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A photograph of a large, rectangular iceberg floating in a calm, deep blue ocean. The sky is a clear, pale blue with a few wispy clouds. The iceberg's reflection is clearly visible in the still water below. The photo is tilted slightly to the right and is part of a larger graphic design that includes lime green and white geometric shapes.

Hogan Lovells Guide on Internal Investigations in Germany

2023

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Guide on Internal Investigations in Germany – 2023

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EDITORIAL

Dear reader,

Compliance obligations and related internal investigations remain of major importance to international companies around the world. We have been focusing on compliance topics and compliance investigations for many years. As a result, we have profound experience in managing the effects of investigations around the world.

This guide outlines some of the most important legal requirements and investigation techniques you should note in Germany. It will help you avoid, prevent, and manage legal risks. The leading authors of this guide are part of our Investigations and Compliance Team in Germany.

We hope to give you a useful overview of compliance investigations in Germany.

Your Hogan Lovells Compliance and Investigations Team, Germany



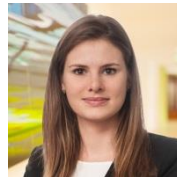
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Further information

For further information on any aspect of this guide, please contact the authors (contact details on pages **132-134**).



1. COMPLIANCE AND INVESTIGATIONS IN GERMANY

1.1 Overview and trends in 2023

From an investigations perspective, the years 2022 and 2023 were dominated in particular by two aspects: First, with the end of the Corona pandemic, regulatory and criminal enforcement picked up again. Second, the legislative framework has become more complex. When facing the challenges from new and fast-changing legislation, companies more and more (have to) turn to legal tech tools for monitoring, auditing and investigating.

During the pandemic, the number of dawn raids had decreased significantly. Since mid-2022, both EU and German authorities have become active again. The number of dawn raids is now even higher than in the years before. This is due to the fact that authorities have to process the back log that the pandemic resulted in. In addition, the regulatory and criminal enforcement environment has become more aggressive in various aspects. Compared to the approach prior to the pandemic, dawn raids now more often extend to private premises, even in case of witnesses. This is due to the practical aspect of more employees working from home.

After the beginning of the war in Ukraine, the European Union enacted laws to stop economic cooperation with Russia. Companies and individuals have to comply with these laws as violations may be punished with heavy fines or even imprisonment (see also Top 10). Navigating through these laws and other sanctions and export control regimes has become even more complex with the fast moving legislation. In practice, legal tech tools can help companies monitor developments worldwide.

ESG and supply chain topics have now fully arrived in the board room and the reality of legal and compliance departments. The growing relevance of ESG is reflected in the fact that many new laws and verdicts address environmental and human rights issues. One example is the prominent case of Internet-personality Fynn Kliemann, who allegedly lied about sustainable and fair production of his articles. The proceedings were discontinued. However, this case is an example for the phenomenon "greenwashing", which describes false or misleading advertisement, and has recently

moved into the focus of investigations (see Top 10 and Rise of ESG-investigations).

As a very specific legislation in the ESG area, the German Supply Chain Act (*Lieferkettensorgfaltspflichtengesetz* – "LkSG"; see also Top 10) came into force on 1 January 2023. It covers ESG topics on a wide scale. After affected companies had one and a half years to install compliant measures, violations would now induce fines and sanctions. Therefore, it is anticipated that there may be future investigations and litigation in relation to this law. The European Commission also presented a draft law for a Directive on Corporate Sustainability Due Diligence. This draft Directive is even more extensive than the LkSG and would entail a lot more obligations if it came into force.

As usual, the Hogan Lovells Guide on Internal Investigations in Germany covers the latest developments in the field of compliance and investigations. You can find our top ten of the last two years in the following article. In addition, the guide contains the key points for daily business to consider when thinking about compliance and investigations in a practical and precise manner.

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1.2 What's new in Investigations – Top 10

1. EU-Sanctions against Russia

The events unfolding in Ukraine since 24 February 2022 led to considerable legal ramifications. Already established sanctions against Russia have been enhanced and expanded significantly. The sanctions against Russia are mainly based on two regulations: Regulation (EU) 833/2014 sanctioning certain sectors of Russian society and businesses and Regulation (EU) 269/2014 aiming at specific individuals and entities.

