

International **Comparative** Legal Guides



Corporate Investigations **2020**

A practical cross-border insight into corporate investigations

Fourth Edition

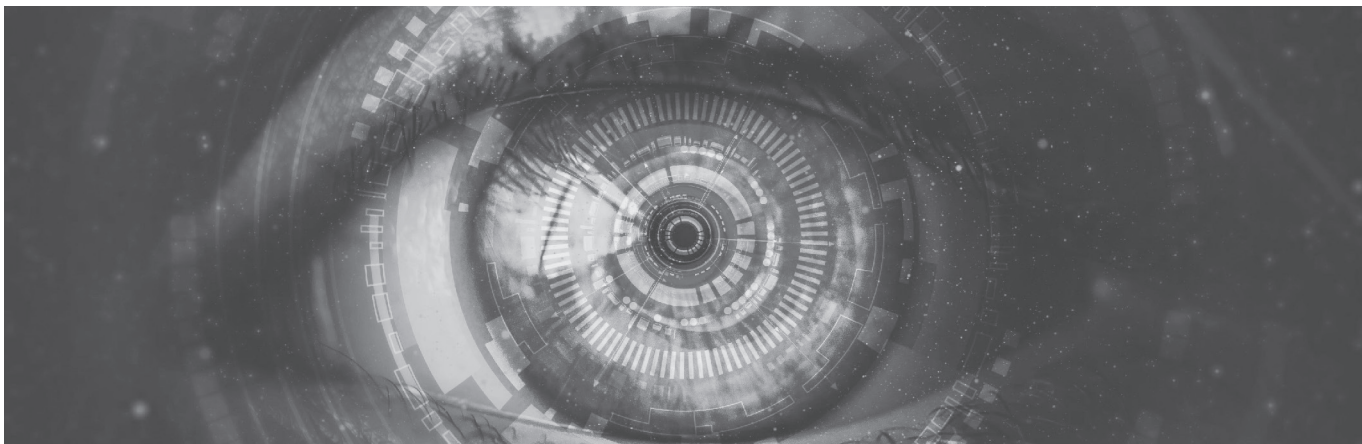
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1 The Decision to Conduct an Internal Investigation

1.1 What statutory or regulatory obligations should an entity consider when deciding whether to conduct an internal investigation in your jurisdiction? Are there any consequences for failing to comply with these statutory or regulatory regulations? Are there any regulatory or legal benefits for conducting an investigation?

While there are no specific rules for corporate investigations, whenever an internal investigation is or becomes aimed at sanctioning a particular employee, it must follow the procedural guarantees set out in the Portuguese Labour Code (Law No. 7/2009, of 12 February). Failure to comply with such guarantees when sanctioning an employee may determine the invalidity of the sanctions applied, as well as a regulatory offence.

Furthermore, under the Portuguese Anti-Money Laundering and Counter-Terrorism Financing Law (Law No. 83/2017, of 18 August – “AML Law”), obliged entities are required to examine and report activities which may be linked to money laundering or the financing of terrorism. Moreover, entities under this obligation must define and apply internal compliance systems to mitigate the risk of money laundering and financing of terrorism.

Failure to comply with these duties is a regulatory offence under the AML Law.

Under the General Data Protection Regulation [Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 – “GDPR”], the Portuguese Personal Data Protection Law (Law No. 58/2019, of 8 August) and the Portuguese Safety in Cyberspace Law (Law No. 46/2018, of 13 August), entities subject to its scope are required to implement adequate measures to ensure the safety of stored data, as well as to conduct impact assessments.

Failure to comply with these duties is a regulatory offence under the aforementioned laws.

More generally, under article 71, section 2, subsection e), of the Portuguese Criminal Code (Decree-Law No. 400/82, of 23 September), internal investigations may be construed as a mitigating factor in a company’s criminal and regulatory liability if the company has ordered an internal investigation to uncover and denounce the execution of criminal or regulatory infractions.

1.2 How should an entity assess the credibility of a whistleblower’s complaint and determine whether an internal investigation is necessary? Are there any legal implications for dealing with whistleblowers?

