the appellant had reason to assume that the first search of his premises and the related charges against X might be followed by

41 AG Braunschweig, Beschluss vom 23.4.2014 – Az. 7 Gs 1017/14.
42 AG Braunschweig, Beschluss vom 20.1.2015 – Az. 7 Gs 174/15.
43 AG Braunschweig, Beschluss vom 25.3.2015 – Az. 7 GS 735/15.
administrative proceedings against the company and/or its organs or subsidiaries. Additionally, the court found that the internal investigation had focused on the clarification of circumstances relating to this specific issue and that the documents were not only gathered by an independent external law firm, which was mandated especially for the conduct of the internal investigation, but were also dated to approximately half a year after the first search, so that there was a recognizable timely connection to the search and the proceedings against X. Consequently, the court ruled that some of the seized documents were exempted from seizure at least insofar as they had been produced with the recognizable intent to prepare a defense as shown with reference to the standards mentioned by the court. However, while the court decided that the internal investigation report was exempt from seizure, it stressed that the report of the internal audit in this case was a legitimate subject to seizure, since the latter was produced earlier and merely stated that its purpose was “future behavior and actions” without further relation to defensive actions or a defense strategy.44

Looking at these cases, it becomes obvious that there is no consistent approach by the courts with regard to the seizure of documents produced in internal investigations, whether they are found in the company or at the advising law firm. As no all-embracing decision by the German Supreme Court (BGH) is apparent, some legal uncertainty remains as well as the risk that a prosecution authority will at first instance insist that the seizure of documents of the aforementioned kind is legal.

D. Risks resulting from testimonies of employees

As we have seen above, information provided by employees is one of the most important sources for the employer when collecting evidence in an internal investigation.45 Likewise, they are of great importance for criminal proceedings by the prosecutor. Thus, in several different constellations, the prosecutor and the officials acting for him try to get statements and testimonies from employees of the company. The main underlying question in all those constellations is, whether the employee is required to give evidence, either to the authorities or the company – or to both.

In general, employees cannot rely on the right to refuse testimony as a professional bearer of secrets pursuant to Section 53 of the Code of Criminal Procedure if they are acting

45 supra II. B.
on behalf of their company. However, they have the right to refuse testimony with regard to Section 55 of the Code of Criminal Procedure, if they would incriminate themselves or a close family member.

If there are parallel criminal proceedings, two main risks arise, that are explained in the following.

1. The questioning of employees during a search

The search of a company’s premises is an unusual and stressful situation for any employee involved. Providing accurate information in such a situation is not easy. Knowing this, the public authorities sometimes try to seize the hour and informally interrogate employees during the search. Even though an employee cannot rely on the aforementioned rights to refuse testimony, he will nonetheless regularly not be obliged to give testimony. On the one hand, this is due to the fact that, apart from giving the basic personal details, it is not compulsory to make statements to the police, who will regularly be the ones conducting the search. On the other hand, even if a prosecutor was present during the search and asked an employee to give testimony as a witness, the employee would only have to follow this order, if handed an official summons on that very occasion and if he was given the right to consult a legal representative beforehand pursuant to Section 68b Paragraph 1 Sentence 1 of the Code of Criminal Procedure.

Nonetheless, the informal questioning of an employee during a search of the company’s premises can bear risks for the company. For instance, if the employees are unaware of their rights to refuse testimony and feel intimidated by the presence and appearance of the public authorities, they might give ambiguous, false or unnecessarily excessive information. Even though the employee might only be mistaken with regard to what he said, these information will be present in the files and it becomes quite hard to correct them. Another risk might be that, when the main proceedings are directed against a business partner, legally not mandatory, extensive and maybe false statements of employees can not only harm the business partner, but also the mutual business relations.

46 The right to refuse testimony pursuant to Section 52 of the Code of Criminal Procedure will normally also not apply, cf. in detail Sascha Süße, Der Compliance Officer im Fokus behördlicher Ermittlungen, NEWS-DIENST COMPLIANCE 71004 (2015).
and thereby the company itself.  

