



**Hogan  
Lovells**

# Hogan Lovells Guide on Internal Investigations in Germany

2019

# Hogan Lovells

## Guide on Internal Investigations in Germany – 2019

---

Published by  
Hogan Lovells International LLP  
Karl-Scharnagl-Ring 5  
80539 Munich  
Germany

© Hogan Lovells International LLP  
Published 2019  
First edition

Contributing editors  
Dr. Sebastian Lach, Hogan Lovells  
Désirée Maier, Hogan Lovells  
Vera Wichers, Hogan Lovells

Editorial assistant  
Stephanie Küppers, Hogan Lovells

The information provided in this publication is general and may not apply in a specific situation. Legal advice should always be sought before taking any legal action based on the information provided. This information is not intended to create, nor does receipt of it constitute, a lawyer-client relationship. The publishers and authors accept no responsibility for any acts or omissions contained herein. The information provided was verified between January and April 2019. Be advised that this is a developing area.

No photocopying.

# Contents

---

EDITORIAL	1
1. COMPLIANCE AND INVESTIGATIONS IN GERMANY	3
1.1 Overview and trends in 2019	3
1.2 What's new in Investigations – Top 10	4
2. THE EARLY STAGE: BEST PRACTICE FOR DAWN RAIDS	9
2.1 Competition dawn raids	9
2.2 Non-competition dawn raids	13
3. IMPLEMENTATION OF AN INTERNAL INVESTIGATION	16
3.1 How to manage internal investigations? Best practice recommendations for internal investigation project management	16
3.2 Immediate measures in the context of internal investigations	18
3.3 Data retention and risk avoidance with regard to discoveries	20
3.4 Disclosure obligations in internal investigations and maintaining attorney-client privilege	22
3.5 Whistleblowing and plausibility – pre-phase planning and preparation	25
3.6 External communication and public relations – dealing with the media	28
3.7 Effective e-discovery with search terms	30
3.8 Effective data protection management in internal investigations	34
3.9 Rules for the monitoring of employee emails: Overview of current opinion and the practical consequences	38
3.10 Dos and Don'ts for employee interviews	42
3.11 Involvement of the works council in internal investigations	45
3.12 Problematic aspects of U.S. pre-trial discoveries and criminal investigations involving German residents and companies	48
3.13 Cooperating with authorities and third parties	52
3.14 Cooperating with BaFin and the European Central Bank in cases involving financial institutions	55
3.15 Tax investigations	58
3.16 Business partner investigations – reasons, means, and red flags	61
3.17 Export controls and sanctions investigations	64
3.18 Cartel investigations: Leniency programs in cartel cases	69

3.19	Civil disclosure obligations under debt-financing agreements	72
4.	SANCTIONS AND LIABILITY	74
4.1	Criminal liability: Bribery	74
4.2	Criminal liability: Embezzlement	78
4.3	Criminal liability: Fraud	80
4.4	Criminal liability: Money laundering	83
4.5	Corporate criminal liability and liability under German administrative law (Sections 30 and 130 OWiG)	86
4.6	Product compliance liability risks	90
4.7	Civil liability of companies and employees toward third parties arising from bribery and corruption issues	95
4.8	Antitrust infringements: Civil liability through private enforcement actions	98
4.9	Personal liability claims against board members and the insurance of such claims (specifically under D&O policies)	101
4.10	Data breach investigation and incident response	106
4.11	Cyber security: Liability risks arising from data security breaches	109
4.12	Liability of the compliance officer	114
4.13	Sections 153 and 153a of the German Code of Criminal Procedure ( <i>Strafprozessordnung</i> – "StPO"): Options for closing criminal proceedings in Germany	116
4.14	Corporate sanctions	119
5.	POST-INVESTIGATIVE ASPECTS	122
5.1	The final report: The last step at the end of an internal investigation	122
5.2	Post-investigative remediation – follow-up	124
5.3	Implementation of compliance rules – requirements due to German employment law	127
	AUTHORS	130
	ABOUT HOGAN LOVELLS	133
	HOGAN LOVELLS' GLOBAL INVESTIGATIONS EXPERIENCE	134
	WHAT OTHERS SAY ABOUT US	135

## EDITORIAL

Dear reader,

Compliance obligations and related internal investigations remain of major importance to international companies around the world. We started focusing on compliance topics and compliance investigations years ago. As a result, we have vast amounts of experience around the world.

