Internal Investigations, Whistleblowing and External Monitoring: Comparative Experiences, Economic Insights, Findings from Corporate Practice

Law Working Paper N° 574/2021
March 2021

Klaus J. Hopt
Max Planck Institute for Comparative and International Private Law and ECGI

ECGI Working Paper Series in Law

Internal Investigations, Whistleblowing and External Monitoring: Comparative Experiences, Economic Insights, Findings from Corporate Practice

Working Paper N° 574/2021

March 2021

Klaus J. Hopt

Abstract

Internal investigations, whistleblowing and external monitoring, are three information and enforcement channels and part of the corporate compliance system. As they relate to corporate management's core area, they are a task of the general management or the (management) board. Internationally, some of these practices are already considered to be good corporate governance. Unsurprisingly, there is extensive experience in many countries, although little empirical evidence of their effectiveness exists.

Nonetheless, prominent cases have shown that national requirements, especially from the U.K. and U.S., tend to have extraterritorial effects. Therefore, the topic is of current importance for scholarship, legislation and corporate practice.

This article offers a comparative analysis of the situation in different countries, thereby considering many insights from economic knowledge and corporate practice as well as particularities and path dependencies. It focuses on the U.S., the U.K. and Switzerland, but also refers to other countries and recent developments in the European Union.

Keywords: corporate governance, internal investigations, whistleblowing, external monitoring, monitor, comparative law, compliance system, whistleblower directive, Sarbanes-Oxley Act, Dodd-Frank Act, Bribery Act 2010

JEL Classifications: D23, G38, G34, K42, K20, M48.

Klaus J. Hopt*
Emeritus Professor of Law
Max Planck Institute for Comparative and International Private Law
Mittelweg 187
D-20148 Hamburg, Germany
phone: +49 404 190 0206
e-mail: hopt@mpipriv.de

Internal Investigations, Whistleblowing and External Monitoring
Comparative Experiences, Economic Insights, Findings from Corporate Practice

Klaus J. Hopt, Max Planck Institute for Comparative and International Private Law, Hamburg[#]

I. The Establishment and Use of Internal Investigations, Whistleblowing and External Monitoring by Corporate Boards

1. The Legal Basis for Board Activity

a) Compliance

The establishment and use of internal investigations, whistleblowing and external monitoring is a topic of current importance for scholarship, legislation and corporate practice.[1] Internal investigations into (suspected) legal violations by companies, sometimes triggered by whistleblowing and, of late, sometimes tracked by external monitoring are components of corporate compliance.[2] For regulated enterprises such as financial institutions and insurance companies, compliance is legislated in great detail, in the European Union for example by CRD IV.[3] But these rules cannot simply be applied by analogy to non-regulated companies.[4] However, this is not to say that their selected use for purposes of rule-making and interpretation is excluded from the outset.[5] For non-regulated companies, with large listed stock corporations standing as the prime example, compliance duties flow from the organizational duties of the board of directors[6] and not merely as part of the board's duty to avert damage from the company, but also as an element of the board's duty to oversee the legality of a company's operations.[7] Given that private law rules may also (simultaneously) pursue wholly public law purposes,[8] there is no reason why the board's compliance obligations should not be viewed as being in the public interest, and for compliance this view is actually convincing and broadly accepted.[9]

b) Internal investigation, whistleblowing and external monitoring as three information and enforcement channels for the board

Compliance as a legal basis for information gathering by the corporate board is also fully suited for internal investigations[10] and the construction of a whistle-blower system within the corporation.[11] At issue is the responsibility (and ultimately the potential liability) of the board of directors.[12] This certainly applies to cases which concern a suspected violation of the law,

which are to be investigated in the public interest and in which it may make sense to carry out the internal investigation in cooperation with the courts and authorities.[13] In serious cases, it may be appropriate to consult external experts.[14]

c) Business judgment of the board

(1) The Board must investigate suspected legal violations[15] in the company. This follows from its duty to oversee the legality of operations[16] and implies that the board[17] does not have any discretion as to "*whether*" it must start some kind of investigation. Rather, according to the recognized principle of "prevent, detect, respond",[18] the board has the obligation to clarify the factual situation, to remedy any legal violation that is found, and to sanction the legal violation.

This does not mean that in all corporations the board of directors is bound to set up a full-fledged compliance structure; rather, it is up to the board of directors to assess the best way to deal with possible compliance violations. This could, for instance, range from instructions as regards a specific case, to organizational arrangements, to the appointment of a separate compliance department as well as a compliance officer.[19] In any event, for listed companies may be the latter, more rigorous, mechanisms are at this point not only common practice but quite possibly to be seen as legally required.[20]

This principle applies equally to the question of whether the board, when confronted with a concrete suspicion of illegality in the company's operation, must investigate the factual situation. In such an instance, the question of whether an investigation must be undertaken is not subject to the business judgment rule nor, if under a certain jurisdiction there is no such rule, is it the case that managers are afforded a margin of entrepreneurial discretion.[21] Yet apart from certain statutory reporting duties,[22] in such an instance the board does not have any general legal obligation to notify the authorities or to cooperate with them, but is free to do so or not to do so.[23] Cooperation may be beneficial for the company in instances of suspected legal violation.[24] But on the other side the company need not incriminate itself.[25]

By contrast, with regard to the "*how*" of an internal investigation, there is broad discretion[26] as to the manner in which the specific violation of law should be addressed and as to the

necessary scope of the inquiry. Among other aspects, it depends on the nature and gravity of both the suspicion as well as the legal violation in question, on the areas of law affected by the violation, on who the victims are, on what damages the company is threatened with, on the company's strategy for such cases, on the availability and accessibility of information, on the state of urgency, on the potential methods of inquiry, and on many other things.[27] There is no legal obligation to observe specific auditing standards set by the auditing community.[28] But in practice these standards have been adopted by large companies,[29] and its use is seen as a de facto obligation.[30]

(2) In terms of *whistleblowing*, the prevailing scholarly opinion is that the board enjoys the protection of the business judgment rule regarding not only as to the "how" but also regarding the "whether". With the exception of special legal regulations, for example for financial institutions, and the recommendation of corporate governance codes for listed companies,[31] it is understood that there is no general legal obligation for the board to set up a whistleblower organization in the company.[32] The EU Whistleblower Directive of 7 October 2019 is limited to violations of European legislation and does not oblige Member States to introduce a whistleblower organization in respect of national legislation.[33] This is justified in part by the still existing empirical uncertainties regarding the effects of whistleblowing.[34] However, there is a minority view holding that – at least – where a compliance organization is set up, it must also include a whistleblower mechanism.[35] And in accordance with the "comply or explain"-principle under European law, there is an obligation to justify any deviation from the recommendations made.[36] This results in a certain factual compulsion to set up a whistleblower system,[37] something that firms otherwise shy away from. Presently, such a whistleblowing organization is considered an element of good corporate governance,[38] and it is established good practice for a large number of companies. From a legal point of view as well, as to listed companies, there are good reasons to see them as having an obligation to set up a whistleblower mechanism as a component of the required obligation of establishing a compliance structure.[39]

(3) As far as *external monitoring* is concerned, the board has discretion as to whether a law firm or external expert should be commissioned to carry out the investigation or at least to involve such actors in the internal investigation.[40] This is especially true when it comes to a

settlement or an agreement with a foreign financial authority – in particular a U.S. authority – as part of a deferred prosecution agreement or a non-prosecution agreement. This is because the consequences of the company's accepting or rejecting such an agreement are both sizable and uncertain. The prospect of securing a reduction in fines by cooperating with the court or an authority is an important consideration, especially in proceedings involving foreign authorities. On the other hand, cooperation may also have an effect on the detection of other violations by the company and by its subsidiaries and on other official proceedings (spill-over effect) and it must be stressed that private claims for damages are not affected by such an agreement, though they typically follow once the agreement comes to light.[41]

2. Application Issues

a) Internal Investigations

In terms of compliance, the establishment and design of the three information channels mentioned above has been dealt with in detail by both academic literature and practice. This applies in particular to the establishment of a compliance organization and the role of the compliance officer, namely his independence and the avoidance of any involvement in day-to-day operations so as to prevent conflicts of interest.[42] This also includes direct reporting from the Compliance Officer to the Executive Board.[43] As far as special internal investigations are concerned,[44] they are primarily a matter for the board. Chief responsibility falls on the compliance department. Studies reveal that the supervisory board has an initial involvement in only 37% of the cases. For 64% of the companies employing an external consultant, the reason is the complex nature of the matter to be clarified; for half of the companies there have been allegations against the management.[45] There is already extensive international and practical experience on designing and using this information channel.[46] In practice, the typical sequence of a compliance investigation is as follows: (1) Indication of an incident: plausibility assessment, preparation, possible ad hoc measures, investigation; (2) Legal assessment of the interim result based on the facts at hand, data analysis and interviews; (3) Result and reporting: measures, tracking, follow-up and identification of lessons learned.[47] The process of the internal investigation must be carefully prepared and organized from the outset,[48] if possible before a concrete suspicion arises. First, suitable methods of inquiry must be selected on the basis of accepted standards.[49] These must be reasonably suited to the specific violation of law suspected with an eye toward the potential for damage, the degree of suspicion and the seriousness of the allegation.[50] In conducting the inquiry, it may be advisable to foster the

independence of the investigation by establishing a steering committee.[51] External examiners should be involved only after first completing a thorough internal preparation. Of importance are accurate documentation and, upon conclusion, a summary of the results.[52] Internal investigations spanning across international corporate groups pose particular challenges.[53]

b) Whistleblowing

Experience has also been had in designing and using the whistleblowing mechanism. A whistleblower hotline is a general and practice-oriented compliance measure. The protection of whistleblowers is particularly important in organizing a whistleblower system. One possible approach is ensuring the anonymity of the whistleblower from the very outset – e.g. an online reporting system – but this does not allow for follow-up queries and it has the disadvantage of facilitating unjustified accusations. The protection of the whistleblower can also be ensured in other ways, e.g. by appointing a designated representative in the company or in the compliance department or by involving an external body, such as a law firm.[54] In a two-tier system it would be conceivable that such a figure be a member of the supervisory board, but this is not advisable.[55] In any event, an organizational separation from the personnel department should be established. Article 6(2) of the EU Whistleblower Directive gives Member States the discretion to decide whether they want to legally require a mechanism for receiving and following up on anonymous reports.[56] Under such a mechanism reports can either be made under a whistleblower system inside the company itself or to an external agency commissioned by the company, such as a law firm,[57] important is that the protection of the whistleblower is unaffected. What counts is how far the protection reaches out, e.g. its thematic scope and whether third parties who gave the tip to the whistleblower are also protected. Articles 21 and 19 of the Directive require protection against reprisals. Further, there are legal limits on the use of related information.[58] Practical recommendations can also be found in US regulations.[59]

c) External Monitoring

When speaking of external monitoring, one needs in the first instance to distinguish between regulated and unregulated companies. As to the former the legal basis and the scope of monitoring is generally prescribed by an administrative act.[60] The analysis which follows focuses on the latter, i.e. on *unregulated companies*, and on external monitors appointed by

the board – though not infrequently under the pressuring of (foreign) authorities. This appointment is decisive for the legal position of the monitor. It results from a private law contract between the company and the monitor, even though the monitor is acting in the public interest. The contract is most typically a business service contract similar to an attorney's carrying out some type of legal proceeding. The monitor does not have the status of a company organ in the sense of stock corporation law like the board, even if it is assigned organ-like tasks, as is possible with regulated companies. The rights and duties of the monitor (duties of due care and of safeguarding of interests and confidentiality) are determined by the contract with the company, though individual details and even the identity of the monitor may be specified by the supervisory authorities. There is extensive experience regarding the mandate of a monitor, particularly with US supervisory authorities.[61] As to the mandate[62] the contract must live up to eventual requirements set by the supervisory authorities, if there is a consent decree or a settlement.[63] It should as precisely as possible specify matters such as the task, the mandate's duration,[64] the involvement of staff affiliated with the monitor, internal project-divisions and contact persons for the monitor within the company, the scope of independence, and inspection rights of the monitor; with such an enumeration unwelcome surprises can be avoided.[65] In practice, working methods include reviewing company documents, on-site testing of selected systems and processes in selected company divisions, interviews with employees and members of management, analyses and tests, and above all, a collaborative effort with the company.[66] Experiences with external monitors, as had especially in the U.S., vary greatly, their ranging from very positive assessments to descriptions of extremely time-consuming, difficult and costly processes.[67]

