


# Unlocking the mystery of internal investigation: the use of information from private internal investigations in the Polish criminal process

*Desbravando os mistérios das investigações internas:  
o uso de informações oriundas de investigações  
corporativas internas no processo penal da Polônia*


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**ABSTRACT:** This study aims to present the problems associated with the use of information from private internal investigation in a criminal process. The paper first presents the essence, functions, limits, and purposes of internal investigations, taking into account legal restrictions, including constitutional ones. Further in the paper, the authors critically analyze the possibility of using materials obtained and produced in internal investigations in criminal proceedings. A significant number of internal investigations are conducted by attorneys. Therefore, the paper also evaluates the permissibility of abolishing the attorney-client privilege and of the court or the law enforcement agencies obtaining the materials produced by an attorney in the course of an internal

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investigation or questioning of the lawyer. Having an attorney conduct an internal investigation improves the security of the information produced in the course of the internal investigation, as the materials are covered by the attorney-client privilege. However, one should bear in mind that in Poland this is not an absolute protection. The considerations led the authors to the conclusion that internal investigations are a valuable tool of the system for preventing irregularities in corporations and an important source of materials that can be used in criminal proceedings.

**KEYWORDS:** internal investigation; obtained evidence; attorney-client privilege; criminal proceedings; compliance investigation; Poland.

**RESUMO:** *Este estudo visa a apresentar os problemas associados ao uso de informações de investigação interna privada em um processo criminal. O trabalho descreve inicialmente a essência, as funções, os limites e as finalidades das investigações internas, levando em consideração as restrições legais, inclusive constitucionais. Mais adiante, os autores analisam criticamente a possibilidade de utilização em processos criminais de materiais obtidos e produzidos em investigações internas. Um número significativo de investigações internas é conduzido por advogados. Portanto, o trabalho também discute a amplitude do privilégio advogado-cliente e do tribunal ou dos órgãos persecutórios obterem os materiais produzidos no curso de uma investigação interna ou interrogatório do advogado. Ter um advogado conduzindo uma investigação interna melhora a segurança das informações produzidas no decorrer da investigação interna, pois os materiais são cobertos pelo sigilo advogado-cliente. No entanto, deve-se ter em mente que na Polônia esta não é uma proteção absoluta. As considerações levaram os autores à conclusão de que as investigações internas são uma valiosa ferramenta do sistema de prevenção de irregularidades nas empresas e uma importante fonte de materiais que podem ser utilizados em processos criminais.*

**PALAVRAS-CHAVE:** *investigações internas; meios de obtenção de prova; sigilo cliente-advogado; processo penal; compliance; Polônia.*

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## I. INTRODUCTION

The role of organizations (corporations) in modern societies of developed countries is aptly reflected in Peter Drucker's concept of "society of organizations." Drucker stresses that in this type of society

“most, if not all, social tasks are done in and by an organization” and this applies as much to commerce as it does to healthcare, social welfare, and the military<sup>3</sup>. Organizations, including corporations, are equal participants in legal relations in the field of civil and administrative law. Over time, it was also recognized that the admissibility of their criminal liability should be considered, for the Latin phrase *societas delinquere non potest* is inconsistent with the current reality. Edwin Sutherland reached similar conclusions. His research shows that corporations resemble professional criminals in their pathological behavior. Only some of their “deeds” come to light, and even if they do, corporations do not lose the “high” status they enjoy among other actors in the “market.”<sup>4</sup> Almost all of the corporations surveyed by E. Sutherland had committed punishable violations of law. Most of them were considered by Sutherland to be repeat offenders<sup>5</sup>. It must be admitted that Sutherland’s research and its conclusions have received considerable criticism<sup>6</sup>. However, the estimation of the size of the phenomenon of corporate wrongdoings made by E. Sutherland was later confirmed by, among others, Marshall Clinard and Peter Yeager, as well as Irwin Ross<sup>7</sup>. The literature emphasizes the need to separate the acts and culpability of individuals (managers, agents, and employees) from the culpability of the corporation for which these individuals acted<sup>8</sup>. Corporate crime is thus different from white collar-crime<sup>9</sup>.

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<sup>3</sup> DRUCKER, Peter. *Post-capitalist society*. London: Butterworth-Heinemann, p. 44, 1993.

<sup>4</sup> SUTHERLAND, Edwin Hardin. *Crime of Corporations*, The Sutherland Papers, pp. 78-95, 1956. Reprint In: ORLAND, Leonard. *Corporate and White Collar Crime: An Anthology*. Cincinnati Ohio: Anderson Publishing Co., pp. 105-106, 1995.

<sup>5</sup> SUTHERLAND [1956], p. 99.

<sup>6</sup> ORLAND, Leonard. *Reflections on Corporate Crime: Law in Search of Theory and Scholarship*. *American Criminal Law Review*. vol. 17, pp. 501-520. 1980.

<sup>7</sup> CLINARD, Marshall B.; YEAGER, Peter C. *Illegal Corporate Behavior*, 1979. Reprint In: ORLAND [1995], p. 106; ROSS, Irwin. *How Lawless Are Big Companies?* *Fortune*. pp. 56-72, 1980. Reprint In: ORLAND [1995], p. 114.

<sup>8</sup> SCHRAGER, Laura S.; SHORT, JR. James F. *Toward a Sociology of Organizational Crime*. *Social Problems*, vol. 25, n. 4, pp. 407-419. 1978, <https://doi.org/10.2307/800493>.

<sup>9</sup> Corporate crime is defined as illegal acts involving actions or omissions by an individual or a group of individuals in a legitimate formal organization in

The need for the concepts of white-collar crime and corporate crime to coexist was extensively justified in 1984 by Brent Fisse in his work titled “*The Duality of Corporate and Individual Criminal Liability*”<sup>10</sup>. From the perspective of this paper, one of the arguments presented by Brent Fisse in support of the proposition concerning the validity of the aforementioned duality of liability is extremely relevant. Fisse claims that the first argument justifying the need for coexistence of both concepts (i.e. punishing simultaneously the members of a corporation for their own acts and the corporation itself for a “corporate crime”) is the existence of a kind of conspiracy of silence - the corporation’s secret. When a corporation is accused of irregularities, its personnel become silent, either out of loyalty to their co-workers or for fear of being fired. According to B. Fisse, the introduction of criminal liability of corporations eliminates this problem. If a corporation is to be liable for irregularities committed by its employees (managers, agents, etc.), it will itself seek to eliminate the wrongdoers and punish every person liable those irregularities (and no one else)<sup>11</sup>. Corporations often seek to punish the perpetrators not so much out of a need for justice, but to mitigate their own potential legal liability<sup>12</sup>. Regardless of the indicated motives, it is necessary to initiate an internal investigation. For this to happen, the corporation’s internal regulations should specify the procedure and rules for conducting the investigation. On the one hand, the existence of an internal act establishing a whistleblowing

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connection with the operational objectives of that organization that have a serious physical or economic impact on employees, consumers, or the general public, see SCHRAGER, Laura S.; SHORT, JR. James F. *Toward a Sociology of Organizational Crime*. *Social Problems*, vol. 25, n. 4, pp. 407-419. 1978, <https://doi.org/10.2307/800493>.

<sup>10</sup> FISSE, Brent. *The Duality of Corporate and Individual Criminal Liability*. In: HOCHSTEDLER, Steury Ellen. (ed.). *Corporations as criminals*. Beverly Hills: Sage Publications, p. 168. Reprint In: CROALL, Hazel. *Corporate Crime Vol. 1, Corporate Crime: Issues of Definition, Construction and Research*, Sage Publications, Thousand Oaks, California, 2009.

<sup>11</sup> FISSE [1984], pp. 167-178.

<sup>12</sup> This argument will be referred to again later in this paper, because it emphasizes the importance of internal investigations for demonstrating the due diligence of a corporation, which should be one of the most relevant criteria for assessing the criminality of the corporation’s “behavior,” and therefore should significantly affect the severity of the penalty imposed on the corporation.

system indicates an authentic commitment of the corporate management to the policies pursued and the values proclaimed, when there is information that indicates that the behavior of the company's employees violates law or ethical principles, or takes the form of unacceptable practices. On the other hand, such an internal act should specify for current and former employees the rules of internal conduct. In particular, it should identify the body that analyzes the information received, its composition, and the rules of appointment and the powers of its members (e.g. hearing the parties involved in the investigation and the witnesses, and the rules of collection and analysis of any evidence).