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

We hope you find this guide a useful overview of compliance topics in Germany.

Your Hogan Lovells Investigations/Compliance Team, Germany



**Dr. Tanja Eisenblätter**  
Partner, Hamburg  
T +49 40 41993 528  
tanja.eisenblaetter@hoganlovells.com



**Dr. Detlef Hass**  
Partner, Munich  
T +49 89 29012 215  
detlef.hass@hoganlovells.com



**Dr. Sebastian Lach**  
Partner, Munich  
T +49 89 29012 187  
sebastian.lach@hoganlovells.com



**Désirée Maier**  
Partner, Munich  
T +49 89 29012 289  
desiree.maier@hoganlovells.com



**Dr. Jürgen Johannes Witte**  
Partner, Dusseldorf/Frankfurt  
T +49 211 1368 443  
juergen.witte@hoganlovells.com



**Dr. Christoph Wünschmann**  
Partner, Munich  
T +49 89 29012 432  
christoph.wuensmann@hoganlovells.com

Please note: This guide is written as general guidance only. It should not be relied on as a substitute for specific legal advice. In the interests of readability the masculine form has been used throughout, although both sexes are accorded equal importance.

### Further information

For further information on any aspect of this guide, please contact the authors (contact details are on pages **130/131**).





# 1. COMPLIANCE AND INVESTIGATIONS IN GERMANY

## 1.1 Overview and trends in 2019

In 2018 we saw a number of significant developments in the compliance and investigations field.

One of the most discussed questions certainly was whether documents from an internal investigation could be seized during a raid of law firm offices. There were various court decisions discussing this question (see "What's new in Investigations – Top 10"). Despite these decisions, documents created by outside counsel in the course of an internal investigation can still be protected by privilege. However, there is a lack of clarity in rules and case law. Instead, the extent to which privilege is respected by prosecutors and courts depends on the specific prosecutor's office and court and, therefore, varies regionally.

These inconsistencies and the lack of reliability resulted in various calls for clear regulations. Accordingly, the coalition agreement of the Grand Coalition includes extensive plans to regulate internal investigations. At the time this year's guide went to print, there was no published draft yet. According to a speaker of the Federal Ministry of Justice ("*Bundesministerium der Justiz*"), a first draft law is planned for publication in spring 2019.

Since the coalition agreement of the Grand Coalition also mentions the extension of sanctions for companies involved in white-collar crime, it can be assumed that this draft law will also contain rules in this respect (see "What's new in Investigations – Top 10").

Increased sanctions are also part of another main development we saw in the past year: The new EU General Data Protection Regulation ("GDPR") became effective on 25 May 2018. Potential fines substantially increased and rules were, in parts, tightened. The GDPR generally reduces the impact of local specifics in cross-border cases. However, given the potential exposure and the complexity, involving experienced data privacy counsel when conducting an investigation continues to be indispensable. In this guide you will find extensive guidance on this as well.

With regard to stricter fines, the regulations of the GDPR might have served as a model for a new draft law of the German government on cyber security, published in April 2019. In addition to increasing possible fines, the scope of the existing German

regulations will be extended to manufacturers of IT products for critical infrastructure companies and to companies that are of specific public interest, for example media companies. Furthermore, the German Federal Office for Information Security ("*Bundesamt für Sicherheit in der Informationstechnik*") will be given enhanced powers to review vulnerable systems. This draft bill highlights the general trend toward a focus on data-related regulations.