II. Internal Investigations

1. Comparative Experiences

a) USA

The USA has a long history with the topic and much can be learned from its experiences,[68] though as always in comparative law due caution for particularities and path dependencies is necessary.[69] Internal investigations undertaken for internal company-purposes naturally occur but are of less interest here.[70] The latest and most important development is the June 2020 Guidance Document issued by the U.S. Department of Justice Criminal Division.[71] It is

true that this document is primarily directed at law enforcement officers and relates to the conducting of a company investigation, decisions on the opening of proceedings (with an eye to the wide range of sentences under the U.S. Sentencing Guidelines) and the negotiation of settlements (plea bargaining).[72] Nevertheless the requirements discussed therein are strictly observed by companies (which must expect authorities to intervene in the event of legal violations) in their own in-house investigation. This is the only way that they can hope to obtain a milder penalty or fine. Of particular note is the relevance of these American requirements even in international contexts due to the extraterritorial effect for example under the Foreign Corrupt Practices Act (FCPA) and under other laws. There are many striking examples of this as is shown by the cases of Siemens, Commerzbank, Volkswagen and others.[73]

According to the Guidance, it is crucial whether the company's compliance program is good, is implemented effectively and actually works in practice.[74] The first thing that matters is whether the compliance program adequately captures the various risks of violations, whether appropriate internal company procedures are in place, whether employees are informed and trained, whether an anonymous or at least confidential internal reporting system[75] and an investigation process are set up and whether arrangements have been made for external monitoring.[76] Recently, new provisions have been introduced particularly for in-house investigations.[77] In sum it is decisive whether the examination is carried out by qualified personnel and whether the company has ensured that the internal examination is carried out independently,[78] objectively and appropriately and whether it is adequately documented. [79] In assessing whether the compliance program actually works in practice, it is recognized that the mere fact that violations have occurred does not foreclose this conclusion.[80] Above all, it is important that the investigation ends with a result that analyzes the causes of the violations ("lessons learned") and thus forms the basis for measures for future avoidance.[81] On the whole, of fundamental importance is the "tone from the top", the establishment of positive incentives and a culture of compliance.[82]

b) United Kingdom, Switzerland and Other Countries

Internal investigations are since long common internationally and are increasingly subject to legal regulations, whether specifically in the context of anti-corruption rules and other laws

or whether explicitly or implicitly in the context of compliance requirements. Exemplary here are not only the United Kingdom and Switzerland that will be covered here more in detail, but also France,[83] Italy[84] and other countries as well.[85] In the *United Kingdom,* the Bribery Act 2010[86] stands as pioneering legislation, creating not only strict standards prohibiting general corruption but also explicitly covering the bribing of foreign officials.[87] Of relevance here is Section 7 on "Failure of commercial organisations to prevent bribery". According to this provision the concerned company can defend itself (full statutory defense) by proving that it has put in place appropriate procedures to prevent bribery by members of the company. Based on Section 9, the Secretary of State issued a text in 2011 on the procedures that companies should adopt for this purpose.[88] These guidelines are formulated around six guiding principles that companies can, but do not have to, comply with;[89] non-compliance does not create a presumption working against the company. Ultimately, it falls upon the court to decide whether the chosen procedure is appropriate in an individual case, this judicial review function representing one of the significant differences for law and practice in the United States. The Crime and Courts Act 2013 then introduced deferred prosecution agreements more generally.[90] In such an agreement between the public prosecutor and the accused company – under which further prosecution for certain criminal offenses is postponed – the company can also promise "to co-operate in any investigation related to the alleged offense", with the promise being based on a statement of facts which the company admits, though this admission does not necessarily amount to an admission of guilt.[91] According to the Code of Practice issued by the Serious Fraud Office (SFO), the company can commit to setting up a "robust compliance and/or monitoring programme" which will be overseen and assessed by the monitor[92] and which can also regulate the company's internal whistleblowing.[93]

Among the later pronouncements on the topic, the UK Serious Fraud Office's Corporate Co-Operation Guidance of August 2019 should be mentioned.[94] In it, the authority outlines which efforts by a company can be favorably taken into account in later criminal proceedings against it. The guidance is in two parts: "preserving and providing material" and "witness accounts and waiving privilege". As to the latter[95], the company should contact the authority before internal investigations and present witnesses for questioning or take other "overt steps". The goal "to avoid prejudice to the investigation" is understandable, but it remains uncertain what

"overt steps" are. It is obvious that witness statements can be influenced by the submission of documents and by the statements of others. It is not explicitly stated whether the prospect of “privilege” depends on the company identifying the witnesses to the authority and making available their testimony and the documents presented to them. But the authority expects this and it is also part of the cooperation under a deferred prosecution agreement.[96]

Experiences with internal investigations have also been made in *Switzerland.*[97] Up to now there is no general statutory regulation, though it has been called to be urgently needed in view of the practice of internal investigations. Despite this, in 2019 such regulation was rejected by the Federal Council (Bundesrat).[98] If the investigations are to go to the authorities, to receive, for example, a reduction in punishment, the independence of the internal investigation is essential.[99] There are special rules for banks.[100] Since 2008, the Swiss Financial Market Supervisory Authority (FINMA) has been using the results of internal investigations conducted by supervised banks in various ways, especially in cross-border matters.[101] FINMA requires banks to promptly report serious compliance violations and matters with far-reaching effects to management and the board,[102] which in complex cases is often possible only by using internal investigations.[103] However, Switzerland, as well as other countries, sets limits on foreign investigations in Switzerland[104] and on the disclosure of information to foreign authorities (blocking statutes).[105]

2. Economic analyses and findings from actual practice

As to internal investigations a key question is the relationship to supervisory and other authorities and thus to the public interest. For those cases in which the public authority initiates and carries out the internal investigation itself, what is at issue are general *economic questions* regarding the implementation of law in regulated and unregulated companies.[106] For the internal investigations dealt with here, i.e. investigations by the corporation itself, more relevant are economic contributions, that deal with the indirect enforcement of the legality of the company’s operations by the public authorities via conditions and directions in the public interest. Prototypes here are the deferred prosecution agreements and non-prosecution agreements that have been used in the USA since around 2001.[107] Economic theory refers to "bargaining in the shadow of the law", consistent with the key study of Cooter/Marks/Mnookin,[108] and more recently to "meta-regulation"[109] or "cooperative

regulation" or "regulatory commissioning".[110] This theory overcomes the traditional dichotomy between (state) regulation (command-and-control) and self-regulation and sets out a model of cooperation between the regulator and the (indirectly) regulated that lies between the two forms of regulation. There are four cornerstones of regulation: target (here: company), regulator (here: supervisory authority, also law enforcement body), command (here: regulatory requirements for internal investigation) and consequences, which can be negative or positive incentives (negative: direct intervention by the authority or the legislature, imposition of a reserved sanction; positive: self-organization of compliance and corporate governance). The advantage of cooperative regulation is greater flexibility. Accordingly cooperative regulation may be preferable if the direct intervention of the authority would be more complicated, more expensive and less secure in the achievement of results. Furthermore, intervention against a foreign company may come to its limits when there is an issue of extra-territoriality. Direct intervention may also be complicated if different authorities are involved and cooperation between them would be difficult.

There are *empirical studies* on successes and failures with self-regulation in many areas, especially in banking, stock exchange and finance law. Self-regulation in the USA and the United Kingdom has a long history in the context of securities regulation and takeovers (prototype: UK Panel on Takeovers), having achieved many noteworthy, if ultimately insufficient, instances of success.[111] Yet as far as compliance managements systems are concerned, it is true that there are some empirical studies,[112] yet there remain significant doubts as to whether their findings are conclusive more generally as to the effectiveness of these system.[113] As regards the US Sentencing Guideline, critics point to insufficient incentivization.[114] Conversely, considerable success is reported with the incentive scheme in antitrust law, particularly as regards leniency programs.[115]

On the other hand, we now have numerous *practical findings*[116] with internal investigations, especially from the regulatory treatment of corporate scandals, such as those at Siemens, Deutsche Bank and Volkswagen.[117] Despite particular facts and difficulties that arise in respect of specific cases and corporations, there is a consensus regarding the belief that voluntary cooperation with authorities and courts can eliminate or at least mitigate the negative legal,

economic or reputational consequences of direct intervention and hard sanctions.[118] The well-known triad of "prevent, detect, respond" is in this regard a fundamental principle.[119]

However, one should not overlook that the described practice of governmental guidance raises considerable problems.[120] As mentioned, companies follow the specified assessment standards as if they were statutory regulations, although it is clearly stated in the Guidances that these are not binding requirements, that other conduct may be appropriate and that ultimately it depends on the individual case. This carries the threat that the authorities – at least in the US while less so in the UK – will increase their requirements beyond what is legally permissible and that the requirements will not or will not be sufficiently and routinely scrutinized by the courts because companies will feel reluctant to pose a challenge. And there is also the related risk that enforcement itself comes to be neglected and is replaced by negotiation.[121]

III. Whistleblowing

1. Comparative Experiences

a) USA

As with internal investigations, the USA is also a leading actor as regards whistleblowing. Legal protection for whistleblowers was first introduced in the USA for federal employees in the 1970s, and it is now enshrined in an array of laws, such as the Sarbanes-Oxley Act (SOX)[122] and, above all, the Dodd-Frank Wall Street Reform and Consumer Protection Act[123] in connection with the encompassed implementing provisions. Under the SOX Act, employees of federal entities and certain (publicly held) companies are protected if they raise suspected legal violations within the company and are subsequently terminated or subjected to other retaliatory measures. The Dodd-Frank Act extends this protection to employees of companies who bring a violation of federal securities laws to the attention of the Securities and Exchange Commission (SEC). This means that whistleblowers are not only protected as regards internal company disclosure, as is the case in the SOX Act, but also regarding reports made directly to the SEC. As a result, companies have a significant incentive to establish internal whistleblower mechanisms which may incentivize their employees to first report issues internally.[124] Furthermore, employees not only have a right of appeal to the Secretary of Labor, as under

the SOX Act, but also their own right of action before the federal courts. Company employees can contact the SEC anonymously.[125] Most importantly, they have a very significant personal incentive, namely rewards, annulment of termination, and – something unusual in the US – reimbursement of their legal and other expenses. The SEC can also take direct action against the company. The SOX Act also requires the audit committee of a listed company to set up an internal whistleblower mechanism.[126] Further improvements to the whistleblower program have been discussed,[127] including removal of the restriction by which whistleblowing protection is given only as regards whistleblowing to the SEC and not for whistleblowing more generally.[128] Whistleblower programs are also required in other laws and by other authorities, or they are regulated in Guidances, such as the one authored by the U.S. Department of Justice Criminal Division in April 2019.[129]