Under the Portuguese AML Law, obliged entities must record any complaints filed and must immediately proceed with the implementation of new due diligence measures whenever the complaint gives the obliged entity reasons to doubt the veracity or accuracy of the data provided by a client. Furthermore, if the complaint provides the obliged entity with enough reasons to suspect that certain funds or assets may be the product of criminal activities or linked to the financing of terrorism, those funds or assets should be reported to the authorities.

Certain regulators may require the submission of periodic reports on the complaints received.

Whistleblowers may not be subject to any form of retaliation for presenting a complaint, unless that complaint is deliberately and manifestly false, and their identity must remain confidential.

Failure to comply with these duties is a regulatory offence under the AML Law. Moreover, the illegal revelation, whether wilfully or negligently, of a whistleblower’s identity, is a criminal offence under the AML Law.

1.3 How does outside counsel determine who “the client” is for the purposes of conducting an internal investigation and reporting findings (e.g. the Legal Department, the Chief Compliance Officer, the Board of Directors, the Audit Committee, a special committee, etc.)? What steps must outside counsel take to ensure that the reporting relationship is free of any internal conflicts? When is it appropriate to exclude an in-house attorney, senior executive, or major shareholder who might have an interest in influencing the direction of the investigation?

The outside counsel’s “client”, for the purposes of an internal investigation, is the company and the outside counsel must report its findings to whoever is designated to act on the company’s behalf in the internal investigation.

Outside counsel should seek, at the onset of the investigation, preferably in the engagement letter, to establish clear reporting

channels and provide for an alternative reporting channel, to be used in case a conflict of interests compromises the main reporting channel. Moreover, obliged entities under the AML Law must ensure, through their internal control mechanisms, that conflicts of interests can be prevented or circumvented, under penalty of incurring in a regulatory offence.

Outside counsel acts in the interests of the company and therefore it is always appropriate to exclude a person when there are compelling reasons to believe there is a conflict of interests between that person and the company.

2 Self-Disclosure to Enforcement Authorities

2.1 When considering whether to impose civil or criminal penalties, do law enforcement authorities in your jurisdiction consider an entity's willingness to voluntarily disclose the results of a properly conducted internal investigation? What factors do they consider?

As was mentioned above, a company's willingness to disclose the results of a properly conducted internal investigation may be construed as a mitigating factor, pursuant to article 71, section 2, subsection e), of the Portuguese Criminal Code. Notwithstanding this general principle, there are several sectors where the disclosure of information to authorities is required and/or rewarded.

Financial intermediaries are required by the Portuguese Securities Code (Decree-Law No. 486/99, of 13 November) to report facts which may be linked to financial crime to the Portuguese Securities Market Commission, offering a detailed account of the reasons for suspicion, the operations in question and any other relevant information.

Failure to comply with this duty is a regulatory offence under the Portuguese Securities Code.

The Portuguese Securities Code establishes that the minimum and maximum limits of the fines applicable to regulatory offences may be lowered if a defendant assists the Portuguese Securities Market Commission's investigation.

Likewise, the Legal Framework of Credit Institutions and Financial Companies (Decree-Law No. 298/92, of 31 December) requires that the management and supervisory bodies of credit institutions inform the Bank of Portugal of internal or external frauds with potential adverse impact on results or capital.

Failure to comply with this duty is a regulatory offence under the Legal Framework of Credit Institutions and Financial Companies.

The Portuguese Competition Law (Law No. 19/2012, of 8 May) allows the first company to report infractions in which it participated to benefit from an exemption from the applicable fine and also allows subsequent companies that offer additional evidence of significant value to benefit from a reduction of the applicable penalty.

The Framework for Regulatory Offences in the Energy Sector (Law No. 9/2013, of 28 January) provides that a company that spontaneously comes forward with the necessary information for the Portuguese Energy Sector Regulator to safeguard the public interest, spontaneously redresses any damages caused and, henceforth, is fully cooperative, to benefit from an exemption from the applicable fine.

2.2 When, during an internal investigation, should a disclosure be made to enforcement authorities? What are the steps that should be followed for making a disclosure?

As explained above, under the Portuguese Competition Law and the Portuguese Framework for Regulatory Offences in the Energy Sector, companies that disclose an infraction to the authorities early, reap the most benefits from collaboration. Therefore, disclosures should be made as soon as possible.