As always, the *Hogan Lovells Guide on Internal Investigations in Germany* addresses these and other important new developments and presents them in a concise and practical manner. The guide includes the essentials to keep in mind when thinking about compliance or investigations, as well as an information sheet that provides an overview of the top 10 developments of the past year.

*Authors: Dr. Sebastian Lach | Partner, Munich  
Désirée Maier | Partner, Munich*

## 1.2 What's new in Investigations – Top 10

### 1. Decision of the Federal Constitutional Court on the role of law firms in internal investigations

In March 2017, the Public Prosecutor's Office Munich II searched the offices of a law firm and provisionally seized documents in connection with the firm's internal investigation for a client (see Hogan Lovells Guide on Internal Investigations in Germany 2018, "What's new in Investigations – Top 10"). The law firm and the client submitted a constitutional complaint against the search warrant.

On 27 June 2018, the Federal Constitutional Court ruled that the search warrant had been lawful due to the specifics of the case.

The law firm's complaint was held to be inadmissible for various reasons.

First, the court ruled that, in this specific case, the required attorney-client relationship did not exist. German law requires a relationship between the lawyer and an accused person/company in a specific criminal investigation. In the present case, the court held that there was no accused company yet as there had been insufficient suspicion that a particular executive had committed a crime or violated supervisory obligations. In addition, the court based its position on the fact that the attorney-client relationship existed only between the raided law firm and the parent company of the company relevant in these proceedings. This highlights the need to have a separate engagement letter with the subsidiary in question.

Second, according to the court, the law firm had been unable to substantiate that its principal administrative office or a significant part of its business was in Germany or another Member State of the European Union. It was therefore not seen as a "domestic legal person" under Article 19(3) of the German Constitution, so not protected by fundamental rights.

The complaint of the law firm's lawyers was also held to be inadmissible because, according to

the court, only a law firm itself (not its lawyers) would be protected by Article 13 (Inviolability of the home) of the German Constitution.

The complaint of the client failed on the basis that there had not been a violation of the fundamental right of informational self-determination, given that the dawn raid had been justified.

### 2. Decision of the Regional Court Stuttgart on confiscation of documents from internal investigations

Following a complaint submitted after a dawn raid, the Regional Court Stuttgart declined to prohibit the seizure documents from internal investigations (decision dated 26 March 2018 – 6 Qs 1/18). The court ruled that the preliminary seizure of documents for further examination under Section 110 of the German Code of Criminal Procedure (*Strafprozessordnung* – "StPO") is lawful unless it affects documents that are "obviously" free from seizure – even if large numbers of documents are being seized.

In this case, the court did not consider the documents seized to be obviously free from seizure.

First, the court had to review whether documents stored in office rooms rented by a law firm on the client's premises are obviously free from seizure. The court denied this because, according to the court, the client nevertheless at least also held custody of the documents. The court argued, among other things, with the fact that the client had retained a key to the rooms and that the rent had been paid by the law firm only after the client had paid the fees for the respective month.

Second, the court assumed that the examination of papers did not obviously include any documents that directly serve the purpose of defense. This included documents such as interview file notes, attorney-client correspondence, presentations, and final and interim reports.



### 3. German grand coalition agreement – corporate sanctions and new rules for internal investigations

The German parties CDU, CSU, and SPD signed a coalition agreement on 14 March 2018. The coalition agreement includes extensive plans to regulate and extend sanctions against companies in cases of white-collar crime ("corporate sanctions", p. 126 of the German grand coalition agreement 2018).

The possible changes and new regulations include the following: Abolition of the principle of discretionary prosecution ("*Opportunitätsprinzip*") under the German Act on Regulatory Offenses (*Ordnungswidrigkeitengesetz* – "OWiG"), legal requirements for internal investigations in particular with regard to seized documents and search options, and a provision of legal incentives to provide information by means of internal investigations and the subsequent disclosure of findings obtained from internal investigations. In addition, sanctions shall be increased. The maximum amount of corporate administrative fines is currently €10 million. In the future, it is intended to allow sanctions in the amount of up to 10 percent of the company's turnover for companies with a turnover of more than €100 million. This could result in a significant increase in fines, in particular against large companies.