Above all, however, the bounties are remarkable. Section 21F of the SEC Release under the amended Securities and Exchange Act provides rewards for successfully collecting fines in excess of $1 million, with the rewards amounting to up to 10 to 30 percent of the amount of the fine.[130] To this end, the SEC has issued whistleblower rules[131] and created its own whistleblower program, and it reports annually to Congress. According to the 2018 report,[132] the SEC has collected a total of $1.7 billion in monetary sanctions since the program began seven years ago, including over $901 million in illicit profits and interest. Of this, approximately $452 million has been or is still being paid out to injured parties. Since the program began, the SEC has paid out over $326 million in bounties to 59 individuals. In 2018 alone, the figure was $168 million to 13 individuals. The highest bounties ever paid totaled $83 million in 2018, made to three individuals, and nearly $54 million paid to two individuals. Bradley Birkenfeld, from the Swiss bank UBS, received a bounty of $104 million from a corresponding program of the Internal Revenue Service in 2014.[133] Given these sums, it is not surprising that the whistleblower tips the SEC has received since 2011 increased from 334 to over 5,282 in 2018. The program is also spreading internationally.[134] Since its inception, the SEC has received whistleblower tips from people in 119 countries other than the US, in 2018 alone from 74 countries.[135]

b) United Kingdom, Switzerland and other countries

The protection of whistleblowers is also regulated by law in other countries,[136] namely for quite a while in the *United Kingdom*.[137] The Public Interest Disclosure Act 1998[138] covers, among other things, protected disclosures, the right not to suffer any disadvantages, unfair termination, or damages, and access to the courts and legal process. It covers workers[139] who reasonably believe that criminal offenses or violations of the law have been committed or are likely to be committed or that, among other things, the health or safety of a person or the environment have been affected.[140] On the side of the whistleblower "good faith" is required, the whistleblower may not act for the purpose of personal gain, and the advice must usually be sent to the employer,[141] under certain circumstances also to others. In such cases the duty of confidentiality under labor law is suspended (public interest defense).[142] Great Britain has implemented the Occupational Safety and Health Directive 89/391 EEC in various laws.[143] The Serious Fraud Office has issued its own information for "Victims and Witnesses" and publishes an annual report on whistleblowing.[144] Whistleblowing is expressly mentioned as good corporate practice in the UK Code of Corporate Governance 2018.[145] How seriously whistleblower protection is taken is shown in the case of Jes Staley, CEO of Barclay, who was prosecuted by the Financial Conduct Authority and the Prudential Regulation Authority of the Bank of England in April 2017 because of his attempt to identify an internal whistleblower; he was forced to pay a fine of £642,430.[146]

In other countries there is no legal whistleblower protection in its own right, but labor law and other protective regulations apply. In *Switzerland*, for example, there is no legal requirement to establish an internal whistleblower mechanism. A recent attempt to adopt whistleblower legislation has failed there.[147] But whistleblowers are for instance, in addition to special provisions for disclosures made to FINMA,[148] protected under employment contract law. Where a whistleblower mechanism is absent and measures to clarify the situation and inform the employee are not taken within 60 days, the employee can forward his report to the responsible authority without violating his contractual duty of secrecy as an employee.[149] Various Swiss companies and, above all, banks have established their own sophisticated whistleblower systems,[150] especially when they are dealing with US authorities.

2. Economic contributions and findings from practice

From an *economic* point of view, whistleblowing is a way of addressing and possibly remedying an information deficit of (civil) society, of law enforcement by criminal or other government agencies as well as of companies themselves in relation to some manner of misconduct. It is only possible to take action against such misconduct if its existence is known. Whistleblowing is thus an instrument for enforcing norms. In companies, it is from an internal perspective a matter of maintaining good corporate governance and, where illegal activity is at issue, putting an end to it and avoiding or mitigating legal sanctions. Whistleblowing has therefore rightly been described as a core element of compliance.[151] Since whistleblowing often has very negative consequences for the whistleblower, the core regulatory problem is therefore to encourage whistleblowing through incentives, but without losing sight of the interests of the people and companies affected by whistleblowing and without creating a climate of denunciation.[152] The incentives can consist of protecting the whistleblower through anonymity, guarantees of confidentiality, and financial and other reward systems.[153] Particularly controversial are financial incentive schemes based on the US system of bounties.[154] A difficult problem with demarcation is how to handle evidence that is false, carelessly inaccurate, or simply not proven.[155] In economic terms, it is therefore a question of minimizing costs in the implementation and enforcement of the law.[156]

From an *empirical* standpoint, despite various inquiries,[157] the overall benefit of whistleblowing – in terms of information gain, costs, positive and negative effects on the company and the people involved, etc. – remains uncertain.[158] Only the immediate effect, the increased discovery of legal violations and misconduct, is guaranteed. The latter is particularly evident for leniency programs in antitrust law,[159] but it holds true also for the US incentive systems in securities regulation.[160]

The numerous practical findings on whistleblowing initially show that a large number of companies have voluntarily set up an internal whistleblower system.[161] These whistleblower systems are now often group-wide, such as at Volkswagen.[162] This is especially true for companies that have introduced a compliance department. From a company perspective, there are clear advantages in favor of introducing whistleblower systems.[163] The introduction of a whistleblower system is often stipulated in US agreements with German companies.[164] From a practical point of view, there are five building blocks that are necessary to set up

effective internal controls that meet the U.S. requirements for whistleblower protection:[165] strong protection against reprisals; clear support of the program by top management (tone from the top); incentives for employees; credible reporting channels, such as an anonymous hotline, as is required for reporting made to the SEC;[166] and transparent and credible investigation of every tip. Trust on the part of employees – that they can turn to an effective whistleblower system which will genuinely protect them – can be gained only slowly, but it is of key importance.[167]

IV. External Monitoring

1. Comparative experiences

a) USA

The USA also has had the first and most extensive experience with external monitoring,[168] even if it is now established or at least practiced in a number of other countries.[169] One of the first cases of the Department of Justice (DOJ) was Prudential Securities in 1994.[170] Today these cases are commonplace: "Corporate compliance monitors are everywhere."[171] The SEC in particular has been using external monitoring for compliance and enforcement since the early 1990s.[172] In addition to securities and financial fraud, external monitoring is also practiced in many other industries and under other laws, for example under the Foreign Corrupt Practices Act[173] and for money laundering, environmental law[174] and health care.[175]

There is no legal basis for external monitors in US federal law.[176] But the Sentencing Guidelines of the U.S. The Department of Justice[177] and the Benczkowki Memorandum of October 11, 2018, on the selection of monitors in criminal matters[178] provide numerous details. Many other American agencies as well as the World Bank have similar programs and practices.[179] The legal basis for setting up a monitor is usually a plea agreement between the authority and the company.[180] The monitors are mostly used for three years,[181] but in individual cases the monitoring continues for up to five years or longer,[182] and only in individual cases will it be shorter. The selection of the person to serve as a monitor is of course of key importance. The companies are usually given the right to propose three people, but the authority is not bound by this[183] and may follow its own wishes. The legal status of monitors, sometimes also referred to as independent compliance consultants, has not been clarified.[184] Because they have been

appointed by the company their mandate relationship seems to be to the company, even though the company acts in accordance to the wishes or requirements of a public agency.[185] The SEC requires the monitor to be independent.[186] The authority sometimes insists on a comprehensive plea agreement, including an admitted statement of facts, which is particularly dangerous for the company, as these remain in place even if the settlement is canceled.[187] The costs arising from monitoring, which can run into many millions of dollars,[188] are a huge problem, also because these monitors bring or employ their own lawyers, sometimes even entire law firms. The actual power of the monitors is enormous; there is sometimes talk of a "corporate czar".[189] Also posing a problem are parallel monitors from different authorities, as authorities cannot always agree on the same monitor or do not coordinate the process. But the authorities, such as the SEC,[190] perceive these problems, and they operate according to a kind of proportionality principle and will sometimes agree to "self-monitoring", for example by the company's Chief Compliance Officer.[191]

b) United Kingdom, Switzerland and other countries

Also *other countries* have had experiences with external monitoring,[192] above all the *United Kingdom.* External monitoring will most commonly occur under deferred prosecution agreements. Such agreements are made between a law enforcement agency and a company that is being prosecuted or could be prosecuted. In these agreements, the company obliges itself to cooperate and to take remedial action. External monitoring by lawyers or other individuals may also be a condition. The details are regulated in the respective deferred prosecution agreements. The UK Serious Fraud Office (SFO) has provided information[193] on this and has published examples of deferred prosecution agreements dating from 2015 to 2019.[194] Generally the company has the option of self-monitoring.[195] In the 2019 case of Serco Group PLC, the agreement stipulated that no internal witness interviews should take place during the criminal investigation. The Serco Group PLC therefore hired an independent law firm to conduct a full investigation of the relevant documents and to provide a detailed report of their findings to the SFO.[196] Full access to the e-mail accounts of current and former employees was an element of this inquiry. With regard to accounting documents, the company made a limited waiver of its confidentiality privilege. In approving the agreement, the judge saw the following as decisive: "early self-reporting to the authorities, full co-operation with the investigation, a willingness to learn lessons and an acceptance of an

appropriate penalty".[197] In complicated cases, criminal prosecution sometimes only becomes possible through deferred prosecution agreements and internal investigations.[198] Deferred prosecution agreements are also entered into with other UK authorities.[199]

Similar experiences with external monitoring have been made in *Switzerland*, where the financial market authorities' use of external parties as a supervisory mechanism has long been established. Rather than employing its own investigators, who can also be assigned competence on the level of a company organ, the Swiss Federal Banking Supervision (SFBC) has issued roughly 200 investigative mandates to external representatives since 2004 – with the frequency increasing over recent years – in order to not overburden its own resources and to take advantage of special expertise. The selection process takes place in a formalized manner with a pool of possible external investigators being compiled and then selected from. The tasks of the external agents are not only to investigate but also to monitor the implementation of the measures ordered and also to prescribe and carry out such measures themselves.[200] This corresponds to the role of a special representative under German law.[201] Here as well, the crucial difference is whether the external person has been employed or is deemed to be employed by the state authority or is legally commissioned by the company itself. This is not always clear and depends, among other things, on whether the company is authorized to issue instructions to external representatives and what competences these persons have in the company.[202] External monitors have also been used in Switzerland under pressure from US supervisory authorities. Such monitors are imposed not under a statutory power of the US authorities, but by the company itself on the basis of an agreement between the company and the authority.[203] The most commonly cited instance is the 2014 Credit Suisse case.[204] As a result of a guilty plea due to US tax law violations brought by the Department of Justice and in connection with a consent order issued by the New York State Department of Financial Services,[205] Credit Suisse was initially obliged to use a US monitor[206] for a period of two years starting in 2014 – but as of mid-2018 the monitor's work had still not yet been completed. According to media reports, the fees for the monitor and his team, as well as the associated expenses, are said to have cost Credit Suisse CHF 570 million.[207]

2. Economic contributions and findings from practice

External monitoring is a form of externalization of law enforcement by government regulators. The *economic question* posed here is when does it make sense to employ an external special representative or other expert appointed by the supervisory authority – or instead to use the investigative and enforcement work of a monitor commissioned by the company itself. The latter has recently been increasingly practiced in an international context, not only because the former would usually not be possible extraterritorially, but because such intervention is more flexible and without direct administrative restrictions; it is cheaper for the authorities in terms of personnel and costs, and, with suitable specifications, for example in an agreement, it can be more targeted and effective.[208] Much depends on whether the external monitor in the company acts or is viewed as an agent of the supervisory authority or the court. By contrast, when the monitor is seen as having an interest in improving the company's corporate governance, its reputation on the market and its own successful relationships with the state and supervision authorities, it can be the case that management and employees not only act in accordance with the agreement, but also cooperate with the monitor on their own initiative. In practice, this has led to the fact that such external monitors often have a hybrid position between engaging in supervisory tasks and having a company organ function, and their task oscillates between the common good and the corporate good.

