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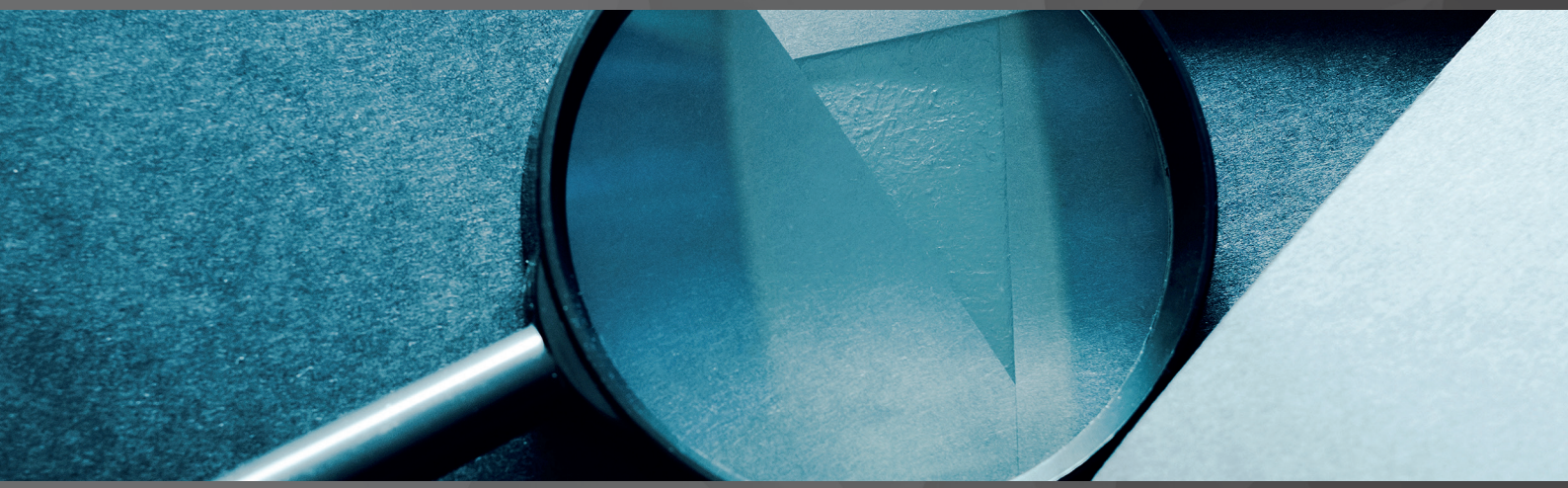

Corporate Investigations 2021

A practical cross-border insight into corporate investigations

Fifth 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?

Some entities, e.g. banks, investment funds, entities managing alternative investment companies, insurance companies, reinsurance companies, as well as entities conducting brokerage activities and fiduciary banks, are obligated on the basis of special provisions to carry out inspections of compliance and internal audits, given the lack of general statutory regulations concerning an internal investigation:

A. Banks are obligated to define and start up an effective internal inspection system on the basis of banking law.
B. The internal inspection system must also operate in investment funds and in entities managing alternative investment companies on the basis of the Act on Investment Funds and on Management of Alternative Investment Funds ("AIF").
C. The obligation to introduce and start up the internal inspection system and internal audit also lies with insurance companies and reinsurance companies on the basis of the Act on Insurance and Reinsurance.
D. Moreover, all entities conducting brokerage activity and fiduciary banks are obligated to comply with the conditions forming the basis for granting a permit to these entities. The permit is granted only after the entity has filed the pertinent description of the internal inspection on the basis of the Act on Trade in Financial Instruments.

Moreover, managers of capital companies are obligated, in this regard, to observe due diligence on the basis of Arts 293 §2 and 483 §2 of the Commercial Companies Code ("the CCC"). According to the Act on Money Laundering and Terrorism Financing Prevention, the obliged entities (such as banks, other financial institutions and even law firms) are obligated to appoint a compliance officer who will be responsible for supervising the appropriate application of the Act. Moreover, these entities have an obligation to introduce internal procedures in the scope of preventing money laundering and financing terrorism.

The draft Act on Transparency in Public Life from the previous term of Polish Sejm provided an obligation to introduce internal anti-corruption procedures; however, in accordance with the principle of discounting the work of the Parliament, in the new term of the Parliament, which started in 2019, work on this project was not resumed.