Pursuant to the Portuguese Securities Code, facts that may come to be qualified as financial crimes must be immediately disclosed to the Portuguese Securities Market Commission. However, the disclosure must describe the reasons for the suspicion, as well as offer a detailed account of the operations in question and the persons involved. Therefore, disclosures should be made as soon as the necessary information is obtained or deemed unobtainable by the company.

In accordance with the Portuguese Criminal Procedure Code (Decree-Law No. 78/87, of 17 February), public officials, including executives and employees of companies engaged in a public service concession, are required to report to authorities any crime that they become aware of in the exercise and because of their duties.

Under the Portuguese AML Law, facts should be reported as soon as there are sufficient reasons to believe that certain funds or assets are the result of criminal activity or related to the financing of terrorism.

Companies should attempt to determine whether the facts determined during the investigation constitute an offence and of what kind, regulatory or criminal, in order to establish whether disclosure is warranted and which authority is competent to receive the disclosure.

2.3 How, and in what format, should the findings of an internal investigation be reported? Must the findings of an internal investigation be reported in writing? What risks, if any, arise from providing reports in writing?

Generally, there are no format requirements for disclosing the findings of an internal investigation. However, such findings will typically be written down by the authority receiving the disclosure, thus being advisable, for the sake of accuracy, to provide written disclosures. Some authorities, such as the Portuguese Competition Authority, provide optional online channels for disclosing information.

The Portuguese AML Law establishes a specific framework for disclosures, which must be made in writing, through the secure channels defined by the competent authority.

3 Cooperation with Law Enforcement Authorities

3.1 If an entity is aware that it is the subject or target of a government investigation, is it required to liaise with local authorities before starting an internal investigation? Should it liaise with local authorities even if it is not required to do so?

An entity under government investigation is not required to liaise with any local authorities before launching an internal investigation.

A company's willingness to liaise with authorities may, however, be construed as a mitigating factor, pursuant to article 71, section 2, subsection e), of the Portuguese Criminal Code.

3.2 If regulatory or law enforcement authorities are investigating an entity's conduct, does the entity have the ability to help define or limit the scope of a government investigation? If so, how is it best achieved?

A company may offer relevant information or request that the authorities execute certain investigative measures, which may influence the scope of an investigation. However, given that authorities are independent, there are no other means to define or limit the scope of the investigation.

3.3 Do law enforcement authorities in your jurisdiction tend to coordinate with authorities in other jurisdictions? What strategies can entities adopt if they face investigations in multiple jurisdictions?

In criminal procedures, law enforcement tends to coordinate and cooperate with authorities in other jurisdictions, with the aid of a specialised section of the Prosecutor General's Office: the Bureau of Documentation and Comparative Law. In regulatory offence procedures, the degree of coordination and cooperation with authorities in other jurisdictions varies depending on the sector in question. The Portuguese Competition Authority, the Bank of Portugal and the Portuguese Securities Market Commission have various collaboration protocols with their respective foreign counterparts, both within and outside the European Union.

When facing investigations in multiple jurisdictions, it is important to seek outside counsel with a strong international network, in order to ensure the legality of the investigation in all relevant jurisdictions.

4 The Investigation Process

4.1 What steps should typically be included in an investigation plan?

Investigation plans should establish the scope of the investigation, define main and alternative reporting channels, identify relevant documentation and individuals, provide for the proposal and execution of preventive measures and outline the structure of the final report.

4.2 When should companies elicit the assistance of outside counsel or outside resources such as forensic consultants? If outside counsel is used, what criteria or credentials should one seek in retaining outside counsel?

Outside counsel and resources should be hired whenever the complexity of the issue demands specialised knowledge or whenever it is foreseeable that the issue may generate a conflict of interests within the company or give rise to criminal or regulatory proceedings.

The most important criteria for retaining outside counsel are experience, specialised knowledge and confidentiality guarantees.

5 Confidentiality and Attorney-Client Privileges

5.1 Does your jurisdiction recognise the attorney-client, attorney work product, or any other legal privileges in the context of internal investigations? What best practices should be followed to preserve these privileges?

Portuguese Law recognises attorney-client privilege with respect to any information or materials obtained in the context of the provision of legal services.