2. The utilization of statements of employees made in interviews

The second aspect is in how far the prosecutor can utilize the information that was presented to him by the company, who gained the information in the course of an internal investigation, especially during an interview, and by which an employee incriminates himself or others.

a. The duty of employees to participate in interviews

The first question coming up in this context is whether an employee has to participate in an interview demanded by the company. Often an employee might not want to answer the questions he is asked, for instance because he does not want to denunciate colleagues or more importantly, himself. The subsequent question is, if any obligation to participate also includes the obligation to provide information even if it is self-incriminating. The determining principles for answering these questions originate mainly from labor law and not from the specific provisions of criminal procedure, since an internal investigation is – in principle – solely of a private character to the company.

As a starting point, it is beyond dispute that the employee can be ordered to participate in the interview due to the employer’s executive prerogative pursuant to Section 242 of the Civil Code and Section 106 of the Industrial Code. Considering that the employee initially assumed the tasks delegated by the employer to him in a voluntary fashion when concluding his labor contract, it is well arguable and agreed upon that the employee is at least also principally obliged to answer all questions concerning the core aspects of his personal work activities truthfully and completely, at least if he doesn’t incriminate himself. Apart from this starting point, a lot of aspects concerning the rights and duties of an employee in an interview are subject to a very controversial legal debate, especially regarding the questions, if the employee is furthermore obliged to give

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50 KLAUS MOOMAYER, *COMPLIANCE – PRAXISFADEN FÜR UNTERNEHMEN* 90, No. 327 (3rd ed. 2015). The legal supplement for this entitlement of the employer is either seen in Sections 666, 675 Abs. 1 of the Civil Code, Sections 611, 241 Abs. 2 of the Civil Code, sometimes cited in conjunction with Sections 242 of the Civil Code, in case of an agency in conjunction with Sections 662 ff. of the Civil Code or in fiduciary duties generating from company law.
self-incriminating testimony,51 if he is entitled to have a legal advisor or a member of the work council present during the interview and if and to what extent the persons conducting the interview have the obligation to instruct the employee with regard to his rights and duties (for instance regarding the – possible – right not to incriminate himself or that the information gained in the course of the interview might be forwarded to the prosecutor).52

Regardless of these questions, one of the risks for the company in these cases is that the statement of an employee, in which he incriminates himself or other employees, simultaneously gives evidence of the violation of the organizational and supervisory duties of the company or its organs and therefore establishes the risk that the company is later on charged due to this violation.

b. The utilization of interview protocols

Subsequently, the question arises, whether the evidence gained and protocolled in the course of the interview may be utilized by the public authorities. This is highly disputed with regard to protocols containing self-incriminating statements of employees due to the fact that – the duty to give self-incriminating statements in an interview provided – the public authorities could thereby gain a self-incriminating testimony of the concerned employee even though the employee would have had the right to refuse testimony when questioned as an accused person by the prosecution authorities themselves.53

51 Answering in the affirmative e.g. OLG Karlsruhe NSTZ 287 (1989); Thomas C. Knierim, Die strafrechtliche Verantwortlichkeit des externen Compliance-Beraters, in Handbuch Criminal Compliance § 7, 253 ff., No. 67 (Thomas Rotsch ed., 2015); Gina Greve & Michael Tsambikakis, Individuaultretzung im Strafverfahren, in Internal Investigations – Ermittlungen im Unternehmen Chapter 17, 508, No. 260 (Thomas C. Knierim et al eds., 2015); Martin Diller, Der Arbeitnehmer als Informant, Handläger und Zeuge im Prozess des Arbeitnehmers gegen Dritte, DER BETRIEB 315, 314 (2004) with regard to the employee’s contractual main duties. Answering in the negative e.g. Imme Roxin, Probleme und Strategien der Compliance-Begleitung in Unternehmen, STRAFVERTEIDIGER 116, 117 (2012); Ralf Tschewink, Interne Ermittlungen zwischen Selbstbelastungsfreiheit und Fürsorgepflicht, in FS Imme Roxin 511, 519 (Lorenz Schulz et al eds., 2012). Some however stress that in practice employees do regularly not refuse testimony with regard to their right to protection against self-incrimination, but with reference to blackouts see Gerlind Wiskirchen & Julia Glaser, Unternehmensinterne Untersuchungen (Teil II), DER BETRIEB 1447, 1448 (2011); Mark Zimmer, Rolle der Mitarbeiter bei unternehmensinternen Ermittlungen – Arbeitsrechtliche Fragen bei der Aufklärung von Compliance-Verstößen, RISK, FRAUD & COMPLIANCE 259, 260 (2011) with reference to the aforementioned.