The main purpose of the paper is to present the possibility of using materials from corporations' private internal investigations in criminal proceedings in Poland. This issue is interesting for several reasons. First, in the Polish legal system, there are no defined rules for internal investigations and, therefore, it is necessary to establish the legal boundaries of private internal investigations. This fact results significant problems in the proper collection of information in internal investigations and in the further procedural use of such information and materials in criminal proceedings. Second, in Polish criminal proceedings, the position of corporations as the aggrieved parties is strong. They can actively participate in criminal proceedings and thus use the information from its internal investigations. Third, many of the internal investigations are conducted by attorneys. This is also true of internal investigations in Poland. Therefore, the paper analyzes the issue of attorney-client privilege in the context of internal investigations and the possibility of obtaining information from an attorney in a criminal trial by law enforcement agencies or the court. Along with these issues, the essence, functions, and types of internal investigations must be presented. Due to the scope of this publication, the issue of whistleblower protection has been deliberately omitted. Recognizing the importance of this issue, we would only like to point out that Poland, as a member of the European Union, has not yet implemented Directive (EU) 2019/1937 of the European Parliament and of the Council of October 23, 2019 on the protection of persons who report breaches of Union law<sup>13</sup>, which requires member states to

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<sup>13</sup> Official Journal of the European Union of November 26, 2019, L 305/17.

implement regulations providing protection to whistleblowers, including the establishment of internal procedures for reporting violations covered by that directive<sup>14</sup>. Therefore, currently the Polish legal system lacks a comprehensive regulation dedicated to the protection of whistleblowers. Reporting of violations of the law and protection of whistleblowers are possible primarily under the Labor Code. In particular, protection of an employee who has reported a violation of law from the employer's retaliation is possible under the provisions on the principle of non-discrimination in employment (Article 183a (1) of the Labor Code)<sup>15</sup> and on the violation of the principle of equal treatment (Article 183b (1) of the Labor Code), as well as those provisions that govern the employer's obligation to prevent discrimination in employment (Article 94 (2b) of the Labor Code).

## II. FUNCTIONS AND TYPES OF INTERNAL INVESTIGATIONS

An internal investigation is usually defined as an inquiry conducted by, or on behalf of, an organization in an effort to discover salient facts pertaining to acts or omissions that may generate legal liability<sup>16</sup>. Internal investigations are widely regarded as “an integral part of the successful defense of corporations against charges of misconduct, as well as an important board and management tool for assessing questionable practices.”<sup>17</sup>

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<sup>14</sup> The provisions of Directive 2019/1937 apply to entities operating both in the public sector and in the private sector. As far as private entities (in particular companies) are concerned, the obligations set out in Directive 2019/1937 related to internal reporting procedures apply to entities with at least 50 employees or those engaged in financial services.

<sup>15</sup> This is dictated by the fact that the Polish Labor Code has an open catalog of prerequisites for considering actions as discriminatory, and these provisions can also be applied to discrimination against an employee who has reported a violation of law.

<sup>16</sup> DUGGIN, Sarah Helene. *Internal Corporate Investigations: Legal Ethics, Professionalism and the Employee Interview*. *Columbia Business Law Review*, no. 3, p. 864. 2003.

<sup>17</sup> BENNETT, Robert S.; KRIEGER, Alan; RAUH Carl S.; WALKER Charles F. *Internal Investigations and the Defense of Corporations in the Sarbanes-Oxley*

An internal investigation can be initiated and conducted for various purposes. Corporate internal investigations may serve preventive purposes by identifying and stopping ongoing violations or developing an informed basis for responding to any civil or criminal action based on the possible wrongdoing<sup>18</sup>. A preventive internal investigation can aim to identify potential weaknesses in internal compliance procedures and to seal the corporation's fraud prevention system. Of similar nature are those internal investigations that aim to assess the legal situation of a company, e.g. in connection with M&A transactions. This type of internal investigations is hereafter referred to as due diligence investigations<sup>19</sup> and is used to obtain information about the actual state of the corporation, including the procedures in place. In particular, due diligence investigations are aimed at assessing the risk of irregularities (including crimes) in the corporation's operations and evaluating the compliance system already in place. Due diligence investigations can therefore be considered a tool that allows the corporation to detect those elements that may cause irregularities at early stages. Due diligence investigations should be conducted periodically and also every time there is a change in the regulatory environment in which the corporation operates. This type of monitoring of the proper functioning of a corporation is usually optional. The obligation to conduct it, however, may arise from legislation which clearly forces corporations to take care of the integrity of their own procedures.

The second group of internal investigations are those carried out to obtain evidence for the company's defense in proceedings that have already been initiated, regardless of the liability regime (civil, tax, administrative, or criminal proceedings). This process is aimed to establish

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Era. *The Business Lawyer*. vol. 62. n. 1. pp. 55-88, 2006.

<sup>18</sup> STEWART, David Overlock. Basics of Criminal Liability for Corporations and Their Officials and Use of Compliance Programs and Internal Investigations. *Public Contract Law Journal*. vol. 22, p. 94. 1992; see also JANUÁRIO, Túlio Felipe Xavier. Cadeia de custódia da prova e investigações internas empresariais: possibilidades, exigibilidade e consequências processuais penais de sua violação. *Revista Brasileira de Direito Processual Penal*. vol. 7, n. 2, pp. 1453-1508, <https://doi.org/10.22197/rbdpp.v7i2.453>.

<sup>19</sup> MICHELS, Kevin H. Internal Corporate Investigations and the Truth. *Seton Hall Law Review*. vol. 40, pp. 84-89. 2010, <https://doi.org/10.2139/ssrn.1481412>.

facts and sources of evidence in proceedings initiated by or pending against the corporation. It can also be used to obtain the information necessary to provide sound legal advice. This type of internal investigations is hereinafter referred to hereafter as counseling investigations<sup>20</sup>.

Counseling investigations are used by corporations to obtain information that is useful for defending their interests in proceedings that are already underway. Internal investigations in this area serve the purpose of obtaining the maximum amount of data to defend against allegations formulated against corporations, which may give rise to their legal liability or form the basis of the corporations' claims against other entities. The proper conduct of this process is sometimes important not only in criminal cases, but also in civil proceedings. By way of example, in the Polish legal system, in civil proceedings, the plaintiff (possibly a corporation) is obliged to cite all claims and evidence in the lawsuit, and the defendant is obliged to do so in the response to the lawsuit<sup>21</sup>. As a rule, any claims and evidence that are relied on at later stages are disregarded. a properly conducted counseling investigation then serves to establish and evaluate all the circumstances that may affect the corporation's legal position in the trial and to determine all the claims that the corporation should raise in the trial (or to which it should refer in the trial) and the evidence to support them. Establishing these circumstances in cases involving criminal proceedings to which the corporation is a party is, of course, no less important. In the case of criminal proceedings relating to crimes committed against a corporation, the corporation should establish all the circumstances related to the perpetration of the crimes and determine the nature and extent of the damage so as to be able to effectively seek redress. In the case of criminal proceedings against a corporation, an internal investigation serves to weaken the asymmetry of information

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<sup>20</sup> MICHELS [2010], p. 89..

<sup>21</sup> It should be added that in a situation where a party fails to provide evidence within the time limit specified by the court, any evidence provided later is subject to dismissal, unless the party demonstrates that it is plausible that it could not be provided earlier or that the need to provide it arose later. In such a case, further claims and evidence in support thereof should be presented within two weeks from the date on which their presentation became possible or the need to prove them arose (Article 458<sup>5</sup> of the Code of Civil Procedure).



between procedural authorities and the corporation's managers. In the case of criminal proceedings against individuals, it is those individuals who know best whether they have committed a crime, whether they have an alibi, and whether they have concealed evidence unfavorable to themselves. The accused persons usually have full knowledge of their own behavior. In the case of criminal proceedings against corporations, sometimes the corporations' managers have either no knowledge of the criminal behavior (e.g. when the proceedings concern the behavior of a company's previous managers) or their knowledge is fragmentary. In such a situation a properly conducted internal investigation may be the only tool for the current management of the corporation to find out the relevant circumstances of the case. Knowledge of such circumstances is necessary to provide the corporation with a fair defense strategy in eventual proceedings against the company. Therefore, it should be considered that ascertaining such circumstances (and thus conducting an internal investigation) can be seen in the category of exercising due diligence by a manager obliged to care for the welfare of the corporation.

The third type of internal investigations are those aimed at identifying and stopping ongoing violations or establishing (or confirming) that irregularities have occurred in the past. Such investigations are initiated when a corporation has become aware of internal wrongdoings of its employees or managers (e.g. as a result of whistleblowing, third-party complaints, or media information) and is taking steps to verify this information<sup>22</sup>. This type of internal investigations, which Michels refers to as reliance and duty investigations<sup>23</sup>, is the main focus of this paper. Reliance and duty investigations are initiated when there is reasonable suspicion that irregularities have occurred within a corporation. Importantly, they are conducted in secret, without the knowledge of and in isolation from any activities carried out by authorities. As a rule, despite, for example, the suspicion that a crime has been committed, internal investigations of this type are conducted without notifying law enforcement authorities. In Poland, corporations - like individuals - do not,

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<sup>22</sup> MICHELS [2010], p. 89.

<sup>23</sup> MICHELS [2010], p. 89.

as a rule, have a legal obligation to report a crime<sup>24</sup>. If it is determined that a crime has been committed inside a corporation, the decision to disclose this information and notify procedural authorities rests with the corporation's management. At first glance, therefore, it may seem that such an internal investigation - regardless of the outcome - is a win-win situation. If an internal investigation does not provide materials to confirm irregularities, this is a good outcome, as no crime has been committed and the company faces no risk of legal liability. If an internal investigation proves that a crime has been committed, then the corporation's managers are able to keep this information to themselves. Of course, this is not very simple.

