



European Investigations Guide

2018

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Preface

Dear Reader,

On behalf of all colleagues and experts involved, we are proud to publish the first edition of the European Investigations Guide. This guide is designed to provide you with a quick reference to some of the most pressing questions relating to internal investigations in European countries.

Although it is important to note that this guide cannot, and is not intended to, replace any kind of legal advice in individual cases, it will help the compliance expert to identify the risks arising and the right questions to ask to address those risks. To that end, a group of leading practitioners from various European countries have provided their expert input on such issues in their jurisdiction. As this guide presents the view of experts on legal issues, we can of course not exclude that courts, authorities and other third parties might hold or take different views.

We hope that you will find the European Investigations Guide helpful and would like to thank you for your interest in this publication.

Dr. Sebastian Lach



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TABLE

	Corporate Liability	Public Bribery	Commercial Bribery	Extraterritorial Applicability of Criminal Laws	Adequate Procedures Defence
Yes	X Corporates cannot be criminally liable under Turkish law but may be liable under administrative law.	X	X	X	X
No					

QUESTION LIST

1. Do any specific procedures need to be considered in case a whistleblower report sets off an internal investigation (e.g. for whistleblower protection)?

There is no specific Turkish legislation providing whistleblower protection. The position is governed by general employment law principles. As such, an employee cannot be dismissed on the ground that they have reported misconduct or suspected misconduct. However, a dismissal of the employee with immediate effect may be justified if the employee discloses trade secrets to authorities or the public without having a genuine suspicion or knowledge of actual misconduct (e.g. where the employee's report is untruthful and/or vexatious). Under Turkish law, the company does not have a duty to investigate a whistleblower report, although it will generally be good practice to do so. At the end of an internal investigation, if any offence is detected, the company should report the offence to the prosecution authorities if it is on-going at the time of the investigation (subject to the right to avoid self-incrimination under the Turkish Constitution).

2. Do the following persons/bodies have the right to be informed about an internal investigation before it is commenced and/or to participate in the investigation (e.g. the interviews)?

- a) Employee representative bodies, such as a works council
- b) Data protection officer or data privacy authority
- c) Other local authorities

What are the consequences in case of non-compliance?

- a) Many companies in Turkey have labour unions and an associated collective bargaining agreement between management and employees. An employee representative from the labour union has the right to be informed about and/or to participate in the investigation if this was agreed in the collective bargaining agreement. In the absence of such an agreement, the employee representative body has no automatic statutory right to be involved in an investigation.
- b) There is no specific provision in the applicable Turkish Data Protection legislation giving the data protection officer or data privacy authority the right to be informed about and/or to participate in the investigation.
- c) Where the relevant misconduct being investigated is also an offence regulated under the Turkish Criminal Code, this Code provides that the offence must be reported to the prosecution authorities if it is on-going at the time of the investigation. In general, even if the relevant misconduct is deemed an offence under Turkish Criminal Code, if the offence is not being committed at the time of the investigation, there is no reporting obligation. However, in some circumstances, money laundering offences uncovered as a result of an internal investigation should be reported to the relevant authority (see question 9 below).

3. Do employees have a duty to support the investigation, e.g. by participating in interviews? If so, may the company impose disciplinary measures if the employee refuses to cooperate?

In general, employees have the labour law duty to cooperate with an internal investigation as far as the facts to be investigated relate to activities conducted or matters known to them as part of their employment. They must answer work-related questions truthfully and completely. If the matters under investigation are unrelated to the employee's work or position in the company, a balancing of interests has to be performed to determine if a duty to cooperate exists.

Where an employee is required to participate, the employee's refusal may be regarded as a breach of duty and such misconduct may justify dismissal.

4. May any labour law deadlines be triggered or any rights to sanction employees be waived by investigative actions? How can this be avoided?

The legal period under Turkish labour law for dismissal for cause is six working days following the date the employer becomes aware of the relevant misconduct giving rise to the dismissal. In case an investigation is carried out, this six working day period will in general not commence until the investigation is finalised and a report is provided to the relevant person/body within the company in charge of employee dismissals. If a claim for unfair dismissal is brought before the courts, the burden is on the employer to prove that the termination is justified.