A speaker of the Federal Ministry of Justice confirmed that both projects are in progress. The Federal Ministry of Justice plans to present a first draft law in the spring of 2019.

According to the Ministry, the draft bill will presumably contain regulations both on corporate sanctions and on internal investigations.

### 4. New Anti-Money Laundering Directive of the European Commission

On 11 October 2018, the European Council adopted the Directive of the European Parliament and of the Council on combating money laundering by criminal law. The new Directive expands the Fifth Anti-Money Laundering Directive, adopted on 30 May 2018, and creates stricter minimum requirements for the criminal act of money laundering.

The future possibility of sanctioning companies is of specific relevance. According to Article 7 of the Directive, Member States shall take the necessary measures to ensure that legal persons can be held liable for money-laundering offenses committed for their benefit.

Apart from criminal or non-criminal fines, the possible consequences for legal persons may also include other sanctions, such as exclusion from entitlement to public benefits or aid, temporary or permanent exclusion from access to public funding or being placed under judicial supervision.

### 5. Draft Directive for stronger protection of whistleblowers

On 23 April 2018, the European Commission submitted a draft law regarding the protection of persons who give notice of breaches of certain areas of European Law. The key element of the proposed new Directive is the obligation for companies with more than 50 employees or an annual turnover of more than €10 million to set up confidential internal reporting systems.

On 20 November 2018, the Legal Committee of the European Parliament adopted and presented proposals for amendments to the proposed Directive. With these proposed amendments, the Legal Committee of the European Parliament has further lowered the thresholds for whistleblowers. For instance, anonymous reports should be handled with equal care to those being made in a non-anonymous way. Also, internal and external reporting to regulators should be on the same

level so that a reporting person is free to choose the most appropriate channel. Furthermore, the scope of the Directive should no longer be limited by an enumerative list of legal acts.

On 12 March 2019, the European Parliament and the Member States achieved a preliminary agreement. This preliminary agreement now needs to be accepted by both the European Parliament and the Council. It is expected that negotiations on the final version of the Directive will be concluded in April 2019.

New discussions about the confidentiality of whistleblower reports have also come up due to a ruling by the Regional Labor Court Baden-Württemberg (decision dated 20 December 2018 – 17 Sa 11/18). The court ruled that a manager unlawfully dismissed on the basis of internal investigations initiated by a whistleblower has access to all investigation reports (as the case may be also in copy) based on the General Data Protection Regulation. The employer had previously refused to grant this access on the grounds of the protection of whistleblowers. This is the first time a higher court has confirmed the right to information, strengthened by the EU General Data Protection Regulation ("GDPR"), is above the protection of whistleblowers.

## **6. Sanctioning infringements of the EU General Data Protection Regulation ("GDPR")**

The GDPR became effective on 25 May 2018. In the event of violations of its provisions, Article 83 of the GDPR allows data protection authorities to impose fines of up to €20 million or 4 percent of the annual group-wide turnover (whichever is higher).

In Germany, the authorities have initially been rather reluctant to impose high fines, granting companies an additional transitional grace period. The first fines were (only) between €20,000 and €80,000, though the authorities clearly stated that the rather low amounts followed from the good cooperation of the companies with the authorities (and the

authorities also considered additional costs to be borne by the companies for implementing the technical and organizational safeguards required by the authorities).

Looking ahead, the enforcement culture is clearly expected to change more drastically. Supervisory authorities in Germany have publicly announced that they expect an increase both in the number of administrative proceedings and the amounts to be fined in the future, and current proceedings are expected to end up with fines in the area of a couple of hundred thousand euros. In cases of drastic violations, it can be assumed that the authorities will eventually call for much higher amounts, making use of the full range available under the GDPR. For example, the French data protection agency CNIL ("*Commission Nationale de l'Informatique et des Libertés*") has already imposed a fine of €50 million against a company, based on alleged GDPR violations.

