Outline

- **Internal investigation**
  - When to conduct an internal investigation
  - Who should conduct an internal investigation
  - Types of investigation
  - Informing (enforcement) authorities

- **Phases of the investigation**
  - Phase I: procedural preparation
  - Phase II: data retention
  - Phase III: data collection
  - Phase IV: interviews
  - Phase V: reporting
  - Phase VI: post reporting
INTERNAL INVESTIGATION

• Should an internal investigation be conducted?

  Relevant factors to consider
  • Is there a *reasonable suspicion of violation* (internal / external norm)?
    - How strong is the suspicion and what is it based on?
    - What is the seriousness of the violation?
    - Did the suspicion arise because of internal or external notification?
  • How much *knowledge of the relevant facts* is present within the company?
  • Are there *internal rules* prescribing an investigation?
  • Are *internal sanctions* on individuals being considered?
INTERNAL INVESTIGATION

• Should an internal investigation be conducted?

  Relevant factors to consider (cont.)

  • What is the *subject of the infraction*? Is it high, medium or low risk?
  • Has the company suffered *financial damage* which can be reclaimed?
  • Is there a *concurrency with other investigations*?
  • Has a governmental body taken *steps against the company* or is it likely?
  • Are there *international aspects* that are of importance?
  • Can the fact that no investigation will be done lead to *culpability concerning management*?
  • Is there a danger that the *findings against the company* will be used in possible proceedings?
### PROs AND CONs INTERNAL INVESTIGATION

#### CONDUCT YES OR NO?
- WHO?
- TYPE OF INVESTIGATION
- FACTORS TO CONSIDER

#### PHASES INVESTIGATION
- PHASE I: PROCEDURAL PREPARATION
- PHASE II: DATA RETENTION
- PHASE III: DATA COLLECTION
- PHASE IV: INTERVIEWS
- PHASE V: REPORTING
- PHASE VI: POST REPORTING

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**Company perspective**
- Scope control
- Less business disruption
- Better fact finding
- Leniency

**Regulator perspective**
- Efficiency
- Low costs
- Flexibility; regulator investigation remains possible

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**PROs AND CONs INTERNAL INVESTIGATION**

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<td>Concealment of wrongdoing</td>
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INTERNAL INVESTIGATION

• Who should conduct the investigation?

1. Company
2. External party/parties
3. Combination

PHASES INVESTIGATION

PHASE I: PROCEDURAL PREPARATION
PHASE II: DATA RETENTION
PHASE III: DATA COLLECTION
PHASE IV: INTERVIEWS
PHASE V: REPORTING
PHASE VI: POST REPORTING
INTERNAL INVESTIGATION

- Who should conduct the investigation?
  1. Company
     - Legal affairs
     - Internal audit
     - Compliance
     - Risk control / risk management
     - HR
     - (Local) management
INTERNAL INVESTIGATION

- Who should conduct the investigation?

2. External party/parties
   - Forensic auditor/accountant
   - Lawyer
   - Investigation agency
INTERNAL INVESTIGATION

- Who should conduct the investigation?

3. Combination
   - Internal / External
   - Legal affairs & Lawyer
   - External
   - Accountant & Lawyer
INTERNAL INVESTIGATION

- Who should conduct the investigation?
  - Relevant factors to consider:
    - What is the **seriousness** of the issue (financial, legal, reputational)?
    - What parties have the required **expertise and manpower**?
    - Can the company carry out a sufficiently **objective and impartial** investigation?
    - Can **confidentiality** be safeguarded if the investigation is carried out in-house?
    - Is there a reason to bring the investigation under **legal privilege**?
    - Will the findings be shared with an **external party** (regulator/ private party)?
    - Are there **accounting / financial** aspects?
    - Will the company lose a **grip on the investigation** if it is carried out externally?
    - What are the **costs** of an external investigation?
    - Is the company **listed**?
INTERNAL INVESTIGATION

• Who in–house should direct the investigation?
  • Legal Affairs / Compliance / HR / Internal audit
  • Management
  • Involvement of the Board of Directors / Audit committee
  • Special committee / Steering committee

• Condition: No factual involvement and/or functional responsibility with respect to the subject matter of the investigation