5. Are there any relevant data privacy laws, state secret laws, or blocking statutes in your country that have to be taken into account before

a) Conducting interviews?

The Law of Protection of Personal Data which entered into force on 7 April 2016 applies to processing of data. This includes securing, collecting and reviewing data, as well as the creation of work products such as interview file notes and final reports. Therefore, it is very important to perform an early assessment of the applicable data privacy laws and to document the steps taken.

b) Reviewing emails?

Private communications are protected under Turkish law. Reviewing private emails of employees may even constitute a criminal offence if data privacy requirements are not observed. Provided that a general disclaimer is provided to the employee, stating that his/her business related communications (including work emails) could be monitored by the company at any time, then the work emails of the employee can be reviewed. This disclaimer should be signed by all employees at the start of their employment contract.

c) Collecting (electronic) documents and/or other information?

As with emails, all other forms of documents containing personal data or private communications will be protected by Turkish law.

d) Analysing accounting and/or other mere business databases?

There is no specific regulation in this respect, unless the relevant databases contain personal data, in which case the Law of Protection of Personal Data will apply.

6. Before conducting employee interviews in your country, must the interviewee

a) Receive written instructions?

There is no general statutory obligation that the employee to be interviewed should receive written instructions. Nevertheless, it is considered that explanations are ethically required and advisable. In general, this includes a brief description on the background of the investigation and the subject matter. For documentation purposes, it is advisable to provide these instructions in written form to be countersigned by the interviewee.

b) Be informed that he/she must not make statements that would mean any kind of self-incrimination?

There is no legal requirement to inform the employee in this regard.

c) Be informed that the lawyer attending the interview is the lawyer for the company and not the lawyer for the interviewee (so-called "Upjohn warning")?

There is no legal requirement to inform the employee in this regard. However, where the investigation may have a U.S. context, an Upjohn warning would be advisable.

d) Be informed that he/she has the right that his/her lawyer attends?

There is no legal requirement to inform the employee in this regard. However, should the employee request the presence of his/her lawyer, it is advisable to allow the lawyer to represent their client at the interview.

e) Be informed that he/she has the right of a representative from the works council (or other employee representative body) to attend?

Where there is a labour union in the workplace and there is a provision to such purpose in the collective bargaining agreement, then the employee representative would have the right to be informed about and/or to participate in the interview.

f) Be informed that data may be transferred cross-border (in particular to the United States)?

The employee should be informed and his/her explicit consent should be requested before their data is transferred outside Turkey. Under Turkish data privacy law, transfer of data to a foreign country is permissible if explicit consent for such transfer is given.

g) Sign a data privacy waiver?

According to Turkish data privacy legislation, the employee needs to consent to the company's use of their personal data. Where the personal data of the interviewee might be used for other purposes in the future, (such as in possible court proceedings), a data privacy waiver signed by the interviewee can be very helpful.

h) Be informed that the information gathered might be passed on to authorities?

Although there is no legal obligation in Turkey in this regard, this should be included in the interview instructions as a matter of good practice.

i) Be informed that written notes will be taken?

For reasons of transparency, the fact that the information provided in the interview will be recorded (e.g. for reports and potentially for disclosure) should be explained. It is also advisable to have a copy of the written notes signed by the relevant employee and maintained in the investigation records. However, there is no legal obligation under Turkish law.

7. Are document hold notices or document retention notices allowed in your country? Are there any specifics to be observed (point in time/form/sender/addressees etc.)?

There is no specific law requiring that a document retention notice should be issued, but issuing such notices is advisable. Such notices should be clear, be sent to all potentially relevant addressees and be issued as early as possible. Before issuing the document retention notice, the company should consider which employee's documents should be retained and what types of documents should be sought (e.g. physical documentation, emails, documents contained on hard-drives and mobile devices). The document retention notice should briefly describe the terms of reference of the investigation, bearing in mind the need to maintain confidentiality.

8. May attorney-client privilege be claimed over findings of the internal investigation? What steps may be taken to ensure privilege protection?