Empirical studies in the strict sense, specifically as relates to external monitoring, seem rare or may have not been found.[209]

However, there are at this point numerous *findings from practice*. Some of these are extremely critical. As summed up by a US study: "What is clear is that monitors are highly paid, have ill-defined roles, and are chosen by prosecutors with little oversight."[210] From the point of view of the US supervisory authorities, on the other hand, the experience with external monitoring appears to be good or at least satisfactory; in any event, monitors are enforcing the agreed requirements, as shown in more detail in the monitors' annual reports.[211] From the outside, it is difficult to say whether this will really lead to changes in a company over the long term. Beyond the individual case, this can ultimately be answered only in the context of the logic and design of the corporate criminal law regime and a more general efficiency analysis of economic and business law enforcement vis-à-vis large companies.[212] Conversely, there is also the risk that supervisory authorities – at least where, as usually in the US, the

agreement and its implementation have not been approved by a court – will encroach too far, i.e. rule over the company more than is necessary and proportionate relative to the purpose of the criminal law or other law enforcement.[213] In any case, experiences with particularly US monitors[214] show that monitoring and enforcement interventions in a company take three or more years, reach deep and far into the company[215] and are extremely time-consuming and costly.[216] On the other hand, the successes of external monitoring – from the company's point of view,[217] from the point of view of the monitors (for example from Waigel at Siemens[218] or Freeh at Daimler[219]) and from a supervisory authority point of view[220] – have in many cases been assessed positively. Success factors associated with the use of a monitor are identified from experiences in practice: a clear restriction of the monitor's mandate[221] to a future-oriented assessment without investigating past individual instances of misconduct, selection of the monitor,[222] clear compensation agreements for the monitor and his team in advance,[223] the support given within the company,[224] contract duration and type and the reasons for dismissal,[225] avoidance of the additional involvement of an auditor, and a consistent implementation of the recommendations of the monitor.[226]

V. Summary

1. The establishment and use of internal investigations, whistleblowing and external monitoring are three information and enforcement channels that may be part of the corporate compliance system. They relate to the core area of corporate management and they are a task of the management and/or the board or in two-tier countries of the management board.

2. The board of directors is legally bound to see that compliance obligations are met, but the board has broad entrepreneurial discretion (business judgment) in terms of deciding how these obligations are met.

3. There is no legal obligation to observe the specific auditing standards set up by the auditing community. But these standards have as a practical matter established themselves in large companies.

4. In practice, a typical sequence of stages and steps has been established in practice for internal investigations: (1) Indication of an incident: plausibility assessment, preparation, possible ad hoc measures, investigation; (2) Legal assessment of the interim result based on the facts at hand, data analysis and interviews; (3) Result and reporting: measures, tracking,

follow-up and identification of lessons learned. There is no general legal obligation to notify authorities and to cooperate with them.

5. In the case of listed companies, the establishment of a whistleblower organization is considered to be a part of good corporate governance and may now also legally be part of the organizational compliance obligation that is already required for them.

6. The EU Whistleblower Directive of 7 October 2019 only concerns disclosures about violations of European legal provisions and does not oblige the Member States to introduce a whistleblower system for national legal provisions.

7. In the case of external monitoring, a distinction must be made between monitors that are used by the supervisory authority itself, usually through an administrative act, for example in accordance with banking law, and those installed by the company itself, albeit often in an international context and under pressure from a foreign supervisory authority.

8. There is a broad and detailed body of comparative legal experiences from the USA, the United Kingdom and Switzerland on internal investigations, whistleblowing and external monitoring, which can also be relevant in other countries for legislation, case law and scholarship.

9. Empirical studies on all three information and enforcement channels are available, but they seem to be scarce and in any case there is a lack of any broad and empirically processed body of data.

10. Conversely there are now many important findings and experiences from national and international corporate law practice that are particularly relevant for external monitoring, which is still less well known in many countries. These findings not only offer suggestions but in some cases already represent good corporate governance standards. In parts and over the long term they can form legal obligations for the corporate board.

[#] This article is in part based on a lecture held at the 2020 symposium of the German corporate law review Zeitschrift für Unternehmens- und Gesellschaftsrecht (ZGR), published in German in ZGR 2020, 373, and on a supplementing article in German in the Festschrift (Liber Amicorum) for Gerd Krieger 2020, p. 411. The present version has been reviewed for an international audience and has been updated as far as necessary. It will also be published in the ECFR 5/2021.

[1] E.G. for the USA WEBB/TARUN/MOLO, Corporate Internal Investigations, New York (as of 2019); parallel for the UK and the USA SEDDON ET AL., eds., The Practitioner's Guide to Global Investigations, 4th ed., London (Global Investigations Review) 2020. For Europe and Germany MOOSMAYER/HARTWIG, Interne Untersuchungen, 2nd ed. 2018; WESSING in Hauschka/Moosmayer/Lösler, eds., Corporate Compliance, 3rd ed. 2016, § 46; KNIERIEM/RÜBENSTAHL/TSAMBIKAKIS, Internal Investigations, Ermittlungen im Unternehmen, 2013.

[2] See the comprehensive treatment by SOKOL/VAN ROOIJ, eds., Cambridge Handbook of Compliance, forthcoming 2021. From Germany cf. Hüffer/KOCH, Aktiengesetz, 14th ed. 2020, § 76 comments 11 et seq.; KORT in Großkommentar Aktiengesetz, 5th ed. 2015, § 91 comments 121 et seq.; HOPT/ROTH in GroßkommAktG, 5th ed. 2015, § 93 comments 182 et seq.; MüKoAktG/SPINDLER, 5th ed. 2019, § 93 commments 47 et seq.; FLEISCHER in Spindler/Stilz, Aktiengesetz, 4th ed. 2019, § 91 comment 57.
[3] Directive (EU) 2013/36 of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms OJ 2013, L 176/338 (Capital Requirements Directive – CRD IV).
[4] MARSCH-BARNER, ZHR 181 (2017) 847 at 850; BACHMANN, ZHR 180 (2016) 563 at 564 et seq.; HARBARTH, ZHR 179 (2015) 136 at 139, 142.
[5] FLEISCHER in Spindler/Stilz (n. 2), § 91 comment 61 with specific examples and IDEM, NZG 2014, 321 at 325; also LEYENS/SCHMIDT, AG 2013, 533 at 536.
[6] For Germany under §§ 76, 93 German Stock Corporation Act (Aktiengesetz – AktG), HARBARTH, ZHR 179 (2015) 136 at 144 et seq.; FLEISCHER, NZG 2014, 321 at 322; FUHRMANN, NZG 2016, 881 at 882; MüKoAktG/SPINDLER (n. 2), § 91 comment 69; FLEISCHER in Spindler/Stilz (n. 2), § 91 comment 63.
[7] FLEISCHER in Spindler/Stilz (n. 2), § 91 comment 61 with further references; GRIGOLEIT, Festschrift K. Schmidt, 2019, vol. I, p. 367 at p. 380 et seq.; HARBARTH, ZHR 179 (2015), 136 at 145 et seq., 148 et seq.
[8] Arguing more generally for private law as regulatory law HELLGARDT, Regulierung und Privatrecht, 2016, summarizing pp. 729 et seq.
[9] HARBARTH, ZHR 179 (2015) 136 at 146 et seq.; VERSE, ZHR 185 (2011) 401 at 403 et seq.; LÖBBE, Festschrift Seibert 2019, 561 at 568; MARSCH-BARNER, ZHR 180 (2016) 563 at 566 n. 18.
[10] BACHMANN, ZHR 180 (2016) 563 at 565 et seq.
[11] MARSCH-BARNER, ZHR 181 (2017) 847 at 850 et seq.
[12] KORT in GroßkommAktG (n. 2), § 91 comment 122. For Whistleblowing FLEISCHER/SCHMOLKE, WM 2012, 1013 at 1015 et seq.
[13] HUGGER, ZHR 179 (2015) 214 at 221 et seq.
[14] DRINHAUSEN, ZHR 179 (2015), 226 at 230 et seq.; OTT/LÜNEBORG, CCZ 2019, 71 at 73 et seq.
[15] Also those that are not reinforced with a penalty or a fine, HARBARTH, ZHR 179 (2015) 136 at 148; BACHMANN, ZHR 180 (2016) 563 at 564 et seq.
[16] This is to avert damage to the company and also to the public, if there is a risk of societal damage in the event of an internal legal violation.
[17] On the possibility of horizontal and vertical delegation of duties, REICHERT/OTT, NZG 2014, 241 at 243; FLEISCHER in Spindler/Stilz (n. 2), § 91 comments 64 et seq. Extensively on the rights and duties of the board, HOPT, ZGR 2020, 373 at 390 et seq., and, on the situation in corporate groups p. 396 et seq.
[18] KLAHOLD, VGR 2019, 2020, 75 comment 4; FLEISCHER in Spindler/Stilz (n. 2), § 91 comment 57, with further references.
[19] HARBARTH, ZHR 179 (2015) 136 at 153.
[20] HOPT, ZGR 2020, 376 at 388. Also in a discussion report, ZHR 179 (2015) 207 at 208; HARBARTH, ZHR 179 (2015) 136 at 171, does not, however, distinguish the question of *whether*.
[21] Especially for internal company investigations, REICHERT/OTT, NZG 2014, 241 at 243; DRINHAUSEN, ZHR 179 (2015) 226 at 230; HUGGER, ZHR 179 (2015) 214 at 219; FLEISCHER in Spindler/Stilz (n. 2), § 91 comment 57 with further references. Generally on the *how* of compliance, MERKT, DB 2014, 2331.
[22] E.g., by a suspicion of money laundering, in tax law and under Art. 17 of the Market Abuse Regulation, KLÖHN, Marktmissbrauchsverordnung, 2018, Art. 17, comments 34 et seq.
[23] BÜRGERS, ZHR 179 (2015) 173 at 202; REICHERT/OTT, NZG 2014, 241 at 243.
[24] HUGGER, ZHR 179 (2015) 214 at 222 et seq.
[25] This is true also for questioned employees.
[26] Entrepreneurial discretion or business judgment under the business judgment that exists in some jurisdictions, in Germany for example under § 93 para. 1 of the German Stock Corporation Act. Limits on entrepreneurial discretion as to the question of *how* are set, for example, by tax, capital market and competition law statutes.