• Relevant aspects / points to consider
  - Holding onto manageability of the process
  - Communication with the Board of Directors / Audit committee / auditor
  - Making manpower available (also managing costs)
INTERNAL INVESTIGATION

- Validation committee
  - Consists of team of external experts in the field
  - Frequent reporting on status of the investigation and process
  - Validation of methodology, scope, approach and report

- Pros
  - **New trend:** In case of a criminal procedure, possibility of validation of the internal investigation report by the authorities
  - Boosting independent status of the internal investigation and its report
INTERNAL INVESTIGATION

- What type of investigation should be conducted?
  - **Objective of the investigation**
    - Objective fact finding – if very important, then independence is key
    - Estimating and limiting risks
    - Pre-phase for internal sanctions
    - Defense against a (future) private claim and/ or enforcement by the authorities
    - Investigation into a problem with compliance or a violation of a specific (legal) norm or regulation
INTERNAL INVESTIGATION

• What type of investigation should be conducted?
  • *Extensiveness of the investigation*
    - Depends on the legal risks involved
    - Depends on reputational issues
    - Depends on possible outside knowledge
    - Depends on involvement of regulator
INTERNAL INVESTIGATION

• What type of investigation should be conducted?
  • **Scale of the investigation**
    - **Full scale “public” investigation**
      • i.e. PPF, Vestia, Imtech
    - **Full scale non-public investigation**
      • i.e. Rabobank, Philips Polen
    - **Medium scale**
      • i.e. Fugro
    - **Limited scale**
    - **(Preliminary) inquiry**
    - **Screening**
INTERNAL INVESTIGATION

- Inform supervisory authorities / voluntary self-disclosure
  (i) legal duty to inform
  (ii) no duty but question whether voluntary notification is desirable

CONSIDERATIONS

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<td>The possibility to mitigate sanctions</td>
<td>A sanction may still be imposed despite voluntary notification</td>
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<td>Improving the relationship between the company and the supervisory authority</td>
<td>Civil claims</td>
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INTERNAL INVESTIGATION

- International practice
  - US style internal investigations
  - European internal investigations
- Cultural issues, for example
  - Harassment
  - Discrimination

- CONDUCT YES OR NO?
- WHO?
- TYPE OF INVESTIGATION
- FACTORS TO CONSIDER
- PHASES INVESTIGATION
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### PHASES INVESTIGATION

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**INTERNAL INVESTIGATION**
- Conduct Yes or No?
- Who?
- Type of Investigation
- Factors to Consider

**PHASES INVESTIGATION**
- Phase I: Procedural Preparation
- Phase II: Data Retention
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- Phase IV: Interviews
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PHASE I: PROCEDURAL PREPARATION

- Internal Rules:
  - Codes of Conduct
  - Whistle blower regulations
  - Privacy regulations
  - Investigation procedures / protocol
  - Note: violation may have consequences re: employment law measures

- Applicable legislation and rules
  - Personal Data Protection Act
  - Labor law
  - Whistle blower rules (US, NL)

- Legal privilege (in different countries)
PHASE I : PROCEDURAL PREPARATION

• Dutch Data Protection Act (“Wbp”)
  - Identify which personal data may be involved
    - Such as name, address, phone number, e-mail address etc.
  - Identify in which way the data may be used
    - Such as data retention, copying, archiving, distribution to third parties etc.
  - Identify applicable statutory grounds for processing personal data
  - Identify safeguards to stay within legal framework of the Wbp
  - Inform of those involved / notify Dutch Data Protection Authority (“CBP”)
    - Possible extension of the information term to individuals (in some cases)
PHASE I: PROCEDURAL PREPARATION

• Legal Privilege
  - Optimize legal privilege for the benefit of the company
  - Marking the following as privileged and confidential:
    - Correspondence, including e-mail
    - Advice
    - Documents
    - Computer equipment, and
    - Data carriers
  - Engaging third parties through law firm
PHASE I: PROCEDURAL PREPARATION

- Determine the *scope* of the investigation
- Determine a central *research question*
- Establish *communication* arrangements
- Select *team members*
- Determine a *timeline*
- If required establish an *investigation protocol*
  - Include non – disclosure obligations
PHASE II : DATA RETENTION