52 For an overview regarding these issues and the legal opinions see Sascha Süße & Ken Eckstein, Aktuelle Entwicklungen im Bereich „Interne Untersuchung“, NEWSDIENST COMPLIANCE 71009 (2014).

53 Differentiating e.g. Folker Bittmann, Internal Investigations under German Law, COMPLIANCE ELLIANCE JOURNAL 74, 92 ff., 95 (2015); Renate Wimmer, Die Verwertbarkeit unternehmensinterner Untersuchungen, in FS Imme Roxin 517, 542 (Lorenz Schulz et al eds., 2012).
These objections against the utilization of self-incriminating testimonies, however, do not apply to non self-incriminating testimony of other employees. In these cases, there is always the risk that the disclosure of all the information recorded in the protocols indicates organizational or other compliance shortcomings.

On the other hand, interview protocols containing non self-incriminating statements may generally be utilized by the company, e.g. for civil and labor law proceedings against the person who has committed the wrongdoing. However, there might be the risk that interviews unlawfully conducted lead to the prohibition of utilization of the protocol for the company. With regard to the yet unsettled questions regarding the conduction of interviews the securing of the possibility to utilize the protocols might be more legally challenging than expected.54

E. Risk of a collision of investigative actions

Another aspect that has to be taken into consideration is that an internal investigation might conflict with criminal proceedings. That is especially relevant with regard to collecting evidence, in particular when interviewing employees. Usually, the company has an easy access to its employees. Additionally, the desire to talk to the employees as soon as the accusations come up, often with the idea that this means “everything will be cleared up soon”, is quite an understandable reaction of the management or the compliance function. However, any interview with an employee means a more or less significant impact on his memory. For that reason, the prosecution authorities sometimes want to have the first grasp on employees who are witnesses, while at the same time, the company equally wants to be the first to get the information from its employee.

Furthermore, in some constellations the company might become aware of a suspicion against a certain employee and consequently might know prior to him that criminal proceedings against him are pending. In these cases, the company might come to the challenging situation to conduct an investigation, possibly at least partly against its own employee, without being allowed to inform the employee about these proceedings. While on the one hand this might be estimated as problematic in the light of the fiduciary duty of the employer,55 on the other hand it might hinder the employer from taking

55 The fiduciary duty of the employer inter alia includes the duty to protect the general right of privacy of the employee, see Ingrid Schmidt, Art. 2 [Allgemeine Handlungsfreiheit, Allgemeines Persönlichkeitsrecht], in Erfurter Kommentar zum Arbeitsrecht Part 10 Grundgesetz für die Bundesrepublik Deutschland (Art. 1 - Art. 14), No. 68 f. (Rudi Müller-Glöge et al. eds., 16th ed. 2016).
actions under labor law against the employee.\(^{56}\)

In both constellations there is the risk that the company is blamed to hinder the state investigation or that the management or the compliance function are accused of obstructing the authorities (Section 258 of the Criminal Code).