An internal investigation allows the persons managing a given entity to learn about material facts in the context of irregularities disclosed in the company; however, under the applicable law, the fact of carrying out an internal investigation does not constitute an independent circumstance which speaks in favour of a specific entity, e.g. in the case that criminal proceedings are initiated against that entity.

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?

The reaction of an entity depends entirely on its internal policy. However, the whistleblowing issue is beginning to appear in Polish legislation. For instance, pursuant to the Act on Detecting and Preventing Money Laundering and Terrorism Financing, some institutions like banks or other financial entities are obliged to create an anonymous whistleblowing procedure of reporting irregularities in the scope of money laundering by employees. Moreover, the planned amendment to the Act on Liability of Collective Entities for Acts Prohibited Under Penalty provides sanctions for causing negative consequences to whistleblowers, which are imposed on a collective entity, e.g. a company. The mentioned draft Act on Transparency in Public Life from the previous term of Polish Sejm also contained regulations that granted the status of whistleblower to people who give reliable information regarding the possibility of a corruption offence being committed.

Regardless of the above, the whistleblower, as an employee, is subject to protection against retaliatory discrimination (e.g. the employee being dismissed from the company).

Whistleblowers – also pursuant to general rules following from internal legal frameworks – are subject to protection following from Art. 10 of the European Human Rights Convention, pursuant to the Strasbourg standards set out in the judgment of *Heinisch v. Germany*. These standards provide for the need to weigh up the interests of a given entity (such as, e.g., protection of a company's good name) with the public interest and to provide protection for a whistleblower against sanctions dependent upon his/her motives, as well as the alternative means available to him/her for achieving the assumed goal of disclosing information.

Moreover, the definition of a whistleblower is included in Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons reporting breaches of EU law. A whistleblower is a person who reports breaches of EU law that are harmful to the public interest. Whistleblowers are persons who work for, or maintain contact with, a public or private organisation in connection with

their professional activities. In the preamble to the Directive, we read that whistleblowers "play a key role in revealing and preventing such violations and in protecting the public good". The purpose of this Directive is "to ensure a balanced and effective protection of whistleblowers" (preamble), that is to say, to establish "standards ensuring a high level of protection for persons who report breaches of Union 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 client" is nearly always the interested company, while communication is essentially conducted with its pertinent representative, the management board or the Chief Compliance Officer. What is problematic are situations in which a member of the management board (or the entire management board) is suspected of bringing about the disclosure of irregularities in the company. In such cases, communication with the client is most often conducted by other company bodies (e.g. the supervisory board).

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?

Polish law essentially does not contain developed leniency-type institutions (except for antimonopoly/antitrust law); although in the case of criminal liability, the perpetrator's attitude is taken into account each time. For example, Art. 15 of the Criminal Code ("CC") provides that a perpetrator is not subject to a penalty if he/she voluntarily prevented the effect of an illegal act or that the penalty is reduced for a perpetrator who voluntarily made efforts to that end. Art. 16 of the Tax Criminal Code regulates so-called "voluntary self-disclosure", i.e. non-imposition of a penalty for a tax crime or misdemeanour by a perpetrator who, having committed an illegal act, informed the law enforcement authority and disclosed material facts about the act, in particular regarding the persons who took part in committing it. Art. 60 § 3 of the CC provides for a reduction of the penalty for a perpetrator who disclosed to the authorities information concerning a crime, in particular the identity of other perpetrators of the illegal act. In the case of bribery of a public official, disclosure by the perpetrator of all the material facts of the crime, prior to their discovery by the authorities, means that under Art. 229 § 6 of the CC he/she is not subject to a penalty. The same applies in case of corruption in business relations. If a perpetrator who, granted or promised to grant material benefit, notifies the relevant authorities and discloses all of the material facts of the crime prior to their discovery by the authorities, he/she shall not be subject to a penalty under Art. 296a § 5 of the CC. Moreover, the aforementioned amendment to the Act on Liability of Collective Entities for Acts Prohibited Under Penalty provides for voluntary submission to criminal liability by a collective entity in certain circumstances, above all when it notifies the prosecution authorities of the crime committed and discloses significant circumstances of the criminal behaviour.

An internal investigation may increase the chances of a perpetrator availing of the above-mentioned conditions to reduce their criminal liability.

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?

Disclosure to enforcement authorities of information gathered by the company during an internal investigation is recommended to a company only after all of the proceedings have been carried out, and after it has been determined that the established facts of the case contain all of the material information. Otherwise, it is not recommended to disclose to the enforcement authorities information gathered by the company.