Petter Gottschalk points out that typical elements of an internal investigation include extraordinary examination of suspicions of misconduct and crime with goal-oriented data collection based on a mandate defined by and with the client. At the same time, the purpose of such an investigation is to clarify facts, analyze events, identify reasons for incidents, and evaluate system failure and personal misconduct<sup>25</sup>. In one of his works, Gottschalk also points out the different levels of private internal investigations, which include "activity investigation," "problem investigation," "evidence investigation," and "value investigation."<sup>26</sup> These levels represent the successive stages of maturity of an internal investigation. An activity investigation is focused exclusively on activities that may have been performed in a reprehensible way (answering the question: What happened?) and the next level, problem investigation, is focused on problems and issues that must be solved and clarified

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<sup>24</sup> According to Article 304 of the Polish Code of Criminal Procedure, anyone who has learned that a crime prosecuted ex officio has been committed has only a social obligation to notify a public prosecutor or the Police. It is only punishable to fail to report a crime included in an exhaustive list of criminal offenses that are not typical corporate crimes (including, but not limited to, crimes against life and health, and crimes against sexual freedom and morality – as provided for in Article 240 of the Polish Criminal Code).

<sup>25</sup> GOTTSCHALK, Petter; CHAMBERLAIN, John Martyn. Limits to private internal investigations of white-collar crime suspicions: The case of Scandinavian bank Nordea in tax havens. *Cogent Social Sciences*, vol. 2, no. 1, p. 4. 2016, <https://doi.org/10.1080/23311886.2016.1254839>.

<sup>26</sup> GOTTSCHALK, Petter. Maturity levels for private internal investigations. *International Journal of Police Science & Management*. vol. 19, no. 4, pp. 285-293. 2017, <https://doi.org/10.1177/1461355717733139>.

(answering the question: How did it happen?). The latter model does not merely seek information about the irregularities that have occurred, but also seeks to answer the question of what has caused them. The evidence investigation level refers to internal investigations that are focused on revealing something that is kept hidden, and therefore on uncovering a kind of corporation's secret mentioned earlier. Gottschalk points out that in this model, "Examiners choose their tactics to ensure success in the disclosure of any possible misconduct and white-collar crime. They are looking for the unknown." The additional goal is to answer the question of why did wrongdoings occur. The last level, value investigation, is focused "on the value for the client being created by the investigation" and its purpose is "to create something that is of value to the client; it may be valuable new knowledge, the settling of disagreements about past events, external opinions, and input to change management processes." Notwithstanding the above, each level of internal investigation results in a "product" - usually a report or a memorandum - which can serve as a source of evidence in future criminal proceedings.

A report resulting from an internal investigation should include, at a minimum, a presentation of the scope of the investigation, the established chronology of events, the methodology adopted for the examination, the collection of documents, data, and other information on which the report's assertions were based, as well as recommendations for the corporation's further conduct. Providing the above scope of reliable information to a corporation's managers is one of the obvious functions of internal investigations. An internal investigation may or may not lead to the initiation of a criminal trial. One of the differences between a private internal investigation and a police investigation is the fact that the goal of the former is more often to evaluate potential for economic crime to occur and to get rid of the issue internally rather than through the involvement of the police<sup>27</sup>.

This paper focuses on the general usefulness of internal investigations and the admissibility of the use of the information collected therein in a criminal trial. Notwithstanding the above, it should be pointed out - to summarize the general considerations so far - that a corporation

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<sup>27</sup> GOTTSCHALK, CHAMBERLAIN [2016], p. 4.

may assume several distinct roles in criminal proceedings. The corporation may act in criminal proceedings as the so-called active party - primarily as a victim (in pre-trial proceedings) or a subsidiary prosecutor (in the court proceedings). The corporation may also act in criminal proceedings as the so-called passive party - the defendant. In this area, Polish legal system recognizes the *quasi*-criminal liability of corporations exercised under the provisions of the Act of 28 October 2002 on the liability of collective entities for acts prohibited under penalty. Then such a corporation would be a "collective entity subject to liability". Of course, depending on the role of the corporation, the functions of such internal investigation will vary. Where the corporation acts as the active party - the key will be to establish the circumstances of the case primarily in order to defend the interests of the corporation understood, *inter alia*, as the need to redress the damage caused to it. Where the corporation acts as the passive party - the aim will be to prepare a solid line of defense for the collective entity against prosecution and retributive liability. Notwithstanding the relevance of these separate perspectives, in the following section we will refer primarily to the problems associated with the use of information from private internal investigation in criminal proceedings.

### **III. INTERNAL INVESTIGATION RUN IN THE FAMILY VERSUS EXTERNAL PRIVATE INVESTIGATORS**

It is not only a corporation's decision in the initiation of an internal investigation and on its scope that is important, but also the determination of the procedure for conducting the internal investigation, *i.e.* its initiation, the scope of the actions taken by the relevant persons within the corporation, its duration, and the selection of the person or team to conduct the investigation. In the case of the first two types of internal investigations (due diligence investigation and counseling investigation), this is clearly important (the team should be composed of professionals in the respective fields), but this choice has much more far-reaching consequences in the case of reliance and duty investigations.

A team conducting an internal investigation of this type should have knowledge, experience, and expertise related to the irregularities the suspicion of the existence of which provided the grounds for the initiation

of the investigation. Corporations have two basic dilemmas to resolve in this regard. First, should the internal investigation be conducted by people from within the corporation or by an independent external expert? Second, what type of expert should conduct an internal investigation?

There are many advantages of reliance and duty investigations conducted by the corporation itself and by people from within the corporation. Such investigations (referred to as internal investigations run in the family) can theoretically be carried out, for example, by people from the compliance or legal departments. Such people, at least at the beginning of the investigation, have more knowledge of the corporation and the processes operating within it than an outside expert. At the same time, running internal investigations by people from inside a corporation allows more of the knowledge of potential irregularities to be kept just inside the corporation. People within a corporation also have “insider knowledge” of individual employees’ personal relationships, their possible friendships or conflicts, mutual conflicts of interest, and financial dependencies of one department on another. This knowledge is difficult for an outside expert to acquire quickly. Also, people from inside a corporation are often more trusted by employees, which can sometimes make it easier to question employees about circumstances that are important for the findings of an internal investigation. Finally, it can be argued, not unreasonably, that an internal investigation conducted by people from within a corporation is less expensive than one conducted by external experts, such as a law firm or external auditors.

A presentation of the disadvantages of an internal investigation conducted by people from inside the corporation can begin by reversing the last argument. Internal investigations conducted by people from within a corporation who normally do not run such audits (which, after all, are incidental, not permanent or periodic) make it necessary for these people to be moved away from their regular tasks in the corporation. During an internal investigation, a corporation’s lawyer is not able to spend as much time reviewing the corporation’s contracts. An accountant is unable not spend as much time keeping the corporation’s books. The IT specialist is not able to handle employees’ inquiries related to the day-to-day operation of the corporation. In fact, having these people conduct internal investigations means “shifting their work” and not

doing their actual work, which constitutes a cost to the corporation. At the same time, it is clear that these people, as a rule, are not specialized in conducting internal investigations. Since this is a “side job” or an “accidental job” for them, it is clear that they are unable to carry out the process as professionally as an external expert in the field.

Similarly, the fact that people inside a corporation know the corporation itself and its employees well can also be a disadvantage. Those inside a corporation may be prejudiced in their opinion about the events taking place within it. Of course, they may know better the relationships between individuals, but they are also themselves involved in those relationships. Such persons may have to conduct internal investigations into suspected wrongdoing by either their colleagues or persons to whom they owe a favor, which constitutes an obvious conflict of interest. A similar conflict arises in the opposite situation, where such a person conducts an internal investigation concerning, for example, another employee with whom the investigator has a personal dispute. From this perspective, hiring an outside expert is advantageous because it helps avoid conflicts of interest.

An obvious conflict of interest is a situation where a person inside a corporation is appointed to run an internal investigation of irregularities in which he or she was involved. After all, at the beginning of an investigation, it is often impossible to identify all those involved in irregularities. A conflict of interest can also become apparent if the internal investigation team makes findings concerning irregularities involving their superiors, such as members of a company’s management board. All these conflicts can be resolved by appointing an external expert to conduct an internal investigation.

One of the advantages of appointing an external expert is the ability to choose a professional in the specific field affected by the potential irregularity, who also specializes in conducting internal investigations. In Poland - as in many jurisdictions - there are no substantive regulations in place governing who can conduct internal investigations. In this regard, it seems that lawyers, accountants, and tax consultants are most often hired, but also private detectives and IT specialists. It seems that in recent years the role of the latter in particular - Forensic IT specialists - has been growing, as complex internal investigations generally require the analysis

of a large amount of documentation or correspondence, the automation of which significantly speeds up the process while lowering its costs.

In the case of the reliance and duty investigations, however, the first choice seems to be lawyers. On the one hand, the recommendation to conduct an internal investigation often comes precisely from a law firm and is made in the course of provision of other legal advice<sup>28</sup>. On the other hand, entrusting an internal investigation to an attorney allows the corporation to enjoy the special protection of the results of this cooperation characteristic of the legal profession, i.e. the attorney-client privilege<sup>29</sup>. An internal investigation conducted by an attorney increases the secrecy of the process in the corporation's view<sup>30</sup>. Moreover, the doctrine points out that the use of a lawyer for this purpose is also supported by the fact that "on a practical level, lawyers are accustomed to the investigative process, interviewing witnesses and reviewing documents to piece together a picture of what really happened" and that "lawyers also will be more aware of the company's potential areas of liability, and are less likely to miss a subject of concern."<sup>31</sup> For this reason, even in cases where an internal investigation has not been commissioned to lawyers, the doctrine indicates that the process should be supervised by a lawyer to some extent<sup>32,33</sup>. It is the work of lawyers - fraud examiners and the possibility of using the results of their work in criminal proceedings that is the main

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<sup>28</sup> DUGGIN, Sarah Helene. Internal Corporate Investigations: Legal Ethics, Professionalism and the Employee Interview. *Columbia Business Law Review*. no. 3, p. 863. 2003.