Attorney-client privilege exists under Turkish law, although there are no specific rules in relation to its application in internal investigations. The documents relating to the findings of an internal investigation may be subject to attorney-client privilege protection if they have been prepared by an independent attorney and to the extent they concern the client's defence rights. Accordingly, to protect and render such documents out of the scope of the public investigation, it is recommended to mark these documents as "Confidential, Privileged, Attorney-client Privileged" and "Relating to Defence Rights".

Prosecutors may search company offices, although they will need a warrant to do so and the search must be done in the presence of a public prosecutor. It is recommended to have a lawyer present at the company offices during a raid. During such a raid, it is important to object to the seizure of any privileged documents and to ensure that this objection is documented in the minutes of the raid. Such objections will be considered by the public prosecutor or relevant judge when assessing the claim for privilege. Where the claim for privilege is successful, the public prosecutor or judge shall return these documents to the company.

Prosecutors may also search an attorney's office, but will need a court warrant to do so, and the search must be done in the presence of a public prosecutor. In case of a raid at an attorney's office, the attorney and/or the bar representative present at the raid may claim during the raid that a document, which is about to be confiscated, is related to the client's defence rights. In this case, the document is put in a separate envelope and the envelope's flap is sealed. The evaluation of attorney-client privilege status of the document is done by the magistrate in cases of criminal investigation, and by the criminal judge in cases of prosecution, in each case within 24 hours. If it is decided that the document falls under the scope of attorney-client privilege, it is immediately returned to the attorney and the correspondence relating to the document is destroyed. Therefore, in order to ensure privilege protection, it is advisable to keep the important documents relating to an internal investigation at the office of an outside counsel rather than on company premises, and to write "Confidential/Attorney-client correspondence" and "Relating to defence rights" on them.

Under the Criminal Procedure Code, upon a judge's warrant, a public prosecutor may seize computers and/or computer files. It is important to obtain a copy of the seized computer files and raise written objections with respect to potentially privileged documents during the raid. A claim for privilege may also be raised following the raid, but, where possible, it is advisable to object during the seizure proceedings, since these objections may be taken into account during the search of the copies of computer files by the relevant authorities.

9. Can attorney-client privilege also apply to in-house counsel in your country?

Attorney-client privilege does not apply to in-house counsel. A recent decision of the Turkish Competition Board held that correspondence with an independent attorney will fall within the scope of attorney-client privilege. It was implicit in this decision that, as in-house counsel are employed by the company, they are not considered independent attorneys.

10. Are any early notifications required when starting an investigation?**a) To insurance companies (D&O insurance etc. to avoid losing insurance coverage)?**

As far as circumstances arise which could give rise to a claim under an insurance policy, (for example, under a D&O policy in relation to conduct of company directors), the company should make a notification of circumstances to the insurer. Each individual policy should be reviewed to ensure notification requirements are met.

b) To business partners (e.g. banks and creditors)?

Duties to inform business partners may arise from contractual obligations between the company and the business partner, particularly where the matter under investigation may have implications for the business partner. Even if there is no explicit provision in the relevant contract, there may be an obligation to notify a business partner of an internal investigation, where that information is highly significant to the business partner and relevant to its contract with the company. The interests of the business partner need to be evaluated against the legitimate interests of the company. Therefore, it depends on the individual case whether and when the business partner needs to be notified.

c) To shareholders?

Potential reporting duties towards shareholders compete with the company's requirements to maintain business confidentiality. Such reporting duty would play an essential role in companies, since certain investigations may require a mandatory disclosure under law (for example, companies listed on the BORSA Istanbul stock exchange will be required to disclose an investigation if it is deemed a material event). As well as statutory disclosure obligations, the company has to evaluate on a case by case basis if there is an *ad hoc* duty to report to the shareholders. If the internal investigation affects the market price significantly and fulfils certain criteria (e.g. relating to the risk, scope, and suspects involved in the internal investigation) an obligation to disclose exists.

d) To authorities?