Another potential risk which is generally present when conducting an internal investigation, but might rise if employees know about criminal proceedings, is that employees overeagerly modify or destroy potential evidence, e.g. e-mails, contracts or invoices. Apart from the fact that this behavior might also fulfill Section 258 of the Criminal Code, these actions can most of the times be tracked and the data be regained by the prosecution authorities, at least if digital data is concerned. Thereby, the employees also put a potential cooperation between company and prosecution authorities at risk.

IV. WAYS FOR COMPANIES TO REDUCE RISKS

As aforementioned aspects display, a number of questions concerning the relation between internal investigations and criminal proceedings remain unsettled. The reason for this is mainly based on the fact that the concept of an internal investigation is rather new to the German criminal procedural law. It basically only developed over the last decade parallel to the increased level of formalization of compliance, the attention paid to compliance matters as such and the Anglo-American influence due to extended investigative powers of foreign prosecution authorities in the context of an ever growing international business environment.\(^{57}\)

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\(^{56}\) Cf. Klaus Moosmayer, *Die verfahrensrechtliche Relevanz der Einrichtung einzelner Compliance-Maßnahmen – Interne Ermittlungen aus unternehmenspraktischer Sicht*, in *Handbuch Criminal Compliance § 34 B. III. 1., 1572, No. 74* (Thomas Rotsch ed., 2015); for an overview of possible labour law and other actions against employees in these situations see DENNIS BOCK, *CRIMINAL COMPLIANCE* 275 f. (2011) and Dennis Bock, *Aufsichtspflichten, §§ 190, 30 OWiG*, in *Handbuch Criminal Compliance § 8, 278 f., No. 36 f.* (Thomas Rotsch ed., 2015). Imme Roxin however points out that disciplinary measures will not be necessary, if the employer cooperates with the prosecutor after he found out about the violation, since the initiating and impending of criminal proceedings are the most effective means to ensure that an employee will not commit a compliance offense again see Imme Roxin, *Probleme und Strategien der Compliance-Begleitung in Unternehmen*, STRAFVERTEIDIGER 116, 121 (2012).

Nevertheless, in practice, there are a number of measures that can be taken to reduce the risks that companies face in cases of conducting an internal investigation parallel to criminal proceedings.

A. Cooperation with the prosecution authorities

It is probably true, that the general approach of a company with regard to criminal proceedings is to cooperate with the prosecution authorities and to support the process of clarifying what has actually happened. This might give reason to ask why a company that cooperates should be in any way reluctant to provide the authorities with (all) interview protocols produced during an internal investigation, any draft of an investigation report or all documents that are obviously connected with the accusations, may they be incriminating or not for the company or its management. Or in other words: Could the risks described above actually pose risks also for a cooperating company?

1. Conflicting priorities

In fact, the company stands between two conflicting priorities.

On the one hand, it is willing to comprehensively cooperate in order to reduce the risk of compulsory measures and to earn brownie points as it apprehends a financial sanction. On the other hand, the company does not want to incriminate itself or (single) members of the management in the first place.

Bearing that in mind, it becomes rather likely that internal investigations conducted by a company will usually be neither totally neutral nor solely impartial. That comes with no surprise, as nobody actually expects a company to send itself to its doom without resistance. Even more, such a behavior might conflict with the management’s duty to act in the best interest of the company. Nonetheless, some compliance officers sometimes describe their way of conducting internal investigations as absolutely neutral and stress that they would collect evidence regardless of the reputation or the position of the involved persons. While this approach is generally favorable, it must not be overseen that not only the company’s management but also the compliance officer or any other function conducting the internal investigation on behalf of the company must act in the best interest of the company. In particular, compliance officers are neither external police

officers nor the extended arm of the prosecution authorities. Thus, within the legally acceptable options the ones that best suit the company’s interest in the individual situation must be chosen.

Insofar, there are significant differences between internal investigations when cooperating with the prosecution authorities in comparison to investigations performed in an international context, especially with the SEC under the FCPA.\(^{59}\) The procedure governing such investigations cannot be applied one to one on internal investigations conducted in the national context.