<sup>29</sup> MULROY, Thomas R.; THESING JR. Joseph W. Confidentiality Concerns in Internal Corporate Investigations. *Tort & Insurance Law Journal*. vol. 25, no. 1, p. 49. 1989-1990.

<sup>30</sup> CIOPEC, Flaviu. New Trends in Addressing Corporate Crimes: Internal Investigations. *Journal of Eastern-European Criminal Law*. no. 2, p. 59. 2019.

<sup>31</sup> STEWART, David Overlock. Basics of Criminal Liability for Corporations and Their Officials and Use of Compliance Programs and Internal Investigations. *Public Contract Law Journal*. vol. 22, p. 94. 1992.

<sup>32</sup> BENNETT, Robert S.; KRIEGEL, Alan; RAUH Carl S., WALKER Charles F. Internal Investigations and the Defense of Corporations in the Sarbanes-Oxley Era. *The Business Lawyer*. vol. 62. n. 1. p. 62. 2006.

<sup>33</sup> DERVAN, Lucian E. International White Collar Crime and the Globalization of Internal Investigations, *Fordham Urban Law Journal*. vol. 39, no. 2, pp. 367-368. 2011.

focus of this paper. It should be added that in common law the attorney-client privilege is considered “the oldest of the privileges for confidential communications known to the common law.”<sup>34</sup> The importance of the attorney-client privilege is also emphasized and reflected in legislation in countries where the continental legal system prevails. Despite the important social function of internal investigations, in many jurisdictions they exist without any regulation in law<sup>35</sup>. This is also true of Poland. The lack of regulation of internal investigations also creates problems from an attorney-client privilege perspective, which is discussed later in this paper.

#### IV. LEGAL LIMITS OF INTERNAL INVESTIGATIONS IN POLAND

Currently, with the exception of selected sectors, there is no legal basis in Polish law for conducting internal investigations in companies. As a result, internal investigations conducted in Poland are frequently based on models and guidelines from foreign companies. In the banking sector, Article 9 of the Banking Law explicitly stipulates that banks are required to have internal control systems. The requirements for an internal control system are specified in Recommendation H issued by the Polish Financial Supervision Authority (KNF) on April 25, 2017. The recommendation is a set of good practices that indicate the KNF’s expectation for banks to act in accordance with the regulations on the principles of operation of an internal control system. However, one may attempt to find the legal basis for conducting internal investigations in other sectors in the provisions of the Code of Commercial Companies (CCC). Of key importance to companies that operate in the form of a joint-stock company is Article 368 (1) of the CCC, which provides the management board, on the basis of its management powers, may decide on the establishment of an internal compliance function, organization, and program. The supervisory board, on the other hand, is charged with

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<sup>34</sup> MULROY, Thomas; R. MUNOZ Eric J. The Internal Corporate Investigations. *DePaul Business & Commercial Law Journal*. vol. 1, pp. 49-84, p. 50. 2002; <https://via.library.depaul.edu/bclj/vol1/iss1/3>.

<sup>35</sup> GREEN, Bruce A.; PROGDOR, Ellen S. Unregulated Corporate Internal Investigations: Achieving Fairness for Corporate Constituents. *Boston College Law Review*. vol. 54, pp. 73-74. 2013.



overseeing the corporate compliance activity of the company within the framework of the powers vested in it by Article 382 (2) of the CCC. In principle, for example, the members of the company's management board or supervisory board may carry out such investigations as part of their own obligation to deal with the company's business activities.

In the Polish legal system, the limits of activities in internal investigations are defined not only by internal acts, but also by the Constitution of the Republic of Poland and the Labor Code. Evidence in internal investigations, defined as any source of knowledge of facts relevant to the resolution of the case under consideration, should be obtained in compliance with the law. The basic legal act in this regard is the Labor Code, which in Article 11<sup>1</sup> imposes an obligation on the employer to respect the dignity and other personal rights of employees. The purpose of this provision is to oblige employers to respect the dignity of their employee. The Labor Code does not define the concept of employee dignity. In linguistic terms, dignity is understood as a sense of self-worth or self-respect. The dignity of an employee, as defined by the Labor Code, boils down to the dignity of every individual, as referred to in Article 30 of the Constitution of the Republic of Poland, i.e. the inherent and inalienable dignity of the human being, which is the source of human and civil liberties and rights<sup>36</sup>. Respecting the dignity of an employee should be understood as not doing anything that would harm his or her dignity. Employers must not take advantage of their relative strength in the labor market or cause employees to lose their self-esteem and accept degrading treatment. Therefore, ongoing internal investigations may not be used to harass employees. The Labor Code does not allow

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<sup>36</sup> For information about human dignity in Poland, see: SONIEWICKA, Marta; HOLOCHER, Justyna. Human Dignity in Poland, in Handbook of Human Dignity in Europe. In: BECCHI, Paolo; MATHIS, Klaus. Handbook of Human Dignity in Europe. Springer: International Publishing, 2019, doi:10.1007/978-3-319-27830-8\_32-1, pp. 697-718, Available at SSRN: <https://ssrn.com/abstract=3464705>; BUTRYNOWICZ, Magdalena. Human Dignity in Law – A Case Study of the Polish Legal System, *The Person and the Challenges*. vol. 6, n. 2, pp. 87–96. 2016, doi: <http://dx.doi.org/10.15633/pch.1894>; CHORAŻEWSKA, Anna. Human dignity as a source, foundation, and principle of the constitutional order in the state of law. *Scientific Journal of Bielsko-Biala School of Finance and Law*. vol. 26, n. 3, pp. 10-16. 2022, doi:10.19192/wsfip.sj3.2022.

internal investigations that consist in persistent and prolonged harassment and intimidation of employees, causing them to have a low opinion of their professional suitability, as well as in humiliating or ridiculing employees, isolating them, or eliminating them from worker teams. Such internal investigations would in fact be a form of mobbing, which is prohibited in the Labor Code<sup>37</sup>. Such a situation could occur if a new internal investigation is initiated with respect to the same employees based on the same information, after a previous investigation has been completed. Also, if an internal investigation team repeatedly “interrogates” employees to get information on the same facts, this could be considered as harassment of employees. Such situations can violate employees’ self-esteem, make them look bad, put their abilities in question, and reduce their commitment to the company.

Article 11<sup>1</sup> of the Labor Code, in addition to “dignity,” also protects the “personal rights” of employees. Since the concept of “personal rights” has not been clarified by the provisions of the Labor Code, in defining this concept, we apply the provisions of the Civil Code. Personal rights are indicated in Article 23 of the Civil Code and include, in particular, health, freedom, honor, freedom of conscience, last name or alias, image, secrecy of correspondence, inviolability of the dwelling, and scientific, artistic, inventive, and rationalization creativity. From the perspective of an internal investigation, respect for employee privacy and mail control are of particular importance. As early as the 1970s, the Supreme Court in Poland ruled that searches of staff members to prevent carrying the company’s property outside of the workplace, as used within the framework of company regulations, are lawful and do not violate the personal rights of employees when employees have been warned of the possibility of application of such checks to protect property<sup>38</sup>. Nowadays, employers’

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<sup>37</sup> Article 94<sup>3</sup> of the Labor Code stipulates that employers are obliged to counteract mobbing, i.e. such actions concerning employees or directed against employees that consist in persistent and prolonged harassment or intimidation of employees, causing employees’ undervaluation of their own professional suitability, causing or aimed at causing humiliation, or ridiculing employees, isolating them, or eliminating them from worker teams.

<sup>38</sup> Judgment of the Supreme Court of April 13, 1972, I PR 153/72, OSNC 1972/10, item 184; LACH, Arkadiusz. Monitorowanie pracownika w miejscu pracy [Monitoring of employees at workplaces]. *Monitor Prawa Pracy*. vol. 10,

general right to control their employees arises directly from Article 22 of the Polish Labor Code, which imposes an obligation on employees to perform work of a certain type under the direction of their employers.

However, in the digital age, workplace monitoring has emerged, which is of particular significance. Undoubtedly, such actions by employers constitute an interference with protected personal rights, in particular employees' right to privacy. Therefore, the Polish legislature found it necessary in 2018 to regulate this issue in detail in the Labor Code. *De lege lata*, the legal forms of permissibility and scope of the use of monitoring in the workplace and monitoring of employees' electronic mail are regulated in Articles 22<sup>2</sup> and 22<sup>3</sup> of the Polish Labor Code, respectively. According to Article 22<sup>2</sup> (1) of the Polish Labor Code, monitoring is allowed if it is necessary to ensure the safety of employees, the protection of property, or the control of production, or to maintain the secrecy of information, the disclosure of which could expose the employer to harm. The catalog of permissible purposes for the use of video surveillance in relation to employees indicated in that article is exhaustive. Consequently, employers are not allowed to use the surveillance for purposes other than those specified in the law. On the other hand, reference to the criterion of necessity means that it is the employer who has to demonstrate that the objectives indicated above cannot be achieved in any other way than through the chosen form of employee monitoring<sup>39</sup>. The circumstances relevant to this assessment are the type of work, its nature, and the position held by the employee.