Attorney-client privilege can be lifted in exceptional cases, notably in criminal proceedings or in assertion of a defence of the client or the lawyer's legitimate interests.

5.2 Do any privileges or rules of confidentiality apply to interactions between the client and third parties engaged by outside counsel during the investigation (e.g. an accounting firm engaged to perform transaction testing or a document collection vendor)?

In Portugal, many professions are subject to a professional duty of secrecy (including accountants), which covers information or materials obtained in the context of the provision of the respective services.

Notwithstanding the aforementioned legal duties of secrecy, it is advisable to conclude non-disclosure agreements with any third parties contacted during the course of the investigation.

5.3 Do legal privileges apply equally whether in-house counsel or outside counsel direct the internal investigation?

Yes, as long as the in-house counsel is a registered member of the Portuguese Bar Association.

5.4 How can entities protect privileged documents during an internal investigation conducted in your jurisdiction?

Privileged documents should be clearly marked as such and authorities should not be allowed to access them. However, in the event that privileged documents are accessed or seized, the validity of the access or seizure should be immediately challenged by the entity's Attorney, in the authority's report of the search.

5.5 Do enforcement agencies in your jurisdictions keep the results of an internal investigation confidential if such results were voluntarily provided by the entity?

Under Portuguese Law, in principle, proceedings may only be confidential until criminal charges are pressed. After those charges are pressed, in principle, all information and documentation provided to the authorities will be made public. There are, however, some exceptions to this rule, namely to ensure the protection of privacy data and trade secrets in competition offence proceedings.

6 Data Collection and Data Privacy Issues

6.1 What data protection laws or regulations apply to internal investigations in your jurisdiction?

All general data protection laws and regulations are applicable to internal investigations, namely, the GDPR and the Portuguese Personal Data Protection Law. Furthermore, the Portuguese Labour Code's data protection rules will also apply whenever the investigation involves the personal data of employees.

6.2 Is it a common practice or a legal requirement in your jurisdiction to prepare and issue a document preservation notice to individuals who may have documents related to the issues under investigation? Who should receive such a notice? What types of documents or data should be preserved? How should the investigation be described? How should compliance with the preservation notice be recorded?

Authorities may issue preservation notices for computer data, pursuant to the Portuguese Cybercrime Law (Law No. 109/2009, of 15 September). Complainants that have acquired "Assistant" status, as well as suspects, may request from authorities the issuance of a preservation notice. Non-compliance with the preservation notice may constitute a criminal offence.

Furthermore, parties in civil proceedings may request that the court order the opposing party to produce a document. Non-compliance with the court's order may result in a fine and the inversion of the burden of proof.

6.3 What factors must an entity consider when documents are located in multiple jurisdictions (e.g. bank secrecy laws, data privacy, procedural requirements, etc.)?

When the required documents are located in multiple jurisdictions, the company should consider whether mutual legal assistance is required to obtain such documents and which are the most efficient mutual legal assistance instruments to obtain those documents.

6.4 What types of documents are generally deemed important to collect for an internal investigation by your jurisdiction's enforcement agencies?

When investigating crimes and regulatory offences, authorities typically focus on bank records, transaction records and emails. Thus, internal investigations should focus on the same kinds of documents.

6.5 What resources are typically used to collect documents during an internal investigation, and which resources are considered the most efficient?

Electronic evidence is the most frequent and efficient method to conduct investigations. It is advisable that adequate measures be taken to guarantee the integrity of the documents collected, namely through the use of hash functions and by employing digital forensics professionals.

6.6 When reviewing documents, do judicial or enforcement authorities in your jurisdiction permit the use of predictive coding techniques? What are best practices for reviewing a voluminous document collection in internal investigations?

Portuguese authorities do not use predictive coding techniques for analysing data.

However, several Portuguese law firms have begun adopting AI tools for due diligence and electronic discovery.

7 Witness Interviews

7.1 What local laws or regulations apply to interviews of employees, former employees, or third parties? What authorities, if any, do entities need to consult before initiating witness interviews?

There are no laws or regulations applicable to interviews of employees, former employees or third parties in the context of internal investigations.

No authorities need to be consulted before initiating such interviews.

7.2 Are employees required to cooperate with their employer's internal investigation? When and under what circumstances may they decline to participate in a witness interview?