## **7. Decision of the Higher Regional Court of Frankfurt on fines against an anti-money laundering commissioner**

The decision of the Higher Regional Court of Frankfurt am Main related to fines issued against a bank's anti-money laundering officer (MLRO) for delayed reporting of potential money-laundering activities to the relevant authorities. The bank's MLRO argued that he had to conduct his own investigations in the first place.

In its decision of 10 April 2018 (2 Ss-OWi 1059/17), the Higher Regional Court of Frankfurt am Main confirmed the fines imposed. The court stated that the purpose of the suspicion report was to prevent suspicious activities of money laundering preventively. Investigations in this respect are to be conducted exclusively by the relevant authorities. A bank's MLRO is not competent to conduct such investigations. The task of the MLRO is limited to providing the relevant information of the suspicious activity.

## 8. Selection of the Head of the European Public Prosecutor's Office

On 20 November 2017, the European Regulation on establishing a European Public Prosecutor's Office (2017/1939) entered into force. The European Public Prosecutor's Office (EPPO) will take action against major cross-border crime committed to the detriment of the EU budget. Currently, 22 Member States are involved. The EPPO is expected to take up its functions by the end of 2020.

On 19 November 2018, the European Commission published the vacancy notice for the European Chief Prosecutor. Three candidates have made it to the final round. An independent commission of experts proposed the following persons to the European Parliament: Laura Kövesi, Jean François Bohnert, and Andres Ritter. The final decision is expected in the near future. The establishment of the EPPO is therefore advancing.

## 9. EU competition enforcers' focus on digital markets requires companies to check their digital antitrust compliance

Digital markets are on top of the agenda of global competition law enforcers, especially in Europe. Following the EU Commission's conference on 17 January 2019 on "Shaping competition policy in the era of digitization", the EU Commissioner for Competition, Margrethe Vestager, recently re-emphasized an even further growing regulatory pressure from the next EU Commission, stating that tech giants can expect a "mandate of action" for the next Commission to tackle competition law issues in online markets as a "matter of urgency". In addition to the EU Commission, the German Federal Cartel Office ("*Bundeskartellamt*") is at the forefront of leading the continuously growing competition enforcers' push into the digital markets.

In the age of digitization and rapidly growing online trade, competition law compliance risks of digital business models are increasing. Especially the use of big data and pricing

algorithms as well as the implementation of digital platform models, cooperation with competitors in the Internet of Things, and the use of blockchain will certainly be in the focus of competition law enforcement in 2019 and beyond. In addition, companies should be aware that competition law enforcers are investing significantly in keeping pace and expanding their expertise in the digital sector and are even working toward an increased use of artificial intelligence, such as algorithms, for automated detection of cartel behavior. These developments as well as the continuously growing number of competition law investigations into such digital business models show that each company should check its competition law compliance with regard to its behavior in digital markets. Digital antitrust compliance, including specific training for the IT department and checks on IT service providers and software development firms, should become an essential module in each company's compliance management system.

## 10. New German "Sustainable Supply Chain" working paper

The German Federal Ministry for Economic Cooperation and Development ("*Bundesministerium für wirtschaftliche Zusammenarbeit und Entwicklung*") prepared a working paper for a Sustainable Supply Chain Act, applicable to German companies, which became public in February 2019.

The draft determines, among other things, an obligation to integrate Human Rights Compliance into a whistleblowing system as well as duties to remediation and investigation. In case of violation, fines up to €5 million and imprisonment may be imposed.

It is still unclear whether the working paper will become law in its present form. However, this step shows a tendency in the current development regarding Human Rights Compliance and Supply Chain and the need to integrate Human Rights Compliance into the existing compliance systems.