The areas affected by the sanctions range from embargos relating to arms, dual-use goods, goods aiding the industrialization of Russia, refinery-technologies, luxury-products etc. to bans on imports of oil and products thereof, coal and certain steel-products as well as further goods leading to substantial revenue for Russia. The group of individuals and entities consists of around 1,580 members with ties to the Russian government or involvement with the war. These sanctions are supplemented by various sanctions to the Russian financial sector, most notably Russian banks being excluded from the international SWIFT payment-system.

The sanction regime requires most careful caution when dealing with Russian companies and individuals. Non-compliance with the aforementioned embargos, bans and financial sanctions may lead to fines and imprisonment.

2. German Supply Chain Act in force

On 1 January 2023 the German Supply Chain Act (*Lieferkettensorgfaltspflichtengesetz* – "LkSG") came into force. It is the first law to impose comprehensive due diligence obligations on companies based in Germany regarding international human rights and environmental issues within their supply chain.

In 2023 all companies that have 3,000 or more employees will be bound by the act. From 2024 this limit will reduce to a 1,000 employees. Thereby, all employees who are regularly employed are taken into account. Only very short-

term fluctuations in company size do not count. In addition, not only full-time employees are included, but also part-time employees as well as apprentices or interns.

The new act imposes several obligations on companies to make the best effort to prevent human rights or environmental violations. The measures required are not always specified in detail in the LkSG.

Implementing a LkSG compliant system is essential for affected companies. In the event of violations, the Federal Office of Economics and Export Control (*Bundesamt für Wirtschaft und Ausfuhrkontrolle* – "BAFA") could impose fines and periodic penalty payments based on the global turnover of the company. BAFA has already started sending letters with requests for information to companies.

3. The European Commission adopted a proposal for a Corporate Sustainability Due Diligence Directive

On 23 February 2022 the EU Commission adopted a proposal for a Directive on Corporate Sustainability Due Diligence. The procedure is still ongoing. If the Directive were to come into force, the European Member States will have to implement it within two years. For Germany that could mean that the new LkSG regulation may have to be adapted.

The draft Directive has a greater scope than the LkSG. It targets all companies with 500 or more employees and €150 million net turnover worldwide. After two years these limits will even decrease. The rulings of the Directive would also apply to Non-European companies with a corresponding turnover generated in the EU.

In addition, whereas under the LkSG companies are mainly responsible for the actions of their direct suppliers, the draft Directive includes the entire "value chain". The draft defines value chain as "activities related to the production of goods or the provision of services by a company, including the development of the product or the

service and the use and disposal of the product as well as the related activities of upstream and downstream established business relationships of the company." Thus, there would be almost no limit to the responsibility towards the supply chain. Furthermore, the Directive should oblige companies to meet the 1.5°C climate target in line with the Paris Agreement.

4. Proposal by the European Commission for a regulation on prohibiting products made with forced labor on the Union market

On 14 September 2022, the European Commission submitted its proposal, which aims at prohibiting economic operators from exporting market products made with forced labor or making such products available in the EU. The new proposal complements existing supply chain legislation in the EU. It is to be expected that the trend will continue for companies to have to screen the origin of their supplied goods. The use of forced labor shall be traced along the entire supply chain and is not limited to specific kinds of goods.

The regulation shall apply to all economic operators. Such can be any natural or legal person or association of persons who are placing products or are making them available on the Union market or exporting them. This large circle of addressees of the regulation is supplemented by far-reaching competencies of the authorities to investigate possible violations based on risk assessment regarding specific business-sectors. As part of the investigation by the competent authorities, compliance by submission of substantial information identifying the products in question and their value chain will be obligatory.

Following this investigation phase, a decision phase can lead to prohibitions and withdrawals regarding certain products. Furthermore, Article 30 of the proposal provides for the possibility of fines. This broad scope of recipients and prohibited actions prompts caution regarding

the further development of the proposed legislation.

5. Greenwashing has come into focus for investigations

With the uprising importance of ESG matters, greenwashing has come into focus of investigations. Greenwashing means publishing false or misleading product descriptions or advertisement that portray a product or company more ESG-friendly than it actually is. This may include false information about ecological production, fair labor or sustainability.