Banks are an exception; they are obligated, under banking law, to immediately inform the preparatory proceedings authorities about each case in which a justified suspicion arises that the activity of the bank has been used to conceal a tax crime, to finance terrorism, to launder money, or for purposes linked to these acts.

Pursuant to the Act on Detecting and Preventing Money Laundering and Terrorism Financing, banks and other financial institutions are obliged to register transactions and convey information on transactions that are suspected to be part of money laundering. If the General Inspector for Financial Information ("GIIF") comes to the conclusion that a given transaction is suspicious, it may demand that the institution withholds the transaction and notifies the prosecutor's office.

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?

In all circumstances, it is recommended that a report be drawn up in writing in a properly secured file. The results of the investigation should only be conveyed orally in situations where it is not possible to prepare a report in writing. The risk of a disclosure of data contained in the written report is minimal if the appropriate methods for securing these data are applied; i.e., above all, securing the file with a password, encoding the disk, and observing the rules for handling classified documents.

It must be pointed out, however, that under the provisions of Polish criminal procedure, a piece of evidence shall not be deemed inadmissible exclusively on the grounds that it has been obtained as a result of an infringement of the procedure or the forbidden act referred to in Art. 1 §1 of the CC, unless the piece of evidence has been obtained in connection with the fulfilment of the official duties of a public officer, as a result of: homicide; causing deliberate damage to health; or deprivation of liberty (Art. 168a of the Code of Criminal Procedure ("CCP")). Thus, it is impossible to entirely rule out the risk of use of information – obtained as a result of the actions of investigation authorities – in a manner which is contrary to the interests of a given entity (e.g. hacking an IT system).

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?

In Poland, there is no legal obligation for an internal investigation to be preceded by engaging in cooperation with the prosecuting authorities. If, in the course of an investigation carried out by the authorities, the object of examination is the functioning alone of a given entity and no specific charges have yet been made against it, then it is recommended that the entity only discloses information obtained as a result of an investigation when it has full knowledge of the facts of the case and after it has carefully examined all of the circumstances of the case. In a situation where proceedings before the prosecuting authorities are already at the stage of verification of specific charges against the examined entity, the rules and procedure of cooperation are specified in individual summonses or notifications served on that entity, and are also determined by the actions of the persons carrying out tasks on behalf of the pertinent authorities.

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?

The law enforcement authorities act independently within their powers. Through cooperation with them, the entity against which the actions of the law enforcement authorities are aimed may have an indirect influence on the scope of those powers (e.g. by filing pertinent evidence applications or by way of participation in the interviewing of witnesses).

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?

Mainly, yes. Law enforcement authorities gladly avail of numerous regulations in this regard; both those following from Polish law (*inter alia*, relating to the European Arrest Warrant or the actions indicated in Art. 585 of the CCP, as well as those regulated in the Act on Exchange of Information Between the Law Enforcement Authorities of EU Member States) and those following from EU law (e.g.: from Art. 82 of the Treaty on the Functioning of the European Union; and from Art. 5 of Council Framework Decision No. 2009/948/JHA on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings, implemented into Polish law in Art. 592a of the CCP), as well as from agreements on mutual legal assistance (e.g. agreement between the Republic of Poland and the United States of America on mutual legal assistance in criminal cases).

If an issue being the subject of an internal investigation may have an international aspect, it is decidedly recommended to avail of the assistance of a team of specialists who are familiar with various legal systems since regulations concerning the course of an investigation, as well as of the potential obligations to disclose its results, are in many countries significantly more developed than in Poland.

However, it is worth mentioning that now, in the European Union, work on establishing the European Public Prosecutor's Office ("EPPO") is in progress. The main purpose of this institution is to combat criminal offences affecting the financial interests of the European Union. Poland, amongst a few other countries, decided not to be involved in the procedure of creating the EPPO. On 27 July 2020, the Council appointed the European prosecutors. The prosecutors will supervise investigations and prosecutions, and will constitute the EPPO college together with the Chief Prosecutor for a non-renewable term of six years. As part of the transitional rules for the first mandate, the European prosecutors from Greece, Spain, Italy, Cyprus, Lithuania, the Netherlands, Austria and Portugal – determined by drawing lots – will hold a three-year, non-renewable mandate.

