

## Romanian businesses increasingly turn to internal investigations



**Since the early 1990s, Romania's expanding business sector has made it one of Central Eastern Europe's most dynamic economies, which has attracted a broad array of foreign investment.**

This rapid growth and the compliance requirements of foreign investors have compelled more and more Romania-based companies to adopt internal investigation and Whistleblowing policies. But how does a Romanian company begin the process of developing these procedures? To begin with, managers need not look any farther than the Labour Code, which obliges companies to have procedures in place to respond to employee reports of wrongdoing and harassment.

The Code also regulates how employees should be disciplined if an internal investigation uncovers misconduct and states that an employee cannot be dismissed for disciplinary reasons unless a mandatory investigation is held. Since the Labour Code does not specify how such an investigation should be conducted, this article contains recommendations on the most effective procedures to put into place.

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**When establishing the general legal framework for a company's investigation procedures, managers must consider the following general principles: data privacy, confidentiality, anti-discrimination and the obligation to ensure transparency and effective communication channels in regard to any allegation of misconduct by any employee.**

A manager that fails to address these general principles could create risks for his company, particularly if the results of an internal investigation are later challenged in court.

In terms of data privacy, all internal investigation procedures must adhere to Romanian data privacy laws and the EU's General Data Protection Regulation (GDPR). To ensure that an investigation does not infringe on the personal rights of any employee, an investigation must adopt a policy of strict confidentiality where the identity of Whistleblowers are protected, evidence is safeguarded, and in the spirit of legal fairness, everyone involved (especially the accused) is treated even-handedly and fully informed about the objective and scope of the investigation.

Note that investigators do not have an obligation to inform the accused and witnesses are not entitled to details on the investigation's charges, evidence or strategy, except where specifically required by law (as further detailed below).

In addition to adopting these principles, Romanian companies should have specific policies in place that clearly define employee inappropriate behaviour and misconduct that could trigger an internal investigation.

Occasionally, company managers will encounter evidence of misconduct by chance, or a wrongdoing will be uncovered during an audit. In most cases, however, a company will learn of a misdemeanour through a "complaint" reported by a member of staff. Such a complaint could concern straight-out misconduct; negligent behaviour in the work place; an allegation of bullying, harassment or fraud; or any breach of company policies in the areas of work safety, employee code of conduct, etc.

Complaints concerning minor issues need not trigger a full-blown investigation, and can be resolved by the appropriate manager in dialogue with the employees involved. Other issues falling short of misconduct can be remedied via administrative or HR measures, such as reassigning certain employees to other offices, modifying company procedures, initiating employee training sessions or advising specific employees on improving communication skills or changing their workplace behaviour.

### **Conducting internal investigations**

For internal investigations that could potentially lead to disciplinary conduct, the Romanian Labour Code sets down specific rules that must be followed. A company must appoint a "disciplinary commission" to investigate the allegation and recommend a disciplinary sanction. Once evidence has been collected, the commission should hold a disciplinary hearing with the accused employee in attendance, providing the employee details in relation to the alleged disciplinary misconduct. During this hearing, the employee should be given the opportunity to present his case and a defence against such allegations.

The Labour Code does not specify deadlines and a time frame for an investigation. However, the law does specify time frames for issuing a disciplinary sanction, which will influence the timing of any investigation. For example, a disciplinary sanction against an employee must be issued no more than 30 calendar days after the company became aware of the misconduct. Furthermore, a disciplinary sanction cannot be issued more than six months after the misconduct was originally committed.

Although Romanian law does not specify details on how to conduct an internal investigation, best practices in Romania offer the following recommendations:

- ◆ Before an investigation ever takes place, a company should define in its internal policies what it considers inappropriate behaviour and the disciplinary sanction for this behaviour;
- ◆ Ensure all sanctions are consistent with Romanian law;
- ◆ Ensure that company procedures on conducting internal investigations include the "mandatory steps" set down in the Labour Code;
- ◆ Ensure that investigation procedures are sufficiently flexible (within the boundaries of the Labour Code) to respond to the challenges of a specific case; and
- ◆ Ensure that a company's disciplinary commission thoroughly documents the investigation process, retains transcripts of all testimony, and keeps a record of all evidence.

For investigations of poor performance or negligence on the job, companies should ensure that they regularly conduct professional assessments of employees in order to identify any potential problems with employees early.

Such assessments are mandatory under the Labour Code, although it gives no details on how the assessments should be conducted.