The provision of Article 22<sup>2</sup> (1) of the Polish Labor Code refers exclusively to control conducted using technical means for video recording. Thus, the control in question is video surveillance, usually implemented with cameras. It can take different forms. In this regard, the doctrine

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p. 264. 2004; LACH, Arkadiusz. Monitorowanie pracownika po nowelizacji kodeksu pracy [Monitoring at work after amendment of the Labour Code]. *Monitor Prawniczy*. vol. 18, pp. 969-974, 2018 doi: 10.32027/MOP.18.18.1; KUBA, Magdalena. Prawne formy kontroli pracownika w miejscu pracy, Warszawa 2014, passim.

<sup>39</sup> JAŚKOWIAK, Kazimierza. Labor Code. A commentary to Article 22<sup>2</sup> of the Labor Code. In: JAŚKOWIAK, Kazimierza; MANIEWSKA, Eliza. Kodeks pracy. Komentarz [Labor Code. A commentary], Warszawa: WoltersKluwer online.

distinguishes between continuous (systematic) and short-term (incidental, sporadic) monitoring, as well as overt and covert monitoring<sup>40</sup>. Employers may process the video recordings only for the purposes for which they were collected and may store them for a period not exceeding 3 months from the date of their recording. If the video recordings constitute evidence in proceedings conducted pursuant to law or the employer has obtained information that they may constitute evidence in criminal, civil, or other proceedings, the 3-month period is extended until the proceedings have become final.

The use of video recordings in internal investigations is permitted under Polish law for a period of 3 months from the date of recording. This period is extended if, in the opinion of the employer, the recording can serve in legal proceedings (including criminal proceedings) or has been used as evidence in such proceedings. Should the latter situation arise, according to Article 22<sup>2</sup> (5) of the Labor Code, video recordings containing personal data must be destroyed after a period of 3 months after the final conclusion of the proceedings and video recordings obtained as a result of video surveillance containing personal data must be destroyed, unless otherwise provided by separate regulations.

It should be added that the provisions of the Labor Code exclude monitoring of premises provided to the company's trade union organization. In addition, monitoring must not cover sanitary facilities, locker rooms, canteens, and smoking rooms, unless the use of monitoring in these rooms is necessary to achieve the purpose set forth in Article 22<sup>2</sup> (1) of the Labor Code and does not violate the dignity and other personal rights of employees, in particular by using techniques that make it impossible to recognize the persons present in these rooms. Moreover, the monitoring of sanitary facilities requires the prior approval of the company's trade union organization, and if there is no trade union organization in the employer's company, the prior approval of employee representatives elected in accordance with the procedure adopted by the employer.

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<sup>40</sup> KUBA, Magdalena. Labor Code. A commentary to Article 22<sup>2</sup> of the Labor Code. In: BARAN, Krzysztof (ed.). Kodeks pracy. Komentarz. Tom I. Art. 1-93 [Labor Code. A commentary. Volume I. Articles 1-93], Warszawa: WoltersKluwer 2022.

The Labor Code also introduces other guarantees to employees that must not be violated in connection with monitoring. Employers are obliged to inform employees about the introduction of monitoring, in the manner adopted by the specific employers, no later than 2 weeks before the monitoring is launched. Such notification must therefore precede the introduction of monitoring. Before an employee is subject to monitoring, he or she must be notified that video surveillance with cameras is to be implemented. In addition, in the case of new employees, employers must provide them with written information on the purpose, scope, and method of application of monitoring (Article 22<sup>2</sup> (8) of the Labor Code) before allowing the employees to work.

As part of an internal investigation, it is also possible to use information from employee email monitoring. It should be noted that, being a type of control of employees by their employers, monitoring must take into account the need to respect the personal rights of employees<sup>41</sup>. Freedom of communication is a part of the right to privacy, constituting a personal freedom that may be subject to restrictions under the conditions set forth in Article 31(3) of the Constitution<sup>42</sup>. In turn, according to Article 49 of the Polish Constitution, “*The freedom and privacy of communication shall be ensured. Any limitations thereon may be imposed only in cases and in a manner specified by statute.*” The introduction of monitoring of employees’ electronic mail must be in compliance with the aforementioned regulations, as well as with the jurisprudential standard of the European Court of Human Rights set forth in Article 8 of the ECHR<sup>43</sup>. In order

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<sup>41</sup> See: ECtHR judgement of 28 November 2017 in the case *Antović and Mirković v. Montenegro*, application no. 70838/13, <https://hudoc.echr.coe.int/eng?i=001-178904>; ECtHR judgement of 3 April 2007 in the case *Copland v. the United Kingdom*, application no. 62617/00, <https://hudoc.echr.coe.int/eng?i=001-79996>.

<sup>42</sup> This regulation provides that “Any limitation upon the exercise of constitutional freedoms and rights may be imposed only by statute, and only when necessary in a democratic state for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons. Such limitations shall not violate the essence of freedoms and rights.”

<sup>43</sup> Among others, in the judgment in the case *Bărbulescu v. Romania* (ECtHR judgement of September 5, 2017, application no. 61496/08, <https://hudoc.echr.coe.int/eng?i=001-177082>), the Court stated that before an employer

to satisfy these requirements, the Polish legal system has explicitly adopted a legal basis for the employer to exercise control in the area of business communications. Article 22<sup>3</sup> of the Labor Code, enacted in 2018, indicates that control of an employee's business mail may be introduced if it is necessary: a) to ensure a work organization that allows the full use of the working time and b) for the proper use of the work tools provided to the employee. Basic examples of purposes for the use of email monitoring are to distribute work evenly among employees, to control the completed tasks assigned to individual employees, and to control whether an employee uses company hardware and software only for purposes related to the company's business. Although the above purposes of monitoring employees' business email are objectively legitimate, one can have doubts as to whether they are the most relevant in the context of the risks associated with employees' use of business email. Some representatives of the doctrine point out that they do not include, for example, the duty to keep secret information that, if disclosed, could expose the employer to harm<sup>44</sup>. This view cannot be accepted. When referring to the need to determine the proper use of the work tools provided to employees (e.g. laptop computers), employers may check their employees' business email when they suspect that the employees send confidential information to unauthorized parties. This is because monitoring of employees' email will help identify those employees who send company data to unknown email addresses and thus reveal company secrets to the detriment of their employers. When introducing this form of monitoring, employers are obliged to inform their employees in the

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decides to use email monitoring in the workplace, it must inform the employee. A similar conclusion was reached by the ECtHR in its judgment in the case *Copland v. the United Kingdom* (ECtHR judgement of April 3, 2007 in application no. 62617/00, <https://hudoc.echr.coe.int/eng/?i=001-79996>), which indicated that the collection and storage of information of a personal nature concerning a person's telephone and email, as well as Internet use, carried out without the applicant's knowledge, amounted to an interference with the right to respect for private life and correspondence within the meaning of Article 8 of the ECHR.

<sup>44</sup> KUBA, Magdalena. Labor Code. A commentary to Article 22<sup>3</sup> of the Labor Code. In: BARAN, Krzysztof (ed.). Kodeks pracy. Komentarz. Tom I. Art. 1-93 [Labor Code. A commentary. Volume I. Articles 1-93], Warszawa: WoltersKluwer 2022.

manner adopted by the employers, 2 weeks before employees' business email monitoring is launched, while newly hired employees must be provided with written information on the objectives, scope and manner of application of monitoring, before they are allowed to work.

This demonstrates that a compliance officer conducting an internal investigation may inspect an employee's business email if such an inspection is permitted in the company and if employees have been informed of the possibility of such an inspection. The compliance officer can conduct this activity himself or herself, or can request the IT department to conduct the monitoring. It is also possible to use "external" specialists if necessary. In such a case, any "external" person being a member of a team conducting an internal investigation should be obliged to keep confidential any information obtained in the course of his or her support for the investigation<sup>45</sup>.

The duty of secrecy of correspondence in business relations raises some concern. The prohibition to violate the secrecy of correspondence applies primarily to private correspondence sent from business email accounts. This prohibition means that if an employer were to find an employee's private correspondence in the employee's mailbox, the employer may not read it in its entirety. The prohibition for the employer to violate the secrecy of correspondence applies even if an internal act prohibits the use of business email for private purposes and the employee has not complied with it. This restriction applies in the context of internal investigations. Even if an employee uses business equipment for private purposes without the employer's consent, the employer should not use the knowledge obtained by analyzing the contents of such equipment, unless the disclosed content proves a violation of employee's duties, e.g. unauthorized transfer of information. It should be noted that an employer may at any time require an employee to make the employee's business equipment (e.g. a laptop, a smartphone, etc.) available. These devices are the property of the employer and therefore the employer has the right to review their contents and check how they are used by the employee. A refusal to hand over business equipment that is the property of the employer may even constitute the

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<sup>45</sup> TOKARCZYK, Damian. Whistleblowing i wewnętrzne postępowania wyjaśniające, Warszawa: WoltersKluwer 2020, p. 62.

crime of misappropriation (Article 284 (2) of the Polish Criminal Code<sup>46</sup>). The situation is different when it comes to use by employees of private equipment for business purposes. If such a situation arises, although it should not, the employer (including the *compliance officer*) is not authorized to monitor or check the employee's private devices<sup>47</sup>.