[27] KLAHOLD, VGR 2019, 2020, p. 75 comments 7 et seq., 20 et seq. This also includes a resource-oriented assessment of weighting and appropriateness.
[28] For Germany Institute of Public Auditors in Germany, The Principles for Proper Auditing of Compliance Management Systems (IDW PS 980), STECKER/NEUMANN, WPg 2020, 70. On the development of a similar approach, ISO 19600 (Compliance Management Systems), in the future ISO 37301, MAKOWICZ/MACIUCA, WPg 2020, 73.
[29] HARBARTH, ZHR 179 (2015) 136 at 143.
[30] Discussion report, ZHR 179 (2015) 207.
[31] For example the German Corporate Governance Code of 2020; references in HOPT, ZGR 2020, 373 at 381 et seq.
[32] For Germany MARSCH-BARNER, ZHR 181 (2017) 847 at 850 et seq. MAUME/HAFFKE, ZIP 2016, 199 at 201; FLEISCHER in Spindler/Stilz (n. 2), § 91 comment 55.
[33] References in HOPT, ZGR 2020, 373 at 382 et seq.
[34] MARSCH-BARNER, ZHR 181 (2017) 847 at 851 et seq. In more detail, below, III 2.
[35] MAUME/HAFFKE, ZIP 2016, 199 at 202, starting with the level set in the famous Neubürger case, Landgericht München I, ZIP 2014, 570; they justify this with a reduction to zero discretion.
[36] § 161 of the German Stock Corporation Act and recommendations made in A.2 sentence 2 of the German Corporate Governance Code 2020, on the latter HOPT/LEYENS, ZGR 2019, 929 at 950.
[37] Also MARSCH-BARNER, ZHR 181 (2017) 847 at 849 and 853.
[38] Below, III.
[39] BAUR/HOLLE, AG 2017, 379 at 380 et seq.; MAUME/HAFFKE, ZIP 2016, 199 at 202. Contra e.g. MARSCH-BARNER, ZHR 181 (2017) 847 at 851.
[40] FLEISCHER in Spindler/Stilz (n. 2), § 91 comment 57; BÜRGERS, ZHR 179 (2015) 173 at 178.
[41] KLAHOLD, VGR 2019, 2020, p. 75 comments 26 et seq. On the advantages and disadvantages of such a voluntary cooperation, see e.g. HUGGER, ZHR 179 (2015) 214 at 222 et seq. On the primary similarities and differences in monitoring in the USA and Germany HITZER, ZGR 2020, 406 at 407 et seq., 419 et seq.
[42] HARBARTH, ZHR 179 (2015) 136 at 150 et seq. On the tone from the top, FLEISCHER in Spindler/Stilz (n. 2), § 91 comments 60a et seq. On compliance officers, KREMER/KLAHOLD, ZGR 2010, 113 at 125 et seq. On the independence requirement for compliance officers, HARBARTH, ZHR 179 (2015) 136 at 166 et seq.
[43] BÜRGERS, ZHR 179 (2014) 173 at 203 et seq.
[44] REICHERT/OTT, NZG 2014, 241 at 244.
[45] EBS LAW SCHOOL/NOERR, Internal Investigations, Compliance Studie 2019, pp. 12, 15.
[46] Below, II 1 and 2. On the implementation and follow-up of internal investigations, EBS LAW SCHOOL, EBS LAW SCHOOL/NOERR (n. 53).
[47] KLAHOLD, VGR 2019, 2020, p. 75 comments 16 et seq. MOOSMAYER/PETRASCH, ZHR 182 (2018) 504 at 520; also TEICKE, CCZ 2019, 298. The US principles can also provide suggestions based on these steps: 1. A well-signed program (A. Risk Assessment, B. Policies and Procedures, C. Training and Communications, D. Confidential Reporting Structure and Investigation Process, p. 3 et seq., E. Third-Party Management, F. M&A). 2. Effective implementation (autonomy, incentives), 3. work in practice (investigation of misconduct!). On this, U.S. DEPARTMENT OF JUSTICE CRIMINAL DIVISION, Evaluation of Corporate Compliance Programs, Guidance, updated June 2020, see further, below, II 1 a.
[48] WESSING in Hauschka/Moosmayer/Lösler (n. 1), § 46 comments 94 et seq.
[49] Court of appeals (OLG) Hamm, GmbHR 2019, 1060, BeckRS 2019, 14258.
[50] KLAHOLD, VGR 2019, 2020, p. 75 comment 7.
[51] DRINHAUSEN, ZHR 179 (2015) 226 at 231 et seq.
[52] HUGGER, ZHR 179 (2015) 214 at 221; WESSING in Hauschka/Moosmayer/Lösler (n. 1), § 46 comments 121 et seq.
[53] WESSING/DANN, Deutsch-amerikanische Korruptionsverfahren, 2013, § 7.
[54] BAUR/HOLLE, AG 2017, 379 at 382; MARSCH-BARNER, ZHR 181 (2017) 847 at 856.
[55] BAUR/HOLLE, AG 2017, 379 at 383; FLEISCHER/SCHMOLKE, WM 2013, 1013 at 1017.
[56] See FEDERMANN/RACKY/KALB/MODRZYK, DB 2019, 1665 at 1669.

[57] In both cases the mechanism is considered to be an internal company disclosure. See Art. 8 para. 5 of the EU Whistleblower Directive, Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law OJ 2019, L 305/17.
[58] References in HOPT, ZGR 2020, 373 at 401 et seq.
[59] Below, III 1 a und 2.
[60] In Germany e.g. pursuant to § 45c para. 1 sent. 1 of the Banking Act (Kreditwesengesetz – KWG), HOPT, ZGR 2020, 373 at 384 et seq.
[61] Extensively, below IV 1.
[62] E.g. In re: Volkswagen "Clean Diesel" Marketing, Sales Practices, and Products Liability Litigation, Third Partial Consent Decree, Case No: MDL No. 2672 CRB (JSC), US District Court Northern District of California San Francisco Division, sections 27 et seq., available at < https://www.epa.gov/sites/production/files/2017-01/documents/vwthirdpartial-cd.pdf (last checked 15 February 2021) >.
[63] "Settlement agreement as the monitor's bible", WARIN/DIAMANT/ROOT, Somebody's Watching Me: FCPA Monitorships and How They Can Work Better, 13 U. Pa. J. Bus. 321 (2011) at 359 et seq., 365 et seq., 371 et seq.: budget, timeline, single point of conduct, internal resources; Siemens case at 366 et seq.
[64] See the report of GARRETT as regarding the monitor for the Siemens Corporation Waigel, Too big to jail, How Prosecutors Compromise with Corporations, Cambridge Mass., London, 2014, p. 183: two-thirds of the time based on more than four years of meetings with more than 1,500 individuals.
[65] With comments on how this can be set up, SCHWARZ, CCZ 2011, 59 at 62 et seq.
[66] MOOSMAYER/HARTWIG (n. 1), O comments 20 et seq., p. 206.
[67] More closely, below, IV 2 at the end.
[68] WEBB/TARUN/MOLO (n. 1); SEDDON ET AL. (n. 1); ROOT, The Monitor-Client Relationship, 100 Va. L. Rev. 523 (2014); KHANNA/DICKINSON, The Corporate Monitor: The New Corporate Czar?, 105 Mich. L. Rev. 1713 (2007); KHANNA, Reforming the Corporate Monitor? in: Barkow/Barkow, eds., Prosecutors in the Boardroom, Using Criminal Law to Regulate Corporate Conduct, New York/London 2011, p. 226; WARIN/DIAMANT/ROOT (n. 63), 13 U. Pa. J. Bus. 321 (2011); GARRETT (n. 64), p. 239 et seq. See the criticism of ARLEN/BUELL, The Law of Corporate Investigations and the Global Expansion of Corporate Criminal Enforcement, University of Southern California Law Review 93 (2020), 697. On legal privileges in connection with internal investigations in the USA, NIETSCH, CCZ 2019, 49.
[69] In the USA, crimes committed by employees are attributed to the company much more widely than under German law according to the principle of respondeat superior – but only under two conditions: (1) conduct within the scope of the agent's employment and (2) conduct done for the benefit of the corporation; offering extensive case law citations, WEBB/TARUN/MOLO (n. 1), § 1.02. For this reason alone, the possibility of mitigating compliance violations has a different meaning.
[70] ROOT (n. 68), 100 Va. L. Rev. 523 (2014) at 537: the primary purpose is "to provide legal advice on how to deal with the legal or regulatory failure".
[71] U.S. DEPARTMENT OF JUSTICE CRIMINAL DIVISION, Evaluation of Corporate Compliance Programs, Guidance Document, updated June 2020 (the "2020 Guidance"), available at < https://www.justice.gov/criminal-fraud/page/file/937501/download (last checked 15 February 2021) >. Similar enforcement of criminal law exists in the US in many other areas of law, for numerous statutory references see WEBB/TARUN/MOLO (n. 1), § 2.04 (1)-(22). Accordingly, there are guidelines for compliance with internal company investigations and whistleblowing from other American authorities, for example at the federal level with the Securities and Exchange Commission and correspondingly at the level of the individual states.
[72] REILLY, Negotiating Bribery: Toward Increased Transparency, Consistency, and Fairness in Pretrial Bargaining under the Foreign Corrupt Practices Act, Hastings Bus. L. J. 10 (2014) 347 at 367: "The memos give prosecutors great leeway in whom to charge, what to charge, and what terms to set forth within DPAs or NPAs if such agreements are ultimately negotiated".
[73] WEBB/TARUN/MOLO (n. 1), § 1.15 and with extensive case depictions (Siemens AG, Toyota Motor Corporation, JP Morgan Chase NA, General Motors Corporation, Commerzbank AG, Volkswagen AG)

§ 1.17; Case summaries also in LEIBOLD, Extraterritorial application of the FCPA under International Law, 51 Willamette L. Rev (2015), 2205; Shearman & Sterling LLP, Recent Trends and Patterns of Enforcement of the Foreign Corrupt Practices Act (FCPA), twice annually, available at < www.shearman.com/en/newsinsights/publications/ (last checked 15 February 2021) >.

[74] U.S. DEPARTMENT OF JUSTICE CRIMINAL DIVISION, Guidance Document (n. 71), p. 2.

[75] On this point, below, III 1 a.

[76] On this point, below, IV 1 a.

[77] U.S. DEPARTMENT OF JUSTICE CRIMINAL DIVISION, Guidance Document (n. 71), p. 15: "(Another) hallmark of a compliance program that is working effectively is the existence of a well-functioning and appropriately funded mechanism for the timely and thorough investigation of any allegations or suspicions of misconduct by the company, its employees, or agents".

[78] U.S. DEPARTMENT OF JUSTICE CRIMINAL DIVISION, Guidance Document (n. 71), p. 11 et seq., this includes a direct reporting line to the board of directors and/or the audit committee.

[79] U.S. DEPARTMENT OF JUSTICE CRIMINAL DIVISION, Guidance Document (n. 71), p. 7 at 16, "investigation of misconduct".

[80] U.S. DEPARTMENT OF JUSTICE CRIMINAL DIVISION, Guidance Document (n. 71), p. 14.