4 The Investigation Process

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

The answer depends on the character of the case, but most often an investigation is conducted according to the following layout. An initial outline is established of the irregularities which may occur in the company. Then, an inspection is carried out, *inter alia*, of the e-mails of company employees and an inspection of procedures and IT systems, in which key data (from the point of view of the subject of the proceedings) may be found. In certain cases, it is also necessary to carry out research of documentation kept in paper form. If possible, it is recommended to question individual employees and persons acting within the organisation once the preliminary conclusions have been drawn by the persons conducting the internal investigation in the company.

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?

Availing of outside specialists is recommended in every situation requiring professional knowledge in a given field, in particular in the area of forensics. Strong investigative skills are an important attribute. One should also take into account specialist knowledge and skills in a given sector, experience in similar cases, as well as analytical abilities.

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?

Yes. The general rule is that attorneys and legal counsel are obliged to keep everything that they obtain secret when performing their professional duties. An attorney or legal counsel cannot be released from this secrecy. This rule applies also to documents, with the only exception provided under Arts 180 and 226 of the CCP. The interviewing of persons who practise the legal profession, e.g. an attorney or legal counsel, with regard to facts which are subject to secrecy, is only possible when it is indispensable for the sake of justice, and the facts cannot be established on the basis of other evidence. These restrictions apply accordingly to documents containing such classified professional secrets and

may be used as evidence in criminal proceedings only when the same premises are fulfilled. However, the Polish CCP permits the use of evidence obtained in breach of the law, which was mentioned above. Thus, all information obtained or created over the course of an internal investigation carries the risk of being used in a manner which is contrary to the interests of the entity. Thus, it is recommended that all files are encrypted, no open correspondence should be conducted, and personnel should be instructed, as appropriate, on the subject of confidentiality.

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)?

Cooperation with third parties is carried out each time in the form of sub-contracting, on the basis of an earlier concluded, individual agreement containing a duly developed confidentiality clause, adapted to the specific nature of the commissioned activities.

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

In practice, cooperation with an outside entity is much more beneficial than with an in-house one. In the former, it is possible to specify the scope of obligations of the outside entity (including those obligations which concern confidentiality) in a manner adapted to the specific nature of the tasks. An outside entity is also not involved in the internal relations of the organisational structure of the client, which may have a negative impact on the integrity of the internal investigation.

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

The scope of possible security measures is very broad, and covers both purely IT-related measures and internal procedures in the company. In practice, much benefit is gained from applying the so-called "Demilitarised Zone" ("DMZ"); i.e., a closely monitored, separated area of the network. In this area, one can store information of a confidential nature, for instance on a mobile server, but it is not used for ordinary communication with other units. All information of a confidential nature, including that concerning internal investigations, should be stored in a DMZ.

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?

Information obtained over the course of preparatory proceedings, regardless of its origin, is subject to so-called "secrecy of preparatory proceedings". Until such time as it is disclosed in court proceedings, it cannot be made public, under sanction of the penalty set out in Art. 241 §1 of the CC. Anyone who publicly spreads information from a closed court trial will be liable to the same punishment. In the current legal state in Poland, there is a possibility of closing court proceedings to the public, subject to the public prosecutor's consent, in cases where important private interest could be infringed due to a public hearing (Art. 360 § 1 and § 2 of the CCP).

6 Data Collection and Data Privacy Issues

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

The legal norms contained in the regulations on personal data protection and protection of privacy are found, *inter alia*, in the Personal Data Protection Act of 10 May 2018. This Act was issued as a result of adjusting Polish law to the provisions of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 (the General Data Protection Regulation – "GDPR"). Data protection provisions are also located in the Polish CC.

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?

No. Such an institution is not used at all in view of the lack of legal regulations, which could make it effective. Moreover, one must remember that issuing a summons to secure documents increases the risk of a disclosure of confidential information, and may negatively impact the prospect of securing evidence in possible future preparatory proceedings.

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.)?

There is a large number of issues which must be taken into account in case of placing information in various jurisdictions. These include subject matters in the scope of banking secrecy or the denunciation obligation, especially with regard to foreign branches of credit institutions. Moreover, an entity must consider other statutory secrecies; for instance, arising out of telecommunication law. It is also very important for an entity to obey GDPR provisions. In the international context, one should also take into account the possible differences in the manner of implementation of EU acts, as well as in the manner and practice of their application in various Member States.

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

In principle, what is deemed important are all documents (both in electronic versions and in writing) which are relevant to a given case, which the entity has in its possession. There are no significant differences between the practice of internal investigations and the practice of preparatory proceedings conducted by law enforcement authorities.