Last but not least, it is necessary to refer to the possibility of the so-called questioning of employees by a compliance officer. Pursuant to Article 100 (2) (4) of the Labor Code, the employer (and, under his authority, the compliance officer) may demand that employees provide information and explanations, regardless of the extent of their potential involvement in an irregularity. This provision formulates the employee's duty of loyalty to the employer, in particular the duty to keep confidential information that, if disclosed, could expose the employer to harm. From its content, it is possible to derive the employee's obligation to participate in questioning conducted as part of internal investigations. An employee often has to make a difficult choice: to answer questions during an internal investigation and risk facing consequences for the irregularities reported, or to use his or her right to remain silent, which can also result in a penalty for not contributing to the investigation. Recognizing that Article 100 (2) (4) of the Labor Code is of a general nature, we are of the opinion that the procedures defining internal proceedings in each case should specify the rules for employee participation in the interview<sup>48</sup>. When a company has defined an obligation for an employee to participate in a questioning conducted as part of an internal investigation, this means that refusing to cooperate in the clarification of the circumstances related

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<sup>46</sup> According to Article 284 (2) of the Polish Criminal Code, anyone who appropriates movable property that has been entrusted to him or her shall be liable to imprisonment for a term going between 3 months and 5 years.

<sup>47</sup> With the reservations specified by TOKARCZYK, Damian. *Whistleblowing i wewnętrzne postępowania wyjaśniające*, Warszawa: WoltersKluwer 2020, p. 62.

<sup>48</sup> The need for this is justified by the fact that the findings from corporate investigations may serve as factual evidence in subsequent legal hearings before the courts regarding either criminal proceedings or related economic claims. If the corporate investigations do not recognize or grant witnesses the right to exercise the privilege against self-incrimination, then there is a risk that the findings of that investigation may either be challenged or be found to be incomplete or potentially materially incorrect.



to a notification may constitute a violation of employee duties. Such behavior by an employee may, depending on the circumstances, justify the imposition of a penalty on the employee or even the termination of his or her employment contract. This does not mean that the employee is obliged to provide evidence that would incriminate himself or herself. Any person, including an employee, has the right to defense. This means that an employer may not force an employee to provide evidence against himself or herself or explanations to his or her detriment. The same principle should be applied to the employees relatives. They are protected by the principle of *nemo se ipsum accusare tenetur*, which introduces freedom from providing evidence against oneself<sup>49</sup>. Depriving an employee of this right in an internal investigation would in fact mean that the right to remain silent in criminal proceedings is fictitious if the accused were that employee. The silence of an accused employee would be irrelevant, as the court could question the compliance officer about the information obtained from the employee during his or her questioning in the course of the internal investigation. It is also unacceptable the use of physical coercion, mental coercion, or threats to induce employees to participate in an internal questioning or to provide certain information.

## **V. MATERIALS OBTAINED DURING INTERNAL INVESTIGATIONS AND THE POSSIBILITY OF ITS USE IN CRIMINAL PROCEEDINGS IN POLAND**

As discussed above, internal investigations are aimed not only at clarifying the situation, but also at gathering materials for possible legal

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<sup>49</sup> BERGER, Mark. Self-Incrimination and the European Court of Human Rights: Procedural Issues in the Enforcement of the Right to Silence. *European Human Rights Law Review*. vol. 5, pp. 514-533. 2007; HELMHOLZ, Richard H. Origins of the Privilege against Self-Incrimination: The Role of the European *Ius Commune*. *New York University Law Review*. vol. 65, pp. 962-990. 1990; SAKOWICZ, Andrzej. Standard of the protection of the right to silence applicable to persons examined as witnesses in the light of the European Court of Human Rights case law. *Ius Novum*. vol. 12, n. 2, pp. 120-136, <https://doi.org/10.26399/iusnovum.v12.2.2018.19/a.sakowicz>. See also HILL Jr, Marvin F.; WRIGHT, James A. Employee Refusals to Cooperate in Internal Investigations: Into the Woods with Employers, Courts, and Labor Arbitrators. *Missouri Law Review*. vol. 56, Issue 4, pp. 899-902. 1991. Available at: <https://scholarship.law.missouri.edu/mlr/vol56/iss4/1>

proceedings. The evidence collected most commonly during internal investigations are documents, data saved on electronic data storage media (e.g. laptop computers), computer printouts, objects, video monitoring recordings, and reports from questioning of employees, witnesses, or persons suspected of involvement in irregularities. The means of obtaining such materials are not always specified in internal procedures, as is the case in proceedings before government authorities, e.g. in criminal proceedings. In these proceedings, there are specific rules that govern obtaining evidence and the possibility of using materials acquired in the course of internal investigations. In this context, the question arises of whether evidence collected during internal investigations can be used in criminal proceedings. Although the current legislation does not explicitly regulate this issue, several observations can be made on the basis of the Polish Code of Criminal Procedure (hereinafter: the CCP).

First of all, it should be pointed out that materials obtained in the course of an internal investigation can be attached to a complaint of a criminal offense. This situation occurs when a corporation, having completed an internal investigation, finds that the collected materials indicate that a crime has been committed. In general, the corporation has no legal obligation to inform procedural authorities that an offense has been committed. Only in the case of some grave felonies (such as murder, grievous bodily harm, causing a public threat, hijacking of an aircraft or vessel, unlawful detention, trafficking in human beings, hostage taking and keeping, and terrorist offenses), is there a legal obligation in Poland to report a crime. In such a situation, the further use of evidence obtained in the course of an internal investigation is at the discretion of the prosecutor conducting the pre-trial proceedings.

It is also possible that the corporation, as a legal entity, obtains the status of a litigant. In Polish criminal proceedings, the position of the aggrieved party is very strong. It can be a natural or a legal person whose legal interest has been directly infringed on or threatened by an offense (Article 49(1) of the CCP). This person may declare, by the beginning of the judicial proceedings at the main trial, that he or she will act in the capacity of the subsidiary prosecutor. The victim, by obtaining the status of a litigant, can take an active part in the course of the criminal proceedings. In particular, he or she can be present at the trial, actively

participate in it, e.g. ask questions of the defendant, the witnesses, and the experts; submit evidence in person during the trial, review the case file, file an appeal against the judgment, as well as submit motions for evidence. The latter power is of particular importance in the context of evidence obtained during an internal investigation. The subsidiary prosecutor has the initiative to present evidence, which may primarily include real evidence. At the same time, it should be noted that the Polish criminal trial, with regard to certain evidence, strictly defines the rules regarding the taking of evidence. For example, testimony provided by witnesses may only be taken by a procedural authorities, its content should be included in a report prepared by this authority conducting the proceedings, and it may not be replaced by other documents<sup>50</sup>. Therefore, a report from the questioning of a witness in the course of an internal investigation may not be used directly. However, the report from the questioning of an employee as part of an internal investigation may justify the appointment of a compliance officer as a witness, along with an indication of the circumstances on which the witness should be questioned.

An important role in the use of information from internal investigations in criminal proceedings is played by Article 393 (3) of the CCP. This provision allows fact-finding in a criminal trial based on the so-called private evidence, which means documents, statements, or recordings made by private individuals outside criminal proceedings. Some jurisdictions, including Poland, permit evidentiary use of information, e.g., recordings, collected by private individuals with the intention of using it later in criminal proceedings. Pursuant to Article 393 (3) of the CCP, in criminal proceedings all private documents created outside criminal proceedings, in particular statements, publications, letters, and notes may be read at the trial. The phrase “outside criminal proceedings” in that article refers to the time when a given document was created. This is because the documents in questions are private documents created by the parties, not by the authority conducting the criminal proceedings, outside the formal framework of criminal

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<sup>50</sup> The provision of Article 174 of the CPP states that evidence consisting of explanations of the accused or testimonies of a witness may not be replaced with the content of documents, notes or memoranda.

proceedings<sup>51</sup>. This can be the so-called private evidence obtained through private collection for use in criminal proceedings, such as a private written expert opinion prepared at the request of the parties, or material obtained from a detective or in the course of an internal investigation. In internal investigations, these can be, e.g., documents, data saved on electronic storage media, computer printouts, objects, video monitoring recordings, and contents of an employee's correspondence.

. Nevertheless, in the private gathering of evidence (which is, after all, the purpose of an internal investigation), a party may not use in a trial, as a private document, a recorded transcript of a person's statements in lieu of questioning of a witness by the authority conducting the proceedings, as mentioned above. On the other hand, it is possible to use notes from a private questioning to confirm or supplement explanations or testimony. In such a situation, the content of a private document is intended to establish the actual knowledge of the witness. On the other hand, a different kind of situation occurs in the event of discrepancies between the testimony of a witness and the content of a private document, in which case the private document can be read for verification.

In light of Supreme Court's jurisprudence, a "private document" can also be a recording of a conversation made, even secretly, by one of its participants. A recording of a conversation made by one of its participants (regardless of whether it was done with the knowledge and consent of the other participant) can in no way be compared to a recording made by law enforcement agencies, such as the police. With this in mind, the Supreme Court added that such a recording "should be evaluated in terms of any provocation or suggestion used in the course of the conversation by the person making the recording, and such evaluation should also take into account the state in which the interlocutor unaware of the recording

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<sup>51</sup> STEFAŃSKI, Ryszard A. A commentary to Article 393 of the Code of Criminal Procedure. In: STEFAŃSKI, Ryszard A. and ZABŁOCKI, Stanisław (eds.). *Kodeks postępowania karnego. Komentarz. Tom III. Art. 297-424* [The Code of Criminal Procedure. A commentary. Volume III. Articles 297-424], Warszawa: WoltersKluwer 2021, pp. 964-965; WAŻNY, Andrzej. A commentary to Article 393 of the Code of Criminal Procedure. In: SAKOWICZ, Andrzej (ed.). *Kodeks postępowania karnego. [The Code of Criminal Procedure. A commentary]*, Warszawa: C. H. Beck 2023, pp. 1125-1126.

was.”<sup>52</sup> A recording from an internal investigation can be used to confirm the credibility of the testimony given by a witness or another person.