- Safeguarding information:
  - Process of document retention
  - Distribution of document retention notice, including frequent reminders
  - Suspension of all regular processes for cleaning up information (hard copy & digital)
  - Involvement of IT in the process
  - Identification of privileged documents
PHASE II : DATA RETENTION

• Importance of document retention:
  - Documents form the most important impartial source of information
  - Documents determine to an important extent the scope of the findings (which are then supplemented by e.g. interviews)
  - Documents often form strong evidence
  - Therefore: respond very attentively to signals of documents being destroyed
PHASE II : DATA RETENTION

• Example United States v. Arthur Andersen

• Fact
  - On 9 October 2001 Nancy Temple, in-house lawyer at AA, knew that the SEC would start an investigation at AA.

• Fact
  - On 12 October 2001 the following e-mail was sent: “It might be useful reminding the Enron-team of our documentation and retention policy.”

• Fact

• Fact
  - AA was found guilty for “obstructing justice.”
  - AA went bankrupt shortly thereafter.
PHASE III : DATA COLLECTION

• Collection of data: who?
  - The *company* collects and transfers information to the investigators
  - The *investigators* themselves are responsible for data collection
  - *Outsourcing* the collection process (e-discovery)?
PHASE III : DATA COLLECTION

• Points to consider
  - Solid recording of process and choices made
  - Try to get a perspective on how much data is involved early in the process
  - Level of disruption for the company
  - Consider data security and safety
PHASE III : DATA COLLECTION

- From collection to selection
  - Intensive process
  - Potentially leading to a second round of information gathering
  - Usually determines the scope for any interviews
PHASE III : DATA COLLECTION

- Document preservation and retention
- Identification sources and people
- Collection
- Selection
- Investigation documentation

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- INTERNAL INVESTIGATION
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PHASE IV: INTERVIEWS

- Interviews
  - Selection interviewees
  - Basis for (further) selection:
    (i) Investigation data
    (ii) Information given by interviewees
  - Consider two rounds:
    (i) General round with open questions
    (ii) Specific round with specific questions on the basis of investigation data
PHASE IV: INTERVIEWS

- Invitation to the interview
  - Preferably in writing (letter / e-mail)
  - Provide information about, inter alia:
    - Background and reason for the investigation
    - If applicable, the degree of circulation interview minutes and report
    - Rights of the interviewee such as the right to inspect and make corrections to the report
    - If applicable, legal privilege on interview minutes
    - Confidentiality
    - “Tone of voice” – avoid impression of suspicion

PHASES INVESTIGATION

- Phase I: Procedural Preparation
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PHASE IV: INTERVIEWS

- Interview procedure:
  - At the beginning of the interview: introduction (interview process, etc.)
  - Interview minutes
  - Right of the interviewee to review and correct the draft minutes
  - No copy of the interview report in connection with confidentiality & privilege
  - Have interviewee sign and agree to interview minutes
INTERNAL INVESTIGATION

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✓ PHASES INVESTIGATION

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PHASE IV: INTERVIEWS

- Interviews – relevant points to consider:
  - Preferably: more than one interviewer
  - Preferably: signed minutes
  - Privilege issue: verbatim vs attorney work product
  - Clarity about the role of the lawyer
  - Legal assistance for the interviewee?
  - Timing: interview right away or after reviewing the documents?
  - Confronting interviewees with others’ statements?
PHASE V: Reporting

- Report format:
  - Written
  - Oral
  - Mix

- Determining scope of people knowledge of the report:
  - Limited if maintaining privilege is important
  - Reading vs. distributing hard copy
  - Drawing up protocol
  - Challenges when working with auditors / accountants
PHASE VI : POST REPORTING

- Remedial measures
  - Decision whether *remedial action* is *necessary*
  - In case remedial measures are required, shall be decided *in which way this will take place*
  - US versus European *approach*
  - Possibility of *hiring an external advisor*
PHASE VI : POST REPORTING

- Draft *communication* and *holding plan*

- If applicable, *settlement negotiations* with regulators or other authorities

- Possible *civil claims*

- *Determine* whether *further investigation* is required
  - Between company and advisors, possibly coordination with the supervisory authority
  - If required, decide on *timeframe* and reporting format
  - If not required, then *evaluation* between company and investigators