*Authors: Dr. Sebastian Lach | Partner, Munich*  
*Désirée Maier | Partner, Munich*  
*Dr. Martin Pflüger | Partner, Munich*  
*Dr. Richard Reimer | Partner, Frankfurt*  
*Dr. Stefan Schuppert | Partner, Munich*  
*Vera Wichers | Senior Associate, Munich*  
*Michael Jahn | Associate, Munich*

## WHAT OTHERS SAY ABOUT US



One client describes them as 'excellent: *They have lots of experience in this field, are practical and business-minded and possess great professional knowledge*', further adding: *'We feel very comfortable having them on our side.'*

*Chambers Europe, 2019*

Hogan Lovells International LLP's 'practical and assertive' team acts for a broad client base from the manufacturing sector with a focus on automotive but its client roster also includes a number of life sciences, health, and technology sector players.

*The Legal 500 EMEA, 2018*

Interviewees describe Hogan Lovells as 'well respected', and highlight its broad service offer.

*Chambers Europe, 2019*

Ranked 2nd in the GIR 30, Global Investigations Practice.

*Global Investigations Review, 2018*

Hogan Lovells International LLP 'has an extensive network of experts at its disposal'. The compliance group, which includes specialists from the automotive, life sciences, technology, media and communications industry groups, is recognised for its 'situational advice'. It has seen an increase in mandates from financial institutions.

*The Legal 500 Germany, 2019*

Excellent practice which is a first choice for compliance-related matters involving the automotive, life sciences, energy and technology industries. Increasingly active in setting up global compliance policies, utilising its extensive network. Particularly praised for its work on product recall matters. Also houses significant expertise in data privacy, and assists clients with the implementation of dawn raid procedures, global compliance training and whistleblower policies.

*Chambers Europe, 2018*

Hogan Lovells International LLP continues to be strategically focused on internal investigations in the context of compliance and white-collar crime, and the 'professional' team has 'extensive expertise' in technical terms and across various industries.

*The Legal 500 Germany, 2019*

Frequently recommended for compliance matters [...]. The firm offers a compelling proposition especially for the manufacturing industry with a thematically very broad and practical range of services.

*JUVE Handbook, 2017/2018*





Alicante  
Amsterdam  
Baltimore  
Beijing  
Birmingham  
Boston  
Brussels  
Budapest\*  
Colorado Springs  
Denver  
Dubai  
Dusseldorf  
Frankfurt  
Hamburg  
Hanoi  
Ho Chi Minh City  
Hong Kong  
Houston  
Jakarta\*  
Johannesburg  
London  
Los Angeles  
Louisville  
Luxembourg  
Madrid  
Mexico City  
Miami  
Milan  
Minneapolis  
Monterrey  
Moscow  
Munich  
New York  
Northern Virginia  
Paris  
Perth  
Philadelphia  
Riyadh\*  
Rome  
San Francisco  
São Paulo  
Shanghai  
Shanghai FTZ\*  
Silicon Valley  
Singapore  
Sydney  
Tokyo  
Ulaanbaatar\*  
Warsaw  
Washington, D.C.  
Zagreb\*

\*Our associated offices

## www.hoganlovells.com

"Hogan Lovells" or the "firm" is an international legal practice that includes Hogan Lovells International LLP, Hogan Lovells US LLP and their affiliated businesses.

The word "partner" is used to describe a partner or member of Hogan Lovells International LLP, Hogan Lovells US LLP or any of their affiliated entities or any employee or consultant with equivalent standing. Certain individuals, who are designated as partners, but who are not members of Hogan Lovells International LLP, do not hold qualifications equivalent to members.

For more information about Hogan Lovells, the partners and their qualifications, see [www.hoganlovells.com](http://www.hoganlovells.com).

Where case studies are included, results achieved do not guarantee similar outcomes for other clients. Attorney advertising. Images of people may feature current or former lawyers and employees at Hogan Lovells or models not connected with the firm.

©Hogan Lovells 2019. All rights reserved.