[81] U.S. DEPARTMENT OF JUSTICE CRIMINAL DIVISION, Guidance Document (n. 71), p. 17: "to conduct a thoughtful root cause analysis of misconduct and timely and appropriately remediate to address the root causes".

[82] U.S. DEPARTMENT OF JUSTICE CRIMINAL DIVISION, Guidance Document (n. 71), p. 5 et seq.

[83] On *France's* Loi no 2016-1691 du 9 décembre 2016 relative à la transparence, à la lutte contre la corruption et à la modernisation de la vie économique, Version consolidée au 6 novembre 2019 (Loi Sapin II), J.O.R.F. 10 déc. 2016, texte no 2, available at < https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000033558528&categorieLicn=id (last checked 15 February 2021) >. See on this ALT, La Semaine Juridique, éd. gén. No. 4, 23 janvier 2017, p. 151; BOURSIER, Revue de droit bancaire et financier, Novembre-Décembre 2016, p. 1; BRIGANT, La Semaine Juridique, éd. gén. No. 1-2, 9 janvier 2017, p. 6; DEZEUZE/PELLEGRIN, La Semaine Juridique, éd. gén., No. 3, 16 janvier 2017, p. 101 (on the convention judiciaire d'intérêt public); LECOURT, Revue trimestrielle de droit commercial 2017, p. 101; LAGESSE/ARMILLEI, Les enquêtes internes en cas de harcèlement: un nouveau défi après la loi "Sapin 2"? JCP / La Semaine Juridique, éd. sociale, no. 23, 11 juin 2019, p. 1167. Also blocking statutes: Loi no 80-538 du 16 juillet 1980 relative à la communication de documents et renseignements d'ordre économique, commercial ou technique à des personnes physiques our morales étrangers.

[84] On the uncertain legal situation in *Italy* LONATI/BORLINI, Corporate Compliance and Privatization of Law Enforcement, in: Soreide/Makinwa, eds., Negotiated Settlements in Bribery Cases. A Principled Approach, Edward Elgar 2020, p. 280 et seq. available at < https://ssrn.com/abstract=3468260 (last checked 15 February 2021) >.

[85] For an international overview, SPEHL/MOMSEN/GRÜTZNER, CCZ 2013, 260, 2014, 2, 179, 2015, 77; SPEHL/GRUETZNER, eds., Corporate Intenal Investigations – Overview of 13 jurisdictions –, 2013; LOMAS/KRAMER, eds., Corporate Internal Investigations, An International Guide, 2nd ed., Oxford 2013.

[86] Bribery Act 2010, UK Public General Acts 2010 c. 23, available at < http://www.gov.uk/ (last checked 15 February 2021) >.
See also MOOSMAYER/HARTWIG (n. 1), B comments 22 et seq., p. 13 et seq., with reference to the case of Sweet Group Plc and its subsidiary in Dubai, B comment 26. DPA can be found there since the Crime and Courts Act 2013, BISGROVE/WEEKES, Criminal Law Review 2014, 6 at 416; KING/LORD, Negotiated Justice and Corporate Crime, London 2018, ch. 5, p. 83 et seq.; SCHORN/SPRENGER, CCZ 2014, 211. On legal privileges in internal investigations in the UK NIETSCH, CCZ 2019, 49. On reform measures, GRASSO, J. of Business Law 2016, 388; LAIRD, Criminal Law Review 2019, 6, 486.

[87] Section 6 Bribery of foreign public officials.

[88] Ministry of Justice, The Bribery Act 2010, Guidance about procedures which relevant commercial organisations can put into place to prevent persons associated with them from bribing (section 9 of the Bribery Act 2010), available at < http://www.justice.gov.uk/guidance/docs/bribery-act-2010-guidance.pdf (last checked 15 February 2021) >, with six principles on internal organization, including

the detailed Principle 1, Proportionate procedures, with Commentary Procedures 1.6 und 1.7; here one can find a long list of possible components of the mechanism, and also case studies in Annex 11. This encompasses tough rules, but the special features of small companies are also taken into account. See also TRANSPARENCY INTERNATIONAL UK, Guidance on Adequate Procedures under the UK Bribery Act 2010. On the guidelines, DEISTER/GEIE/REW, CCZ 2011, 81 at 86.

[89] The six guiding principles are: proportionate procedures, top-level commitment, risk assessment, due diligence, communication (including training) and monitoring and review.

[90] Crime and Courts Act 2013 Schedule 17; for a comprehensive comparison of the UK and the USA from a practical perspective, SEDDON ET AL. (n. 1).

[91] Crime and Courts Act 2013 Schedule 17 paragraph 5(1), (3)(f).

[92] See below, IV 1 b.

[93] See below, III 1 b.

[94] Serious Fraud Office, Corporate Co-operation Guidance, available at < https://www.sfo.gov.uk/download/corporate-co-operation-guidance/ (last checked 15 February 2021) >. See also the Serious Fraud Office, Guidance on Corporate Prosecutions, available at < https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/corporate-self-reporting (last checked 15 February 2021) >. Also highly informative was the speech by SFO Director LISA OSOFOSKY on 3 April 2019 in London, available at < https://www.sfo.uk/2019/04/03/fighting-fraud-and-corruption-in-a-shrinking-world/ (last checked 15 February 2021) > with references to the numerous and significant differences in the law and practice of the USA.

[95] Called de-confliction in the USA.

[96] Expressly, OSOFOSKY (n. 94); Serious Fraud Office, Deferred Prosecution Agreements Code of Practice, available at < https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/deferred-prosecution-agreements (last checked 15 February 2021) >. According to this, a DPA is an agreement between a law enforcement agency and an organization that could be prosecuted under the supervision of a court of law.

[97] FRITSCHE, Interne Untersuchungen in der Schweiz, Zürich/St. Gallen 2013; ROMERIO/BAZZANI, eds., Interne und regulatorische Untersuchungen II, Zürich et al. 2016; RAEDLER, Les enquêtes internes dans un contexte suisse et américain, Instruction de l'entreprise ou Cheval de Troie de l'autorité?, PhD Thesis, Lausanne 2018; FRITSCHE, Interne Untersuchungen im Kontext grenzüberschreitender Ermittlungen, in: Emmenegger, ed., Banken zwischen Strafrecht und Aufsichtsrecht, Basel 2014, p. 193. On work protection and data privacy, see GEISER, Behördliche und interne Untersuchungen: Die arbeits- und datenschutzrechtlichen Rahmenbedingungen, in Emmenegger, IBID, p. 165; on information gathering and employee interviews during internal investigations, BLOCH/GÜTLING, SZW 2019, 275. See also ZULAUF/WYSS/TANNER/KÄHR/FITSCHE/EYMANN/AMMANN, Finanzmarktenforcement, 2nd ed., Bern 2014, X, p. 261 et seq.

[98] RAEDLER (n. 97), p. 19 et seq., 674 et seq., 685; for detailed information on the process of internal investigations, IDEM, p. 363 et seq. Rejecting a more general introduction of a deferred indictment (and thus monitors), SCHWEIZERISCHER BUNDESRAT, Botschaft zur Änderung der Strafprozessordnung, 28.8.2019, BBl. 2019, 19.048, available at < https://www.admin.ch/opc/de/federal-gazette/2019/6697.pdf, p. 6722 et seq. (last checked 15 February 2021) >.

[99] FRITSCHE in: Emmenegger (n. 97), pp. 193 at 203 et seq.

[100] STRASSER, Interne Untersuchungen: Compliance im Spannungsfeld zwischen Verwaltungsrat, Geschäftsleitung und Mitarbeitenden, in: Emmenegger (n. 97), p. 240.

[101] FRITSCHE in: Emmenegger (n. 97), pp. 193 at 202.

[102] FINMA, Rundschreiben 2017/1, Corporate Governance – Banken, comment 81.

[103] BLOCH/GÜTLING, SZW 2019, 725 n. 1.

[104] Credit Suisse, UBS and further cases in FRITSCHE in: Emmenegger (n. 97), pp. 193, 210 et seq.

[105] Arts. 271 and 273 Swiss StGB; LIVSCHITZ in Spehl/Gruetzner (n. 85), § 12 comments 20 et seq.; FRITSCHE in Emmenegger (n. 97), pp. 193, 205 et seq., 225 et seq. On the possibility of approval from the Federal Council, IDEM at p. 223 et seq. On the draft of a Swiss federal law on cooperation with foreign authorities, FRITSCHE, IDEM at p. 233 et seq.; the draft was not taken up further.

[106] Further on the prevention of corporate crime across different legal fields, BAUR/HOLLE/REILING, JZ 2019, 1025.
[107] GARRETT (n. 64), p. 63; as of the end of 2018 GIBSON DUNN, 2018 Year-End Update On Corporate Non-Prosecution Agreements and Deferred Prosecution Agreements, 10 January 2019.
[108] COOTER/MARKS/MNOOKIN, Bargaining in the Shadow of the Law: A Testable Model of Strategic Behavior, Journal of Legal Studies XI (1982) 225, a study based on pretrial bargaining.
[109] COGLIANESE/MENDELSON, Meta-Regulation and Self-Regulation, in: Baldwin/Cave/Lodge, eds., The Oxford Handbook of Regulation, Oxford 2010, p. 146.
[110] LEYENS, Informationsintermediäre des Kapitalmarkts, 2017, pp. 205 et seq., 210 et seq., 219 et seq.
[111] See CARY, Self-Regulation in the Securities Industry, American Bar Association Journal 49 (1963) 244. See also HOPT, Self-Regulation in Banking and Finance - Practice and Theory in Germany - in: La Déontologie bancaire et financière/The Ethical Standards in Banking & Finance, Bruxelles (Bruylant) 1998, pp. 53-82. Also BUCK-HEEB/DIECKMANN, Selbstregulierung im Privatrecht, 2010.
[112] ARMOUR/GARRETT/GORDON/MIN, Board Compliance, 104 Minnesota Law Review 1191 (2020), available at < https://ssrn.com/abstract=3205600 (last checked 15 February 2021) >; ARMOUR/GORDON/MIN, Taking Compliance Seriously, 37 Yale Journal on Regulation 1 (2020), available at < https://ssrn.com/abstract=3244167 (last checked 15 February 2021) >.
[113] BAER, Designing Corporate Leniency Programs (2020), available at < https://ssrn.com/abstract=3555950 (last checked 15 February 2021) >; COGLIANESE/NASH, Compliance Management Systems: Do They Make a Difference? (2020), available at < https://ssrn.com/abstract=3598264 (last checked 15 February 2021) >; VAN ROOIJ/FINE, Preventing Corporate Crime from Within: Compliance Management, Whistleblowing and Internal Monitoring (2020), available at < https://ssrn.com/abstract=3563478 (last checked 15 February 2021) >; GRIFFITH, Agency, Authority, and Compliance in: Sokol/van Rooij, eds., Cambridge Handbook of Compliance, forthcoming 2021, available at < https://ssrn.com/abstract=3462638 (last checked 15 February 2021) >, p. 7: "unknown and largely untested"; IDEM, Corporate Governance in an Era of Compliance, William and Mary Law Review 57 (2016) 2075; NESTLER in Knieriem/Rübenstahl/Tsambikakis (n. 1), p. 3 comment I 36: criminological legal findings "fragmentary". More generally in favor of the internal control requirements under the US Sarbanes Oxley Act of 2002, HERTEL, Effective Internal Control and Corporate Compliance, 2019, p. 473 et seq., 496 et seq. For earlier references from organization law and organization-sociology literature, HARBARTH, ZHR 179 (2015) 136 at et seq.
[114] HERTEL (n. 113), p. 502 et seq., 505 et seq.
[115] From the perspective of competition law practice, HECKENBERGER in Moosmayer/Hartwig (n. 1), M comment 13, p. 170, speaks of a "hardly imaginable paradigm shift in cartel prosecution and the investigation of hardcore cartels". On incentives generally, LEYENS (n. 110), p. 215 et seq. with further references; in favor of internal investigations and disclosure, MOOSMAYER/PETRASCH, ZHR 182 (2018) 504 at 530 et seq. Generally, RÜBENSTAHL/HAHN/VOET VAN VORMIZEELE, eds., Kartell Compliance, 2020.
[116] See first the sources mentioned in n. 1. Furthermore HUGGER, ZHR 179 (2015) 214; DRINHAUSEN, ZHR 179 (2015) 226; HARBARTH, ZHR 179 (2015) 136 at 157 et seq. with five guiding principles; WESSING in Hauschka/Moosmayer/Lösler (n. 1), § 46; GARDEN/HIÉRAMENTE, BB 2019, 963 at 969. For the USA ROOT MARTINEZ, Complex Compliance Investigations, 120 Columbia Law Review 249 (2020); WEBB/TARUN/MOLO (n. 1), §§ 4.01 et seq. Particularly as regards competition law inquiries, HECKENBERGER IN Moosmayer/Hartwig (n. 1), M comments 40 et seq., p. 175.
[117] EWALT-KNAUER/KNAUER/LACHMANN, Journal of Business Economics 2015, 1011; particularly as regards the Siemens/Waigel FCPA Compliance Monitorship 2008, GARRETT (n. 64), p. 8 et seq., on the statements of facts with detailed admissions, IDEM p. 60 et seq., 183 et seq.; SCHWARZ, CCZ 2011, 59 at 60. See also the practical guide based on actual experience from MOOSMAYER/HARTWIG (n. 1), 2018, comments 126 et seq., p. 48 et seq.; both editors are affiliated with Siemens.
[118] HUGGER, ZHR 179 (2015) 214 at 222.
[119] Above, I 1 c (1).
[120] E.g. GRIFFITH (n. 113), ssrn p. 9 et seq.; RYDER, Journal of Criminal Law 2018, 82(3), 245.
[121] GARRETT (n. 64), p. 285 et seq. Conversely, GRIFFITH (n. 113), contends there is a "symbiotic relationship between compliance officers and regulatory agencies", ssrn p. 1; counteracting this by