In a Polish criminal trial, the subsidiary prosecutor may also use a private opinion (e.g. of an expert auditor) prepared as part of an internal investigation. A private opinion as a private document may be used in the event of a need for the court to admit an opinion of an expert witness. *De lege lata*, in the Polish criminal proceedings, a private opinion does not have the same status as an opinion of an expert witness appointed by the court. The court may not make factual findings on its basis in a scope that requires special knowledge. As indicated above - data obtained during internal investigations - may constitute relevant evidence which could serve the court to establish the material truth in the criminal proceedings. However, it should be noted that in the Polish criminal procedure the decision on admitting such evidence in criminal proceedings and “reading out” a private document belongs to the court. The Article 393(3) of the CCP introduces the court’s power to “read out” such documents, not the court’s obligation to do so. The party may only provide such document and file an evidentiary motion regarding it. If the Court decides to read out such private document at the hearing, or to disclose it without reading out (which is permissible under Article 405 (2 and 3) of the CCP) then such documents may be used as evidence in the case. However, it should not be forgotten that the court is obliged to ascertain the material truth, and the discussed ‘private document’ may be of vital importance for this purpose.

The reliability of a “private documents” may be considered as another important issue related to using such documents as an evidence in the criminal proceedings. One may argue that, for example, an expert opinion commissioned by a party may have been drawn up in a biased manner. The party paid for the document, so one can assume that the party demanded its author to prepare the document of specific content and conclusions. However, the court, after reading out such a private document, evaluates it in accordance with the Code’s principle of free appraisal of evidence - like any other evidence. In this context, the case

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<sup>52</sup> Decision of the Supreme Court of October 20, 2016, III KK 127/16, OSNKW 2017, vol. 2, item 10.

law emphasizes that the court shall not disregard a “private document” and mechanically, indiscriminately refuse to include it in the case file or instrumentally dismiss it as not requiring any assessment. In some cases the author of the opinion may be appointed to prepare an expert opinion commissioned by the court in the same proceedings, which will constitute separate evidence in the case<sup>53</sup>.

## VI. ATTORNEY-CLIENT PRIVILEGE IN POLAND

Polish law shapes the attorney-client privilege as follows: “An attorney is obliged to keep secret everything he has learned in connection with the provision of legal assistance.”<sup>54</sup> In the doctrine, it is assumed that this privilege covers information obtained by the attorney from the client, which is to remain secret from third parties, and therefore information that the lawyer has acquired in connection with the provision of legal assistance, the disclosure of which could jeopardize the client’s

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<sup>53</sup> Judgment of the Court of Appeal in Wrocław of April 19, 2012., II AKA 67/12, OSAW 2013, no. 3, item 294; The “private document” even if it was prepared by an expert is not considered as an “expert opinion” within the meaning of the Code of the Criminal Procedure - as it is not the result of the court’s decision to admit such an opinion. Under Article 193 (1) of the Code of Criminal Procedure, if the establishment of circumstances vital for the solution of a case requires special knowledge, the opinion of one or more experts is requested. Any other private opinion provided by the party, and not requested by the court (or requested in the preparatory proceedings by the prosecutor) is not an expert in the case in the meaning of Article 193 (1), See Decision of the Supreme Court of June 25, 2020, V KK 631/19, LEX nr 3224943.

<sup>54</sup> Article 6 (1) of the Law on the Bar of May 26, 1982 (Journal of Laws no. 16, item 124, as amended). It should be pointed out that in the Republic of Poland, a defense counsel in criminal proceedings can be either an attorney or a legal counsel. The Act of May 26, 1982 on Legal Counsels (Journal of Laws no. 16, item 124, as amended) contains an analogous regulation in Article 3 (3) which provides that a legal counsel is obliged to keep secret everything he or she has learned in connection with the provision of legal assistance. The remainder of this paper will refer to attorneys, but the regulations in this area are, in principle, analogous. About attorney-client privilege in Polish law see, HRYNIEWICZ-LACH, Elżbieta. Attorney-client privilege in Polish law and legal practice – on legal gaps and some controversial matters. *ERA Forum*. vol 23, pp. 447-461. 2023, <https://doi.org/10.1007/s12027-023-00741-0>

interest deserving protection<sup>55</sup>. The attorney-client privilege covers the substantive aspects of a case, and therefore that information which is directly related to the legal assistance provided<sup>56</sup>.

The attorney whom a corporation hires to conduct an internal investigation has an attorney-client relationship with the corporation. Legal advice related to the conduct of an internal investigation is covered by the protection provided for the attorney-client privilege. The attorney is obliged to keep secret everything that he or she has learned in connection with the internal investigation, including, in particular, information that he or she has learned in connection with the provision of legal assistance, the disclosure of which could jeopardize a legitimate interest of the client - corporation. It seems that, in this context, information obtained not only from the client (and therefore representatives of the corporation), but also from other persons, in particular persons from inside the corporation, including employees with whom the attorney has had discussions in connection with the internal investigation, should be covered by the attorney-client privilege.

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<sup>55</sup> MATUSIAK-FRĄCCZAK, Magdalena. Ochrona poufności komunikacji klienta z adwokatem. Standardy międzynarodowe, standard Unii Europejskiej oraz standardy krajowe wybranych państw a prawo polskie [Protection of the confidentiality of the communications between the client and his attorney. International standards, the standard of the European Union, and the national standards of selected countries vs. the Polish law]. Warszawa: C. H. BECK, p. 228, 2023 and quoted there; CHOJNIAK, Łukasz. Obowiązek zachowania tajemnicy adwokackiej a kolizja interesów adwokata i jego klienta [The obligation to maintain the attorney-client privilege and the conflict between the interests of the attorney and his or her client]. In: GIEZEK, Jacek; KARDAS, Piotr, (eds.). Etyka adwokacka a kontradiktoryjny proces karny [Attorney's ethics and the adversarial criminal process]. Warszawa: Wolters Kluwer Polska, p. 282, 2015.

<sup>56</sup> Judgment of the Supreme Court - Criminal Chamber of December 1, 2016, SDI 65/16 OSND 2016, item 107. The cited Supreme Court thesis comes from a judgment in an attorney's disciplinary case where an attorney was accused of disclosing to a prosecutor information obtained from a client in connection with the provision of legal assistance. In that case, the Supreme Court held that attorney-client privilege does not extend to activities of a formal nature, unrelated in content to the case in which legal assistance is provided. The ruling was not made in a criminal case, however it is relevant to the scope of the attorney-client privilege and the permissible release of such information.

When applying the above in the consideration of internal investigations, it should be noted that, as a rule, the result of a completed investigation is a document (a report, a legal opinion, or a memorandum) that contains the findings, the conclusions, and often the recommendations of the expert who conducted the internal investigation. In the case of attorneys, the recommendations most often concern further legal steps related to the findings made. Such documentation is protected pursuant to the laws on the attorney-client privilege. In US legislation, the protection of such documents is known as the Work Product Doctrine, which is widely recognized as applicable to the secrecy of the outcomes of internal corporate investigations<sup>57</sup>.

It is clear that a report containing findings on irregularities in a corporation could be a desirable evidence for procedural authorities investigating such irregularities. In Poland, procedural authorities have the authority to demand from a person who is in possession of items that may constitute evidence in a case to surrender such items. If a person refuses to voluntarily surrender an item, a seizure and search may be conducted (Article 217 of the CCP). An internal investigation report prepared by an attorney is protected as a document that is subject to the attorney-client privilege and, as such, should not be disclosed. If such a document is obtained in the course of a search of the corporation, the representative of the corporation should indicate that the document contains information covered by the attorney-client privilege. In this situation, the authority carrying out the activity immediately forwards the document without reading it to the prosecutor or the court in a sealed package to prevent unauthorized persons from learning its contents<sup>58</sup>.

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<sup>57</sup> MULROY, Thomas R.; THESING JR. Joseph W. Confidentiality Concerns in Internal Corporate Investigations. *Tort & Insurance Law Journal*. vol. 25, no. 1, p. 49. 1989-1990.

<sup>58</sup> The provision of Article 225 (3) of the Polish Code of Criminal Procedure states that if the defence counsel or other person summoned to surrender an object or whose premises were researched, declares that correspondence or other documents surrendered or found in course of the search contain information pertaining to the performance of function of the defence counsel, the agency conducting the search leaves the documents to the said person without becoming familiar with their contents or appearance. However, if such a statement made by a person who is not a defence counsel, raises doubts, the



This also applies to information saved on electronic storage media<sup>59</sup>. The fact that such a document is handed “to the prosecutor or the court in a sealed package” rightly raises the presumption that it can be used. The CCP provides for the possibility to use such documents. It will now be discussed in the context of the second possible way of gaining knowledge about the findings of an internal investigation: questioning of the attorney.