To fully protect a company's interests, we recommend that prior performance assessments include clear, transparent and fair evaluation criteria that apply directly to an employee's professional responsibilities in accordance with the principles reflected in employment law. (The company's counsel or outside legal experts should be consulted for this).

If an assessment suggests that an employee is performing poorly on the job, the assessment should contain continuous documentation on the employee, including a record of regular feedback on his day-to-day performance and regular reviews conducted on a yearly or quarterly basis.

In line with these assessments, accurate and thorough job descriptions should be compiled for every employee, which should include a list of each worker's professional responsibilities.

In addition, the team conducting the assessments should be carefully selected, and no team member should have a conflict of interest or be perceived as biased.

For other types of investigations, there are no rules mandated by the Labour Code or Romanian law. These inquiries can be conducted according to the company's internal-investigation procedures, which should be carefully established. The exact procedures can vary depending on company policy and culture. But whatever your procedures are, we recommend that they be set down in clearly defined steps understandable to both investigators and employees. These procedures should include thorough documentation so that there is a detailed record of each investigation.

As stated earlier, the investigation should be confidential. Although the process should be transparent, the investigation team should not divulge any information about the details of a probe. Every effort should be made to protect the identity of Whistleblowers. In addition, employment contracts should include confidentiality agreements that apply to any internal investigation an employee may be involved in at the company.

### **Preparing for a specific investigation**

If misconduct has been alleged and an investigation is to be launched, the company should identify all rules and provisions (e.g. laws, internal regulations, provisions specified in an employment agreement) that must be adhered to during the inquiry. With these rules in mind, the company should draft an investigation plan and select an investigation team. Again, team members should be perceived as having no conflicts of interest or biases vis-à-vis the subject matter of the investigation or anyone involved.

### **Conducting the investigation**

Once the plan is drafted and the team assembled, the investigation can get underway. At this time, team members should carefully collect evidence, documenting both it and any other actions that the investigators take during the course of the probe.

Arguably, some of the most important evidence will come from interviews with the accused and witnesses. Personal and data privacy rules should be observed during interviews and detailed minutes of the testimony should be taken.

Employees should not be permitted to make recordings of interviews.

If an investigation team wants to make either an audio or video record of a worker's testimony, the employee must give his consent in writing. Any and all recordings should adhere to the EU's GDPR and Romanian privacy laws.

### **Internal investigations during lockdown and work from home**

The fact that many Romanian companies were locked down during the pandemic with employees working from home raises the question: can an internal investigation be conducted virtually and remotely? The answer is: yes.

Before embarking on a remote investigation, however, a company should consider whether an investigation can be postponed. The ability to collect evidence at a later date and the legal risks of delay should be weighed carefully. If the company decides that the investigation cannot be rescheduled, it must then confirm whether it possesses the appropriate resources to conduct a remote inquiry with the same accuracy and care as a regular probe.

While this assessment is going on, a company can take immediate steps – albeit interim measures – to address the incident, and ensure that staff members are protected and risks to the company are mitigated.

When conducting a remote investigation, a company will have to adjust its procedures accordingly. Interviews, for example, will have to be conducted by video conferencing. (In addition, it's recommended that all video interviews include specific information on their date, time and duration. If any employee refuses to be interviewed in this way, this fact should also be documented).

Also, in order to conduct video interviews, companies will have to get the expressed consent of employees first since this procedure will entail the processing of personal data.

### **The investigation's conclusion**

Whether performed remotely or not, when the investigation is completed, the team must then prepare a report, which documents the probe in detail, listing evidence, testimony, and explaining the team's final conclusions about the initial allegations.

The report should also include any and all details required by the Labour Code, and be reviewed and approved by the company's corporate leadership and compliance officers.

If the accused is deemed to be guilty of wrongdoing, the company must decide whether disciplinary action is warranted. Discipline could include a warning, demotion, reduction of salary rights or termination, depending on the severity of the misconduct.

Lastly, the company should determine whether the misconduct breaks any criminal or corporate laws or violates state regulations (e.g. data privacy, workplace safety, environmental protection), and whether the company is obliged to report the offence to state authorities. (This decision should always be considered in consultation with the company's counsel or outside legal advisors).

For more information on conducting internal investigations in Romania, contact your regular CMS advisor or local CMS experts: [Horia Draghici](#) and [Ruxandra Georgescu](#).