2. Reasons why companies accept risks

Stating that, it becomes obvious that there are reasons why the described risk scenarios above are real for the company under investigation. However, there are reasons why such a company might accept risks and e.g. refuse to hand in all evidence collected.

Being willing to cooperate, does not automatically mean to forfeit all procedural rights the company has. If the criminal proceedings are solely targeting individuals, the company is merely a witness, however an endangered one as it might become secondary participant if the preconditions of Section 30 of the Act on Regulatory Offenses are fulfilled. At the latest when the company becomes secondary participant because of a procedure under Sections 29a or 30 of the Act on Regulatory Offenses, it is, according to Sections 444, 432 Paragraph 2 of the Code of Criminal Procedure, granted the same procedural rights as an accused individual. A company can nevertheless cooperate comprehensively and still refuse to hand out every single document that has been produced or found in the course of the internal investigation on the grounds of its procedural rights. Reasons for that might be that the information included goes beyond the scope of the criminal and administrative proceedings; or that business secrets are included for which a proper protection cannot be guaranteed by the prosecutor; or single information might be misleading, because they are ambiguously drafted, and thus would arouse an unfounded initial suspicion by the prosecutor. Furthermore, as stated above, the company’s management is obliged to act in the company’s best interest. Thus, if only the disclosure of information for which no legal duty exists would give grounds for a sanction against the company, one can argue that the management breaches this duty.

\(^{59}\) For the characteristics of an investigation initiated by the SEC see FREDERIKE WEWERKA, INTERNAL INVESTIGATIONS – PRIVATE ERMITTTLUNGEN IM SPANNUNGSFELD VON STRAFFRECHTSREELLEN GRUNDSÄTZEN UND ANFORDERUNGEN EINES GLOBALISIERTEN WIRTSCHAFTSSTRAFVERFAHREN\(^{91-110}\) (2012).
Finally, the management might refuse to provide certain documents because of its fiduciary duty towards its employees.

3. Reducing risks by communication

Having said this, on the other hand, when cooperating with the prosecution authorities it is indispensable that the internal investigation must be performed properly and in compliance with all applicable laws. Furthermore, any communication with the prosecution authorities must be made in good faith and without any inadmissible deceit. The aim to reduce the negative impact on the company from compulsory measures and sanctions will usually only be reached, if the company cooperates in a confiding and reliable manner with the authorities. Prosecutors will regularly check the plausibility of the information provided by the company, at least on a random basis. The involvement of an experienced criminal lawyer can ensure that the company exercises all its procedural and legal rights and at the same time refrains from collecting evidence improperly, falsifying evidence gained or inadmissibly sugar-coating the outcome of the internal investigation.

In this regard, the most crucial advice regarding a cooperation with the prosecution authorities is to maintain close and transparent communication with the authorities. In many cases, measures taken by the prosecutor that seem irrational or unexpected can be traced back to a misunderstanding in earlier communication. Therefore, it seems important to explain to the authorities what the company does in its investigation and how it conducts each single step. Depending on the approach by the prosecutor in the single case, it might be helpful to discuss an investigation map and hand out interim reports. For the discussion of operational aspects it can also be helpful to get (and stay) in touch with the investigating police unit. In the course of the criminal proceedings it is also advisable to stick to deadlines with regard to the handing in of documents or reports. In practice, however, delays are not uncommon. In such circumstances the timely and comprehensible explanation why a deadline needs to be postponed, should usually prevent negative consequences. In most cases, a deliberate “Salami-tactic”, i.e. bit by bit just admitting what is respectively already known, is not recommendable and might lead to a silent termination of the cooperation by the prosecutor. Investigation reports should be clear and easy to read and to handle, especially with regard to the appendices. When handing in documents or statements that are ambiguous, an early annotation will prevent the receiver from making wrong conclusions.