As a rule, an attorney may not be questioned about circumstances covered by the attorney-client privilege. The provisions of the Law on the Bar cited earlier explicitly indicate that attorney may not be exempted from the obligation of professional secrecy as to the facts that he or she has learned while providing legal assistance or conducting a case. However, an opposite provision is contained in the CCP, which allows the questioning of an attorney regarding the attorney-client privilege in exceptional cases, when “it is necessary for the interests of justice and the circumstance cannot be established by other evidence.”<sup>60</sup> The prevailing view in the jurisprudence of the common courts of law is that the provisions of the CCP in this regard constitute *lex specialis* in relation to the provisions of the Law on the Bar and therefore they allow for the questioning of an attorney.

The decision on questioning or permission to question an attorney is decided by the court. The court’s decision may be appealed and the attorney should challenge it. The primary basis for the challenge is the

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agency conducting the procedure hands these documents over to the court. The court, having acquainted itself with the documents, returns them in their entirety or in part to the person, from whom they were taken, or issues a decision that the documents be seized for the purposes of the proceedings.

<sup>59</sup> The ECtHR judgment of 3 September 2015 in the case *Sérvulo & Associa-dos - Sociedade de Advogados RL v. Portugal*, application no. 27013/10, <https://hudoc.echr.coe.int/eng?i=001-157284>.

<sup>60</sup> Article 180 (2) of the CCP provides that “Persons obliged to maintain the secrecy of a notary public, attorney, legal counsel, tax advisor, physician, journalist, or statistician, as well as the secrecy of the General Counsel to the Republic of Poland, may be questioned as to the facts covered by that secrecy only if it is necessary for the interests of justice, and the circumstance cannot be established by other evidence. In pre-trial proceedings, the questioning or permission for questioning shall be decided by the court, at a meeting held without the participation of the parties, within no more than 7 days from the date of service of the prosecutor’s request. The court’s decision may be appealed.”

failure to meet the premise of “necessity for the interests of justice” combined with the impossibility of establishing the circumstances in question on the basis of other evidence. It is not unreasonable to raise doubts about what should be considered “necessary for the interests of justice” in the above context. Especially since the principle of material truth is considered the guiding principle of the Polish criminal trial. Therefore, an argument about the need to establish the truth in the trial is possible, for the issuance of a verdict not based on the truth appears to be incompatible with the interests of justice. This in turn would mean that the attorney-client privilege is in fact fictitious. The Polish Constitutional Tribunal found that the allegation of indefiniteness of Article 180 (2) of the CCP is not justified, by emphasizing the precise nature - in the opinion of the Constitutional Court - of the prerequisite of indispensability of evidence, and therefore the impossibility of making specific findings with the help of other evidence<sup>61</sup>.

However, the standards for abolishing the attorney-client privilege have been partially clarified in the jurisprudence of common courts of law, according to which, among other things, exempting an attorney from the obligation to maintain the attorney-client privilege should relate to specific circumstances about which the witness is to testify and may not constitute a blanket exemption covering the attorney’s entire knowledge covered by attorney-client privilege<sup>62</sup>. An exemption from the attorney-client privilege may not apply to any facts that the investigators want to know, but only to facts necessary for justice while demonstrating the absence of other means of establishing evidence<sup>63</sup>.

Not all internal investigations inevitably lead to a scenario in which an attorney is required to testify on specific circumstances or provide access to documents based on the premise of necessity in the interests of justice. However, even if this were permissible in the Reliance and Duty Investigations section, even there it is reasonable to point out that such

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<sup>61</sup> Judgement of the Constitutional Tribunal of 22 November 2004, SK 64/03, Dz.U. 2004 nr 255 poz. 2568.

<sup>62</sup> Decision of the Court of Appeals in Cracow of 21 April 2010, II AKz 129/10, KZS 2010, Nr 5, poz. 36.

<sup>63</sup> Decision of the Court of Appeals in Cracow of January 13, 2009, II AKz 651/08, KZS 2009, no 1, item 72, Prokuratura i Prawo 2009, vol. 7-8, p. 45.

circumstances can be established by other evidence. After all, like law enforcement agencies and the court, the attorney conducting the internal investigation sees only the “reflected light” of the case and relies on evidence obtained from documents, IT data, interviews with employees, etc. In this regard, law enforcement agencies and the court adjudicating the case have much more far-reaching powers in the acquisition of evidence, so the claim of “impossibility of establishing evidence” is unfounded in many cases<sup>64</sup>.

However, regardless of the existence of a provision in the CCP that allows questioning of an attorney on an exceptional basis on facts covered by the attorney-client privilege, that privilege gives the most extensive protection to the findings of an internal investigation from their acquisition in the process by, for example, law enforcement agencies that might in the future pursue a case concerning identified irregularities in the corporation’s operations.

In addition, it should be pointed out that the provisions of the CCP do absolutely prohibit the interrogation of an attorney acting as a defense counsel in proceedings that are already underway or providing legal assistance to a detained person (before that person becomes a suspect). This secrecy - referred to as defense secrecy - relates to the facts that the attorney learned while providing legal advice or handling the case<sup>65</sup>. However, this secrecy does not apply in internal investigations where the attorney-client relationship is concluded between the corporation and the attorney and therefore does not apply to the legal assistance of the defense counsel provided to the person against whom criminal proceedings are being conducted.

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<sup>64</sup> For example, an employee of a corporation who is a witness is required to provide true information and not to conceal the truth under the penalty of criminal liability for providing false testimony. In a conversation with an attorney in an internal investigation, that employee may lie or conceal the truth virtually without legal consequences.

<sup>65</sup> According to Article 304 of the CCP, it is not permitted to examine as a witness a defence counsel or an advocate providing legal assistance to a detainee as to the facts that he learned while giving legal advice or conducting a case.

## VII. CONCLUSION

The paper presents the essence, functions, and limits of internal investigations in Poland and the use of information from private internal investigations in the Polish criminal trial. The analysis carried out proved that internal investigations can achieve various goals. On the one hand, these investigations can be an important tool for identifying potential weaknesses in internal compliance procedures and for making the system leak-proof to prevent fraud or irregularities in the corporation. On the other hand, internal investigations can serve the purpose of obtaining evidence for the purpose of filing a complaint of a criminal offense or can aim to obtain evidence for the corporation's defense in ongoing criminal or civil proceedings. Last but not least, in some situations, corporations seek to punish the perpetrators not so much out of a need for justice, but to mitigate their own potential legal liability. Regardless of the purpose of an internal investigation, any corporation that wants to use this mechanism should specify in its internal regulations the procedure and rules for conducting the investigation. In particular, it should identify the body that analyzes the information on irregularities, its composition, and the rules of appointment and the powers of its members (e.g. hearing the parties involved in the investigation and the witnesses, and the rules of collection and analysis of any evidence).

The paper points to the fact that the evidence collected most commonly during internal investigations are documents, data saved on electronic data storage media, computer printouts, objects, video monitoring recordings, and reports from questioning of employees, witnesses, or persons suspected of involvement in irregularities. The manner in which these materials are obtained must comply with the provisions of the Constitution of the Republic of Poland, the Labor Code, and other legal acts defining individual rights and freedoms. In particular, it is prohibited to conduct internal investigations to harass and intimidate employees. It is also not permissible to use video monitoring recordings or electronic mail as part of internal investigations, unless the employee concerned has been informed of the possibility of its use in the corporation. An important part of an internal investigation is the questioning of employees by a compliance officer. From to the

current provisions of the Labor Code in Poland, it is possible to derive the obligation of an employee to participate in questioning conducted in the course of internal investigations. The existence of this obligation does not mean that the employee is obliged to provide evidence that would incriminate himself or herself. Any person, including an employee, has the right to defense. An employer may not force an employee to provide evidence against himself or herself or explanations to his or her detriment. Depriving an employee of this right in an internal investigation would in fact mean that the right to remain silent in criminal proceedings is fictitious if the accused were that employee.

The analysis showed the limits of the use of materials from internal investigations in criminal proceedings in Poland. The strong position of the aggrieved party in criminal proceedings and the ability of the aggrieved party to become a litigant (i.e. the subsidiary prosecutor) allows a range of information from private internal investigations to be used in court proceedings. Usually, this information is real evidences. The situation is different in the case of a so-called private questioning. A report from questioning of an employee as part of an internal investigation may not form the basis for factual findings, but may only justify the designation of a compliance officer or a person questioned by him or her as a witness.

The analysis showed that attorneys play an important role in internal investigations. An attorney may conduct an investigation or be a member of the team conducting it. In both cases, he or she is obliged to maintain secrecy. There is no doubt that legal advice related to the conduct of an internal investigation is covered by the protection provided for the attorney-client privilege. The scope of the attorney-client privilege should cover information obtained from the client (and therefore representatives of the corporation), but also from other persons, in particular persons from inside the corporation, including employees with whom the attorney has had discussions in connection with the internal investigation. At the same time, for the materials in question to be covered by the attorney-client privilege, it is irrelevant how they were recorded and then possibly introduced into the criminal trial. Protection is extended equally to the attorney's knowledge that he or she may present when testifying in criminal proceedings, as well as to any products of his or her work that contain this knowledge regardless of the medium (i.e. printouts,

notes, electronic documents, datasets produced in the course of the investigation, or correspondence with the attorney). The regulations allowing the abolishing of the attorney-client privilege should be treated narrowly, with the condition of “necessity for the interests of justice” approached with due caution. After all, maintaining the attorney-client privilege is also a part of the proper operation of the judiciary and the entire system of legal protection in a democratic state. A court allowing an attorney to be exempted from the attorney-client privilege should also establish without question in each case the impossibility of obtaining the information in question by means of other evidence.

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