adding the compliance department to the legal department, p. 11, is however neither realistic nor desirable.

[122] Sarbanes-Oxley 2002, Pub.L. 107-204, Sec. 806; 18 U.S.C. § 1514A with labor law protections for whistleblowers.

[123] Dodd-Frank 2010, Pub.L. 111-203, sec. 922; 15 U.S.C. § 78u-6(d)(2)(A). In detail, DELIKAT/PHILLIPS, eds., Corporate Whistleblowing in the Sarbanes-Oxley/Dodd-Frank Era, 2nd ed., New York 2015 (as of: September 2019), ch. 16 et seq.; GERDEMANN, Transatlantic Whistleblowing, Tübingen 2018, p. 287 et seq.; ROYBARK, An Analysis of the SEC's Whistleblower Award Program Mandated by the Dodd-Frank Act (2010): FY 2010-FY 2017, available at < https://ssrn.com/abstract=3201679 (last checked 15 February 2021) >; SILVER/BERRINGER IN SEDDON ET AL. (n. 1), ch. 20, p. 351.

[124] On the debate under the EU Whistleblower Directive (above, n. 57) HOPT, ZGR 2020, 373 at 382 et seq.

[125] 15 U.S.C. § 78j-1(m)(4).

[126] Access hotline, Sarbanes-Oxley (n. 122), Sec. 301, revised by Dodd-Frank, 15 U.S.C. § 78j-1(m)(4).

[127] KREINER RAMIREZ, Whistling Past the Graveyard: Dodd-Frank Whistleblower Programs Dodge Bullets Fighting Financial Crime, Loyola University Chicago Law Journal 50 (2019) 617.

[128] This was the narrow interpretation of the Supreme Court in Digital Reality Trust v. Somers, 138 S. Ct. 767 (2018) at 777, in relation to a Release of the SEC; viewed critically by KREINER RAMIREZ (n. 127) at 632 et seq. Other problems include circumvention via arbitration clauses, slow decisions on bounties and budgetary barriers. A qui tam action in accordance with the False Claims Act has also been proposed, i.e. the whistleblower's right to sue the government and secure a percentage share if successful, IDEM at 662 et seq.

[129] Above, II 1 a, n. 71, p. 6: "Confidential reporting mechanisms are highly probative of whether a company has "established corporate governance mechanisms that can effectively detect and prevent misconduct … [It represents] a system, which may include mechanisms that allow for anonymity or confidentiality, whereby the organization's employees and agents may report or seek guidance regarding potential or actual criminal conduct without fear of retaliation". And then as well "incentives and disciplinary measures", such as the setting up of an incentive system, remain important, p. 12 et seq. Some whistleblower programs, among others, are to be found, Commodity Futures Trading Commission (CFTC). For an overview on US whistleblower law, GERDEMANN (n. 123), p. 27 et seq., 100 et seq.

[130] 15 U.S.C. § 78u-6(b)(1).

[131] SEC Release No. 34-64545, 17 C.F.R. §§ 240.21F-1 through 21F-17, available at < https://www.sec.gov/rules/final/2011/34-64545.pdf (last checked 15 February 2021) >.

[132] SEC 2018 Annual Report to Congress Whistleblower Program, available at < https://www.sec.gov/sec-2018-annual-report-whistleblower-program.pdf (last checked 15 February 2021) >.

[133] GARRETT (n. 64), p. 225 et seq.; see also MARSCH-BARNER, ZHR 181 (2017) 847 at 848.

[134] GERDEMANN, Transatlantic Whistleblowing (n. 123), p. 366 et seq. on the USA and Deutschland.

[135] SEC 2018 Annual Report (n. 132), p. 23.

[136] For a recent comparative study, STOLOWY/PAUGAM/LONDERO, Journal of Business Law 2019, 3 at 167; see also THÜSING/FORST, eds., Whistleblowing – A Comparative Study, Heidelberg et al. 2015. For *France* Loi Sapin II, Art. 6 et s.: De la protection des lanceurs d'alerte, Art. 17 II 2: un dispositif d'alerte interne …", above, n. 83; see also ALT, De nouvelles protections pour les lanceurs d'alerte, La Semaine Juridique, éd. gén., No 4, 23 Janvier 2017, p. 151; BARRIERE, Les lanceurs d'alerte, Revue de sociétés 2017, 191; BOURSIER (n. 83), p. 6 no 34 et s.; BRIGANT (n. 83), p. 6, 9 et s.; LECOURT (n. 83), p. 101, III. Réglementation des lanceurs d'alerte; QUERENET-HAHN, RENARD, Le régime de protection des lanceurs d'alerte issue de la loi Sapin 2, JCP / La Semaine Juridique, éd. sociale, No 11, 20 mars 2018, p. 1095; HERTSLET/BARSAN, IWRZ 2019, 256.

[137] ASHTON, Industrial L. J. 2015, 44(1), 29; LEWIS, Int. J. of Law and Management 2017, 59(6), 1126; BEYER, Whistleblowing in Deutschland und Großbritannien, 2013. Also considering the interests of the alleged wrongdoers, LEWIS, Industrial Law Journal 2018, 47(3), 339.

[138] Public Interest Disclosure Act 1998, UK Public General Acts 1998 c. 23. See BEYER (n. 137), p. 141 et seq.; NAYLOR/WILSON/CASEY/PROUDLOCK in SEDDON ET AL. (n. 1), ch. 19, p. 330.
[139] Defined very broadly in section 43K.
[140] More closely section 43B as well as sections 43C-H.
[141] Also regarding, among others, the Director of the Serious Fraud Office.
[142] BEYER (n. 137), p. 187 et seq.
[143] BEYER (n. 137), p. 58 et seq.
[144] Serious Fraud Office, Annual Report on Whistleblowing Disclosures 2018-2019.
[145] UK Code of Corporate Governance 2018 No. 6: The board "should ensure that arrangements are in place for the proportionate and independent investigation of such matters and for follow-up action." Employees should have a way to express their concerns confidentially and anonymously if they desire. On the UK Code in more detail, HOPT, Festschrift Seibert, 2019, p. 389.
[146] See ANDREADAKIS, Enhancing Whistleblower Protection: It's all about the Culture, (2019) EBLR 859. In favor of of a "radical overhaul", the APPG Report (All Party Parliamentary Group for Whistleblowing) of July 2019; also highly critical was the 2nd report of July 2020, available at < https://www.appgwhistleblowing.co.uk/ (last checked 15 February 2021) >.
[147] ZULAUF, Rejet de la loi sur le „whistleblowing": fiasco parlementaire, mais pas une tragédie, available at < https://www.cdbf.ch/1074/, 2 July 2019 (last checked 15 February 2021) >.
[148] ROMERIO/BAZZANI, Informationen – Vermittlung, Verwertung und Verbreitung bei komplexen Verfahren, in: Romerio/Bazzani (n. 97), p. 7 at p. 32 et seq.
[149] See draft Art. 321a bis et seq. Of the Swiss Law of Obligations; see also PORTMANN/RUDOLPH in Widmer/Lüchinger/Oser, Eds., Obligationenrecht I, 7th ed., Basel 2020, Art. 321a OR, comment 28; RIEDER, Whistleblowing als interne Risikokommunikation, Zürich/St. Gallen 2013, p. 173 et seq.
[150] FRITSCHE (n. 97), pp. 193 at 205.
[151] MAUME/HAFFKE, ZIP 2016, 199 at 200 et seq.
[152] SCHMOLKE, ZGR 2019, 876 at 889 et seq. identifies the following as a regulatory strategy: duty of disclosure (demand), penalty for non-disclosure (fine), protection of the whistleblower (protect) and reward (pay); see also FELDMAN/LOBEL, 88 Texas L. Rev. 1151 (2010) at 1157 et seq.: protect, command, fine, pay.
[153] SCHMOLKE/UTICAL, Whistleblowing: Incentives and Situational determinants, June 2018, available at < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3198104 (last checked 15 February 2021) >.
[154] In greater detail, above, III 1 a on the USA.
[155] On the case law of the European Court of Human Rights GROß/PLATZER, NZA 2017, 1097 at 1098 et seq.; recently European Court of Human Rights, II. Section, Judgment of 27 February 2018, 1085/10, Guja/Moldau Nr. 2, NJW 2019, 1273: Going public only as last resort.
[156] SCHMOLKE, ZGR 2019, 876 at 892 following CALABRESI, The Costs of Accidents, New Haven 1970, p. 26 et seq.
[157] Z.B. DYCK/MORSE/ZINGALES, Who Blows the Whistle on Corporate Fraud, J. of Finance 65 (2010) 2213; TEICHMANN, Anti-Bribery Incentives, Journal of Financial Crime 2018, 1105; TEICHMANN/FALKER, ZCG 2019, 245 at 247 et seq. (expert interviews). Overview by WILLENBACHER, Whistleblowing – Empirische Untersuchungen, in von Kaenel, ed., Whistleblowing – Multidisziplinäre Aspekte, Bern 2012, p. 27 et seq.
[158] CASPER, Liber Amicorum Winter 2011, pp. 77 at 88; FLEISCHER/SCHMOLKE, NZG 2012, 361 at 365; also EIDEM, WM 2012, 1013 at 1016 et seq.; WILLENBACHER (n. 158), pp. 27, 43, 45; MARSCH-BARNER, ZHR 181 (2017) 847 at 851 et seq.
[159] HUGGER, ZHR 179 (2015) 214 at 222; HECKENBERGER in Moosmayer/Hartwig (n. 1), M comments 13 et seq., 15, p. 170 et seq., comment 81 p. 182. Also DAV, NZG 2019, 1138 at 1144: leniency applications and MAR.
[160] FLEISCHER/SCHMOLKE, NZG 2012, 361, 365 with further references; PFEIFLE, Finanzielle Anreize für Whistleblower im Kapitalmarktrecht, 2016. Criticism by ANDREADAKIS (n. 146), (2019) EBLR 859 at 867 et seq., 878.
[161] MAUME/HAFFKE, ZIP 2016, 199 at 200, according to their own study approximately 70% of the questioned firms.