Sticking to these basic rules usually keeps the cooperation alive and supports the aims of the company. That is not contradicted by the fact that in any case the company and its lawyers must exercise all procedural rights they deem to be appropriate and compete for legal opinions or the evaluation of facts wherever necessary.
4. Considering further measures to reduce risks

However, cooperation always means advantages on both sides. Though improvements can be witnessed over the last years, very often the prosecution authorities still have neither the capacities nor the expertise to effectively evaluate the large amounts of data seized in cases of alleged economic crimes. Long durations of proceedings are the result. If evidence is stored in another country, it will be even more difficult and time consuming for the prosecutor to gain them via legal assistance of that country than just getting them handed in by the company.\(^6\) If, however, in the course of the cooperation it becomes evident that the cooperation becomes a one way street or if commitments by the prosecution authorities were broken, it is inevitable for the company and its lawyers to fearlessly consider the termination of the cooperation.

Nevertheless, it must be stressed that in by far the most cases a once started cooperation between the company and the prosecutor works until the end of the proceedings. Still, it would be unprofessional not to take the abovementioned risks into careful consideration and to omit to reduce these risks or the possible negative effects arising from them. The following further aspects (B. to E.) should therefore be scrutinized by the internal investigator and – depending on each single case – observed where necessary.

B. Proper documentation of an internal investigation

As the case regarding the search of an employee’s habitation\(^61\) shows, documentation of the steps that have been taken in the course of the investigation is crucial. An ambiguous wording or measures taken, but not explained properly or understandable at first glance, might lead to an initial suspicion. Thus, the person responsible for the conduct of the internal investigation should ensure that the documentation is made properly and regularly, e.g. by preparing short notes or “work dones”, and that it is stored centrally and easily accessible. Furthermore, wherever appropriate, legal or technical experts for conducting professional methods of collecting evidence should be involved.

C. Conducting state-of-the-art interviews

Even without parallel criminal proceedings, conducting interviews is one of the most

\(^61\) supra III. B.
common but also most ambitious tasks when conducting an internal investigation. The risk for the company in that context is that by incriminating himself the employee might also give grounds for sanctions against the company or its management. Thus, in such cases the company might also have the interest that a protocol of an interview, in which an employee has voluntarily incriminated himself, is not utilized. In other constellations, especially if the company is a victim to a fraudulent action by its employee, it is in the absolute interest of the company that the information provided by the employee can be utilized, as they might form the basis for any labor action, civil claim or criminal charge.

Thus, in any case the company should ensure that the conduct of an interview is in conformity with all applicable laws, especially that no unduly pressure is put upon the interviewee, that he is informed about the content of the questioning, that he knows the role of the interviewer and also what might happen with the information he provides, i.e. for what it might be used. Additionally, the information provided should be properly documented and, if appropriate, reviewed together with the interviewee.

D. Labeling documents of an internal investigation with their purpose

The different court decisions described above show that there is still a lot of uncertainty with regard to the seizure of documents produced or collected in the course of an internal investigation. In any case, the risk remains that during a search the prosecution authorities may take a restrictive approach and try to seize them. Thus, in the first place, it is important to react properly in the very situation and to officially complain against that seizure. That should be accompanied by the demand to seal the documents concerned (cf. Section 110 Paragraph 2 Sentence 2 of the Code of Criminal Procedure) and to force a court decision on the seizure afterwards.

Some further guidance regarding suitable risk limiting measures can be drawn from the decision of the District Court of Braunschweig. As shown, the court ruled that the documentation of an internal investigation can generally be seen as intended for defending the company and therefore be exempt from seizure.