A greenwashing incident can cause serious reputation damages for a company. In addition, it can also become a subject matter of an investigation since certain greenwashing actions may violate laws. First, greenwashing can cause a case of misstatements in financial reporting (Section 331 Commercial Code/*Handelsgesetzbuch* – "HGB", Section 400 Stock Corporation Act/*Aktiengesetz* – "AktG") which can lead to potential compensations claims (Section 823 para. 2 Civil Code/*Bürgerliches Gesetzbuch* – "BGB"). Second, providing wrong information always results in the potential risk of completing investment fraud (Sections 263, 264a Criminal Code/*Strafgesetzbuch* – "StGB"). Third, including greenwashed information in advertisement can result in liability for punishable advertising (Section 16 Law Against Unfair Competition/*Gesetz gegen den unlauteren Wettbewerb* – "UWG").

Very well-known through various media is the greenwashing case of German singer and influencer Fynn Kliemann. He promoted his products as "*fairly produced in Europe*" even though he allegedly imported them from Vietnam and Bangladesh. The prosecutor's office investigated for fraud and punishable advertising.

6. Influence of an internal investigation on the termination notice period

According to a ruling of the German Federal Labor Court (*Bundesarbeitsgericht* – "BAG") the two-week notice period of Section 626 para. 2 sentence 1 BGB does not usually start when an internal compliance team or external investigators learn of reasons for termination (BAG, 5 May 2022, 2 AZR 483/21). The BAG now stated that the two-week notice period was obeyed as it only starts when the person who is entitled to terminate the contract gains knowledge of reasons for termination. This is only to be judged differently if the acquisition of knowledge would be intentionally thwarted by the management. According to BAG a deliberate thwarting is regularly not present when standard investigation processes with compliance teams and external investigators take place. That is because the establishment of a compliance department and its assignment to investigate possible breaches of duty by employees is not in itself dishonest, but rather appropriate.

In the case in question an employee brought action for unfair dismissal, due to delay of the termination. The employee was given notice in September of 2019 after internal investigations were pursued starting in October of 2018. The compliance team decided to suspend their investigations in June of 2019 to prepare an interim report for the managing department. The managing department received the report in September of 2019 and gave notice of termination within 10 days.

7. Decision of the Higher Regional Court Nuremberg on the management obligation to establish compliance structures

In its ruling of March 30, 2022, the Higher Regional Court of Nuremberg confirmed the previous case law on the necessity of compliance management systems and specified the obligations a company has. The ruling does not result in a new interpretation of the law, but confirms the already existing best proactive approach:

According to the court, an internal organizational structure within the company must be created that ensures legality and efficiency. The obligation to introduce a compliance system follows directly from the duty of legality. The managing director must have an understanding of the company's economic and financial situation at all times. Therefore, a monitoring system must be in place that records and controls risks.

The intensity of the monitoring is determined in each individual case. Occasional inspections are not sufficient. Random, surprise inspections shall be necessary and usually sufficient. However, if apparent in an individual case that this is not sufficient, it may be necessary to conduct more surprisingly comprehensive business audits. In case of irregularities in the past, more intensive supervisory measures are required.

However, the court also sets limits to the duty of supervision. The limit of all supervisory measures is their objective reasonableness. Here, the dignity of company employees, the preservation of the working atmosphere, the personal responsibility of company employees and the principle of trust applied in delegated processes must be taken into account. Excessive supervisory measures characterized by excessive mistrust are not reasonable. An almost comprehensive monitoring network is not legally required.

When tasks are delegated, the effective supervisory duty of the managing director is reduced to the employees directly subordinate to them and their management and supervisory behavior ("supervisor of supervisors"/"meta-supervision"). However, the so-called overall supervision remains inseparably with the managing director, in particular the organizational and system responsibility for internal company delegation processes.

8. The implementation of compliance measures reduces the fine amount

In April of 2022 the German Federal Court (*Bundesgerichtshof* – "BGH") has ruled that a "self-cleaning process" after the start of an investigation shall have a fine reducing effect (BGH, 27 April 2022, 5 StR 278/21). In the case judged, a company had established comprehensive compliance measures and a whistleblower protection procedure after the former manager and former employees were accused and later on convicted of fraud and bribery.