In general, there is no duty to inform the prosecutor about an internal investigation or potential misconduct within the company. However, there are exceptions where certain types of serious misconduct are uncovered during an investigation. For example, under the Regulation on Suspension of Transactions within the scope of Laundering Proceeds of Crime and Financing of Terrorism, certain companies (e.g. financial and insurance institutions, lawyers and accountants) are required to notify the Turkish Financial Crimes Investigation Board if a serious indication exists which shows that a suspicious transaction has been performed or attempted. Even where no statutory duty to report exists, a cooperative approach with the local prosecutor may prevent adverse and unexpected measures by the authorities.

11. Are there certain other immediate measures that have to be taken in your country or would be expected by the authorities in your country once an investigation is started, e.g. any particular immediate reaction to the alleged conduct?

The company has to minimise damages, stop any on-going misconduct and try to prevent new cases of misconduct. Additionally, the company may have to reevaluate its compliance system, especially its compliance policies (such as its Code of Conduct) and the related training provided to the employees, in order to eliminate potential deficits and to improve its existing system. Further, the company may impose sanctions on the concerned employees including termination, in order to show that misconduct is not tolerated inside the company. Depending on the individual investigation and the industry sector concerned, notification to certain regulators may be advisable for strategic, risk management reasons.

12. Will local prosecutor offices generally have concerns about internal investigations or do they ask for specific steps to be observed?

Internal investigations are not very common in Turkey and usually Turkish subsidiaries of global companies conduct such investigations. As of today, the findings of such investigations are reported to the authorities in rare cases, therefore the case law on the matter is very limited. However, where criminal misconduct is found in an internal investigation, a detailed internal investigation report of such misconduct would be helpful to the prosecution office (although there are no provisions under Turkish law relating to self-disclosure by the company to the prosecutors).

13. Please describe the legal prerequisites for search warrants or dawn raids on companies in your country. In case the prerequisites are not fulfilled, may gathered evidence still be used against the company?

A search of company premises can be carried with a judge's warrant, or by the prosecutor's warrant in urgent cases. The search warrant should detail the suspected criminal act to which the search relates, the person(s) to be searched, the address, the property to be searched and the duration of the warrant. In principle, the prosecutor should be present during the search. However, where this is not possible, the search can be made in the presence of two aldermen or neighbours. ("Aldermen" are elected government officials who act as neighbourhood representatives, and a "neighbour" is someone who lives in the same neighbourhood and who agrees to be a witness during a search).

In case of non-compliance with the rules on search warrants, the evidence gathered in the search cannot be used in court proceedings. Furthermore, anybody whose rights are violated by a non-compliant search can claim pecuniary and non-pecuniary damages.

14. Are deals, non-prosecution agreements, or deferred prosecution agreements available and common for corporations in your jurisdiction?

Deals and non-prosecution or deferred prosecution agreements are not available under Turkish law. However, the prosecutors have discretionary powers whether to commence criminal action under certain circumstances. For criminal acts which require filing of a complaint and are punishable by maximum one year of imprisonment, if the defendant has no criminal past, the prosecutor can defer the criminal case for five years. If the suspect does not commit any crime during this five year period, the prosecutor may decide not to commence any criminal proceedings.

Since criminal liability does not attach to companies, the deferment of prosecution would only be applicable for the company's related directors, officers, or employees.

15. What types of penalties (e.g. fines, imprisonment, disgorgement, or debarment) may companies or its directors, officers, or employees face for misconduct of (other) individuals of the company?

Corporations are not subject to criminal responsibility under Turkish law. However they can be subject to sanctions such as administrative fines, cancellation of business, and permits or expropriation (i.e. taking possession of assets). This will depend on the type of the misconduct committed by their directors or officers.



Individuals who have supervisory duties may face sanctions not only for their own misconduct but also in relation to misconduct of other employees under their supervision. These may include imprisonment, fines, or official debarment from their profession.


16. Please briefly describe any investigations trends in your country (e.g. recent case law, upcoming legislative changes, or special public attention on certain topics)?

Since internal investigations are not common and not widely conducted in the country, precedents are very rare, but as a result of the accession talks between Turkey and the European Union, there is a tendency for local corporations to follow the practices in Europe. Although the process for new legislation is slow, as long as the accession talks continue as planned, the legal environment in this regard would most probably evolve accordingly.

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