Regarding the crucial factors for the acceptance of documents as defense material set out by the court, the challenge will be to demonstrate the specific “defense character” of the respective documents. This can be more difficult in some cases than in others. In the present case for instance, the internal investigation was conducted after the company
had been searched, which – according to the court – basically showed that the internal investigation was conducted in response to the criminal proceedings and thus with the intent to prepare a defense. With regard to cases like this, the defense character of the documents produced should be established quite easily, even if the proceedings are not yet led against the company itself. However, in most of the cases where the offense in question was committed to the (assumed) benefit of the company or a violation of Section 130 of the Act on Regulatory Offenses is at stake, proceedings with regard to Section 30 of the Act on Regulatory Offenses will be expectable, even if at the time of the beginning of the internal investigation no criminal proceedings are pending.

Furthermore, the court seemed to differentiate between documents produced by the internal audit department on the one hand and documents produced by the external law firm on the other hand. In the latter case, the documents were more likely to be considered as being produced in a defense context, since the company mandated the law firm in response to the search of the company’s premises and especially for the interviews. Nevertheless, the court pointed out that documents produced by the internal audit department can principally also be exempt from seizure.

Thus, the most important criterion obviously seems to be the identifiable purpose of a document. The court held that the seizure of a document containing an audit report was legal, since the purpose of the report was not to prepare a defense for behavior in the past, but a strategy on how to behave in the future. Therefore, making sure that the defense purposes are sufficiently clear and expressively stated in the respective documents, can contribute to reduce the risk of seizure.

Additionally, all documents produced in the course of the internal investigation and for the company’s defense should be stored separately from other documents of the company.\(^\text{64}\) Apart from that, it is still advisable to keep all sensible documents for defense purposes at the law firm that defends the company.

E. Providing trainings and witness assistance for employees

Finally, risk minimizing means can be taken with regard to statements or actions of employees.

First, the employer should regularly and recurrently provide trainings for his employees.

\(^{64}\) See also Ingo Minoggio, *Interne Ermittlungen in Unternehmen, in Wirtschaftsstrafrecht in der Praxis Chapter 15, No. 58* (Marcus Böttger ed., 2nd ed. 2015).
regarding their rights and duties when confronted with the public authorities, especially regarding searches of the company’s premises. The employer should stress the importance that employees be very restrictive or even better refusing with respect to giving information to the public authorities, in order not to endanger possible lines of defense or to present false or ambiguous evidence. However, employees could – in the interest of abbreviating the search – be allowed to support the investigating authorities on an organizational basis. Additionally, they should be informed that no evidence must be suppressed or destroyed. Most importantly, employees working at the reception of the company’s premises should be trained to inform the management and the legal department immediately after the search has started so that a legal advisor can be informed or especially mandated on short notice and be present during the search.

Moreover, if an employee has to give testimony to a public prosecutor or has to appear before court, the employer should provide witness assistance to safeguard the interests of the company.

V. CONCLUSION

Conducting an internal investigation is indisputably not an easy task. However, it becomes even more challenging if parallel criminal proceedings are pending. Especially in cases where the management and the company itself are at the risk of being sanctioned, collecting evidence might include gathering evidence to the disadvantage of the principal of the internal investigation. Nevertheless, if criminal proceedings are already pending, the advisable approach in most of these cases is to cooperate with the prosecution authorities, especially in order to reduce the risks that parallel criminal proceedings impose on the company and the internal investigation conducted. These risks include in particular the search of the company’s premises or an employee’s or member of the management’s habitation, the seizure and utilization of interview protocols and other documents produced in the course of the investigation and possible conflicts between internal and external investigative actions.

Cooperation, however, does not mean at all that the company waives all its rights. Usually, cooperation that is based on transparent proceedings, the will to clarify what has happened and a professionally conducted investigation are in the interest of both parties to the cooperation. Nevertheless, as the prosecution authorities have wide discretionary powers in deciding about taking compulsory measures against the company or terminating cooperation without further notice, it is important to consider appropriate measures to safeguard the legal defense rights that the company and its management have. A close communication with the prosecution authorities, ensuring a transparent documentation of the investigative measures taken, properly labeling the relevant documents and providing trainings for employees may diminish the risks of parallel proceedings with regard to the collecting of evidence in an internal investigation significantly.