In this verdict the BGH goes into detail about how the amount of a fine pursuant to Sec. 30 para. 1 of the Administrative Offenses Act (*Ordnungswidrigkeitengesetz* – "OWiG") is to be calculated. The actual focus of the verdict is on involving kickbacks into calculation. Therefore, it is even more astonishing that the court mentions the positive impacts of implementing compliance systems as a short but clear sidenote.

This statement of the first penal senate is to be understood as a follow up to a ruling of the fifth penal senate in 2017 which already contained a similar statement. The very clear and unambiguous wording of the new verdict shows that the BGH seems to consider this to be a principle.

9. Decision by the German Federal Labor Court on employers' obligation to record working hours

The German Federal Labor Court put forth in its ruling on 13 September 2022 that employers are obligated to record the beginning and end of their employees' daily working hours. This strict interpretation of the court could lead to extensive specific regulatory investigations. This decision is based on case law of the European Court of Justice.

Hence, Section 3 para. 1 of the Act on Occupational Safety and Health (*Arbeitsschutzgesetz* – "ArbSchG") is to be

interpreted in accordance with European Law. Therefore, occupational safety requires the recording of working hours in order to comply with the employer's obligation to protect employees' safety and health. Pursuant to Section 17 para 5 of the Working Hours Act (*Arbeitszeitgesetz* – "ArbZG") the competent supervisory authority may not only demand documentation on compliance with maximum working hours, but may even inspect work sites. A violation of the maximum working hours may constitute a misdemeanor and even a criminal offense pursuant to Sections 22 and 23 ArbZG.

The decision's *obiter dictum* has led the German Department of Labor to announce draft legislation on the matter in early 2023. In the meantime, employers must be careful to close any gaps in their system recording working hours.

10. The implementation status of the whistleblower directive differs in the EU member states

On 16 December 2019, the European Directive (EU) 2019/1937 on the protection of persons who report breaches of Union law entered into force. The Member States had to implement the new rules by 17 December 2021. The Directive introduces, *inter alia*, safeguards to protect reporters from retaliation, such as being suspended, demoted and intimidated.

The German government created a draft law (*Hinweisgeberschutzgesetz* – "HinSchG") to implement the Directive into national law, which was passed on to the federal parliament (*Bundestag*) on 16 December 2022. However, the federal council (*Bundesrat*) did not approve of the HinSchG, so that the law failed on 10 February 2023. Now the parliament is trying to create a new draft law assisted by government-efforts.

Due to the belated implementation of the Directive, the European Commission launched a formal infringement procedure on Germany and six other European countries.

On 15 February 2023 the Commission referred Germany to the Court of Justice for failure to transpose and notify the national measures transposing the directive.

In addition to Germany, Czech Republic, Estonia, Hungary, Luxembourg, Poland, and Slovakia have not implemented the directive yet. The implementation in Czech Republic and Poland is expected to take place soon, though.

Other countries have already transposed the directive into local law. Most of the local laws exceed the scope of the directive and introduce an obligation to open channels also for reports on violation of local (non-EU) law. With regard to the narrow interpretation by the EU Commission of the group privilege question, there is no consistent approach. Some countries have expressly included a provision saying that they allow for a group privilege, i.e., that local entities may rely on group wide/central channels. Others have not included any statement and remain unclear on whether or not they follow the EU Commission's interpretation. Others have included clear language that they follow the EU Commission's interpretation.

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WHAT OTHERS SAY ABOUT US

“

Hogan Lovell International LLP's international investigation practice enjoys an excellent reputation and is regularly consulted by well-known companies [...].

The Legal 500 Germany, 2023

"Extensive experience and high quality. "
"Large powerful force. "

The Legal 500 Germany, 2023

Tier 1 for Compliance and Internal Investigations.

The Legal 500 Germany, 2023

Law Firm of the Year for Compliance
JUVE Awards 2022

TOP law firm for compliance.
WirtschaftsWoche, 2023

Hogan Lovells showcases a well-recognised practice with a particular focus on advising DAX-40 and international clients on complex compliance issues. It comprises particular expertise in internal and external investigations regarding money laundering, tax evasion, corruption and data protection violations.

Chambers Europe, 2023

Hogan Lovells' German compliance and investigations team is clearly one of the leading teams in the German market and is also very well known internationally for its expertise and remarkable track record in the field.

The Legal 500 Germany, 2021

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