Employees are subject to the employer's power of direction. As such, employees can be instructed to cooperate in an internal investigation. However, the employer's power of direction cannot infringe upon the employee's rights, namely the employee's rights to privacy and to remain silent in disciplinary proceedings.

7.3 Is an entity required to provide legal representation to witnesses prior to interviews? If so, under what circumstances must an entity provide legal representation for witnesses?

Companies are not required to provide legal representation to witnesses. However, pursuant to article 66, section 3, of the Portuguese Bar Association's Statutes, witnesses cannot be forbidden from seeking legal representation.

7.4 What are best practices for conducting witness interviews in your jurisdiction?

Interviews should begin by informing the witness of the relevant context, of his or her rights, and initial questions should be open-ended. Impertinent or leading questions should be avoided. The employee should be questioned on how he or she came to know the facts being reported.

Interviews should be documented and the resulting documents reviewed and signed by all participants. Audio and video recordings should only be used if the employee offered his or her express consent.

Non-disclosure agreements may be concluded with the employee if the subject matter is particularly sensitive.

7.5 What cultural factors should interviewers be aware of when conducting interviews in your jurisdiction?

There are no cultural factors in Portugal that require special attention when conducting interviews.

In accordance with the Criminal Procedure Code, any person who intervenes in a criminal procedure and does not understand Portuguese is entitled to an interpreter.

7.6 When interviewing a whistleblower, how can an entity protect the interests of the company while upholding the rights of the whistleblower?

Companies should ensure that complaints are acknowledged and offer feedback on the complaint. Complaints should be considered credible and should be acted upon, except where manifestly false.

Whistleblowers must be allowed to benefit from legal representation during the interview.

The interview should be preferably conducted by an impartial third-party.

The whistleblower's identity should remain confidential and the whistleblower should not be the target of any form of retaliation as a consequence of filing a complaint, unless that complaint is knowingly and manifestly false.

7.7 Can employees in your jurisdiction request to review or revise statements they have made or are the statements closed?

Employees are entitled to review the documentation of any statement made and challenge its veracity or accuracy.

Employees can also ask to review or revise past statements, but the company is not required to allow it.

7.8 Does your jurisdiction require that enforcement authorities or a witness' legal representative be present during witness interviews for internal investigations?

Portuguese Law does not require that enforcement authorities or the witness' legal representatives be present during the witness interview conducted in the context of an internal investigation.

8 Investigation Report

8.1 How should the investigation report be structured and what topics should it address?

Investigation reports should include: an executive summary; scope of the investigation; evidence collected (interviews and documents); facts ascertained; analysis of the facts ascertained; and recommendations.

Certain sectors have more specific requirements. In particular, the AML Law requires that reports contain: the identification of the persons involved and, if known, their respective activities; the analysis methodology employed by the obliged entity; a description of the suspicious operations; the concrete factors that arose suspicion; and a copy of the documentation that supports the analysis methodology.

Also, the Portuguese Securities Code requires that financial intermediaries, when reporting financial crimes, to describe: the reasons for suspicion; the operations in question; the orders given; the persons involved in the transaction; the means of trading; the portfolios involved; the transaction's economic beneficiaries; the markets in question; and any other information potentially of significance.



Tiago Félix da Costa joined the firm in 2007 and became partner in 2015. He is a member of the litigation team, coordinating one of the criminal litigation, regulatory sanctions and compliance teams and the data protection team. Practising law since 2004, Tiago has wide experience in the areas of criminal and regulatory litigation and civil, corporate and commercial litigation. Tiago has also acted in the personal data protection field, providing legal assistance on criminal and regulatory processes in this area and assisting several companies on the creation of policies and programs of “compliance” in the personal data protection field. From 2009 until 2018, Tiago Félix da Costa was a Guest Professor at Nova Law School and often teaches several Advanced and Postgraduate Courses in his areas of practice. In 2017, he received the “40 under Forty Award” organised by *Iberian Lawyer* which distinguishes 40 lawyers under the age of 40 in Portugal and Spain. In 2019, Tiago was nominated “Client Choice”, exclusively for Portugal, in the category “Litigation”. He coordinates Instituto Miguel Galvão Teles, established in 2016.

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