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

Most often, cooperation is engaged in with authorised employees

of the client who are instructed about what tasks they should perform and what information and documents they should obtain. Documentation is then collected in electronic form, after which it is reviewed and analysed. However, seizure of electronic evidence should be performed by forensic specialists using dedicated hardware and software.

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?

Various technologies and software are used to review documents. In the case of a large number of documents, it is worth using review platforms, for instance Relativity or Niux.

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 legal regulations in this regard; however, one should always bear in mind the personal rights of the interviewed person. The provisions of the CCP on interviewing witnesses or parties to proceedings do not apply. With regard to current employees, depending on the situation, the provisions of the Labor Code ("LC") may apply, in particular Art. 94 point 2, which regulates the obligation to organise work in a manner best suited to make effective use of working time and achievement of high efficiency and appropriate quality of work by employees through the exercise of their abilities and qualifications. In addition, one has to bear in mind that an employee, if a member of a trade union, may be represented by a trade union. There is no obligation for earlier consultation with any authorities, regardless of the intention to interview.

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?

The obligation to cooperate with the employer follows essentially from Art. 100 § 2 point 4 of the LC; i.e., the confidentiality of information, the disclosure of which could cause damage to the employer. In the absence of application of the provisions of the CCP to internal investigations, an employee does not have the right to refuse to make a statement. At the same time, however, the interviewed person does not face any consequences, apart from professional ones, in the case of making a false statement or refusing to make a statement.

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?

This obligation does not exist because of the informal character of the internal investigation.

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

There are no strict rules for conducting witness interviews, but it is important to take care of the rights and freedoms of a witness. Interviews are essentially conducted by members of the investigation team – lawyers and forensic specialists. Sometimes, HR and/or compliance officers of the client also participate in such interviews.

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

Poland is a country which is quite ethnically and culturally uniform. In this respect, there are no particular factors which should be taken into account when planning and conducting internal investigations.

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

In light of the absence of detailed whistleblowing regulations in Poland, it is difficult to answer this question. However, it is inadmissible to apply any means or methods towards the whistleblower which could infringe his/her dignity or which could restrict his/her freedom, *inter alia*, freedom of speech.

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

Internal investigations have an informal character, thus these issues take different forms depending on the internal policy of a given entity – in certain companies there may, for example, exist an internal inspection regulation which guarantees the interviewed person specific rights.

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

There is no such requirement in Polish law.

8 Investigation Report

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

Reports on internal investigations are almost always drawn up in writing as this facilitates both their later use by a given entity, and the management of the information collected over the course of the investigation. Of course, recording the results of the investigation on a permanent carrier gives rise to certain risks, as mentioned above in the answer to question 2.3. Situations also occur (though rarely) in which the preparation of a written report is required directly by legal provisions. An example of such a regulation is point 4.29 of attachment No. 2 to the regulation of the Minister for Health on the conditions of Good Manufacturing Practice.

Tomasz Konopka joined Sołtysiński Kawecki & Szlęzak ("SK&S") in 2002. Since 2013, as a partner specialising in business crime and investigation, he has headed a team of lawyers (which he created in 2008) that deals with business crime cases. Before joining SK&S, he was an attorney for a number of years and sat on the boards of a range of firms, including those listed on the Warsaw Stock Exchange. He advises and represents clients in cases involving criminal liability risk. He also advises entities that have incurred damage as a result of business crime. Tomasz has extensive experience in conducting internal clarification proceedings, covering abuses such as corruption, fraud, money laundering, acting to the detriment of business entities, forgery and other crisis situations. He advises clients on planning and implementing comprehensive compliance projects, as well as solutions which improve business security, including cybersecurity. He represents Polish and foreign clients before courts and prosecution authorities in Poland and abroad.

Tomasz is a speaker at and organiser of conferences devoted to the issues of criminal liability, as well as compliance. He is the author of a range of Polish and foreign publications dealing with criminal law.

Tomasz has been recommended many times as a Leading Lawyer in his field in leading foreign rankings, such as *Chambers and Partners* and *The Legal 500*, as well as in the law firm rankings of the newspaper *Rzeczpospolita*. He is a member of the Association of Certified Fraud Examiners ("ACFE"), and since 2020 he has been the Regional Representative for Europe in the Anti-Corruption Committee of the International Bar Association ("IBA").

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