[162] MAUME/HAFFKE, ZIP 2016, 199 at 200/201. E.g. Volkswagen, available at < https://www.volkswagenag.com/de/group/compliance-and-risk-management/whistleblowersystem.html (last checked 15 February 2021) >; New reporting system as of 1 January 2017 as a result of the consent decree, THOMPSON, Erster Jahresbericht des Independent Compliance Auditor für die VW Defendants, 17.8.2018, p. 26. 2. Jahresbericht < https://www.vwcourtsettlement.com/wp-content/uploads/2019/09/Independent-Compliance-Auditor-Report-August-2019-English.pdf (last checked 15 February 2021) >.

[163] BUCHERT IN Hauschka/Moosmayer/Lösler (n. 1), § 42 comments 70 et seq.

[164] See also THOMPSON (n. 162), p. 26 et seq., Annex page g.

[165] Cleary Gottlieb, Cleary Enforcement Watch, 7.8.2019, available at < https://www.clearyenforcementwatch.com/2019/08/five-building-blocks-for-effective ... (last checked 15 February 2021) >.

[166] 15 U.S.C. § 78j-1(m)(4).

[167] WERNER (member of the board with particular responsibility for legal affairs at VW) und THOMPSON (monitor at VW), Spiegel-Interview, 23.3.2019, p. 68, from an earlier 80 to 90 notifications per year in the meantime up to 1100 notifications; WERNER, Handelsblatt 23.-25.8.2019, No. 162, pp. 16/17: meanwhile 80% of the notifications with source, earlier 15%.

[168] BARKOW/BAROFSKY/PERRELLI, eds., The Guide to Monitorships, Global Investigation Review, 2nd ed. 2020; LISSACK/LESLIE/MORVILLO/MCGRATH/FERGUSON in Seddon et al. (n. 1), ch. 32, p. 574; O'HARE, The Use of the Corporate Monitor in SEC Enforcement Actions, 1 Brook. J. Corp. Fin. & Com. L. 89 (2006); WARIN/DIAMANT/ROOT (n. 63), 13 U. Pa. J. Bus. 321 (2011); HITZER in Goette/Arnold, Handbuch des Aufsichtsrechts, 2020, § 4 H. Externes Monitorship; HITZER ZGR 2020, 406 at 407 et seq.; BAUMS/VON BUTTLAR ZHR 184 (2020) 259 at 261 et seq.

[169] Below, IV 1 b.

[170] GARRETT (n. 64), p. 176. The SEC began with this as early as 1978, LISSACK ET AL. (n. 168), ch. 32.2.1.

[171] ROOT (n. 68), 100 Va. L. Rev. 523 (2014) at 524. In comparison to the period of 2013 to 2017, the number of monitorships agreed to with the Department of Justice has risen to roughly 30% (50 out of 138 settlements), HITZER, ZGR 2020, 406.

[172] FRANK, SEC-Imposed Monitors, in: Stuart, SEC Compliance and Enforcement Answer Book, 2017 Edition, Q 9.3; O'HARE (n. 168).

[173] GARRETT (n. 64), p. 176 et seq.; practical experiences with FCPA Compliance Monitorship also in SCHWARZ, CCZ 2011, 59.

[174] GARRETT (n. 64), p. 178, reporting on over 2,000 cases of plea agreements with the Environment and Natural Resources Division between 2001 and 2012, in which at least 110 cases involved a monitor or special master reporting to the court.

[175] Figures in GARRETT (n. 64), p. 175. For a report on US monitors in Switzerland, ZULAUF/STUDER, GesKR 3/2018, 301 at 308 et seq. Also REYHN, CCZ 2011, 48.

[176] HITZER, ZGR 2020, 406 at 409; ZULAUF/STUDER, GesKR 3/2018, 301 at 307 et seq.

[177] U.S. Sentencing Guidelines (U.S.S.G.), ch. 8, Sentencing of Organizations, available at < https://www.ussc.gov/guidelines/2018-guidelines-manual/2018-chapter-8#NaN (last checked 15 February 2021) >.

[178] U.S. Department of Justice, Criminal Division, Memorandum on the Selection of Monitors in Criminal Division Matters, 11.10.2018, Assistant Attorney General Brian Benczkowski, available at < https://www.justice.gov/criminal-fraud/file/1100366/download (last checked 15 February 2021) >, earlier version known as the Morford Memorandum, 7 March 2008. See also HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE AND FINANCIAL REGULATION, The DOJ's New Corporate Monitor Policy, 5.11.2018; also GIBSON DUNN (n. 107) at 5 et seq.

[179] E.g. SEC, Federal Trade Commission, Commodities Future Trading Commission, and States attorneys general and regulators, e.g. New York State Department of Financial Services, FRANK (n. 172), Q 9.2; for Volkswagen the US Environmental Protection Agency (EPA); see also ANELLO, Rethinking Corporate Monitors: DOJ Tells companies To Mind Their Own Business, 15.10.2018, available at < https://www.forbes.com/sites/insider/2018/10/15/rethinking-corporate-monitors-doj-

tells-companies ... (last checked 15 February 2021) >. References to US best practice in AMERICAN BAR ASSOCIATION, ABA Standards for Criminal Justice Monitors and Monitoring, 2020.

[180] For the example of VW (n. 62); WALTENBERG, CCZ 2017, 146.

[181] See the numerous cases in SCHWARZ, CCZ 2011, 59 at 61 n. 11.

[182] ANELLO (n. 179), at 3.

[183] HITZER, ZGR 2020, 406 at 410; for the example of VW (n. 62), section 27; HARVARD LAW SCHOOL FORUM (n. 178) at 4.

[184] Morford Memorandum (n. 178), III A 2: "A monitor is an independent third-party, not an employee or agent of the corporation or of the Government"; differently, ROOT (n. 68), 100 Va. L. Rev. 523 (2014) at 528, 531: enforcement agent of the government.

[185] See also HUGGER in the discussion found in, ZHR 179 (2015) 267, 271. In the USA it is partly assumed that they have fiduciary duties, KHANNA/DICKINSON (n. 68) at 1733 et seq. Most of the time, however, the monitor's duties, in particular any fiduciary duties, towards the company are generally rejected and, above all, a comprehensive disclaimer of liability is agreed in the mandate agreement, which is regularly subject to US law; HITZER, ZGR 2020, 406 at 412; list of the extensive competencies granted to the monitor, generally not on a voluntary basis, IDEM at 412 et seq.

[186] FRANK (n. 172), Q 9.6; on the threat posed by a privileged monitor-client relationship, ROOT (n. 68), 100 Va. L. Rev. 523 (2014) at 573 et seq.

[187] HITZER ZGR 2020, 406 at 414.

[188] ROOT (n. 68), 100 Va. L. Rev. 523 (2014) at 580. According to GARRETT (n. 64), p. 180, the reported costs for Siemens were $ 950 Mio. and $ 500 Mio. for Daimler. According to ANELLO (n. 179), at 3, a "cottage industry of lawyers" with costs of more than $ 30 Mio., in one case more than $ 130 Mio.

[189] KHANNA/DICKINSON, The Corporate Monitor: The New Corporate Czar? (n. 68). Previously there was in a full-time position a so-called "monitor czar", ANELLO (n. 179), at 3. Opposing this and viewing it positively DIAMANTIS, in Barkow/Barofsky/Perrelli (n. 168), p. 79. Illustrative of the possible course of a US monitorship, HITZER, ZGR 2020, 406 at 412 et seq., with generally three phases: initial review, follow-up review and certification.

[190] On a SEC monitor retention agreement, FRANK (n. 172), Q 9.7, monitor's obligations, 9.8, relying on company's work, 9.8.3, re-investigating, 9.8.4, new misconduct found, Q 9.8.5. See also SCHWARZ, CCZ 2011, 59 at 61 et seq.: initial review, initial report, certification.

[191] HARVARD LAW SCHOOL FORUM (n. 178) at 2 et seq.; see also ANELLO (n. 191), at 3. On self-monitoring, FRANK (n. 172), Q 9.3.1, 9.3.3 for the SEC; see also SCHWARZ, CCZ 2011, 59 at 60, with examples n. 6.

[192] On France, Loi Sapin II (n. 83), see also BOURSIER (n. 83), no. 19 et s. on "peine complémentaire de mise en conformité" (based on the model of American monitoring); BRIGANT (n. 83), p. 6, 7. On the challenges of installing a foreign monitor in France because of restrictive provisions on the disclosure of sensitive information to foreign authorities, SCHWARZ, CCZ 2011, 59 at et seq., with references on settlements (Technip S.A. und Alcatel-Lucent S.A.), owing to which a French monitor could be used in any case.

[193] Serious Fraud Office, Deferred Prosecution Agreements Code of Practice, 2014, available at < https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/deferred-prosecution-agreements (last checked 15 February 2021) >. Extensively on the possible contents of a DPA from the Code of Practice 7. Terms, Monitors 7.11-22. The company suggests three people with appropriate qualifications and no conflicts of interest. The prosecutor is usually supposed to take the person the company wants in the first place, Terms 7.15-7.17. The monitor program is specific to the respective company and can include a code of conduct, a training program, procedures for internal company reports (Whistleblowing), internal management and exam procedures and much more, Terms 7.21 i-xviii. On Great Britain, LISSACK ET AL. (n. 168), ch. 32.2.2 at p. 579 et seq.; SEDDON/STOTT/IVANOVS in Barkow/Barofsky/Perrelli (n. 168), p. 125; auch BAUMS/VON BUTTLAR, ZHR 184 (2020) 259 at 269 et seq.

[194] IDEM, News Releases: Standard Bank, 2015; Sarclad Ltd, 2016; Rolls-Royce, 2017; Tesco, 2017; Serco Geografix Ltd., 2019; Güralp Systems Ltd., 2019.

[195] FRANK (n. 172), Q 9.3.3 on Rolls-Royce in the UK.

[196] Serious Fraud Office v. Serco Geografix Limited, In the Crown Court at Southwark, In the matter of s.45 of the Crime and Courts Act 2013, Case No: U20190413, Judgment, 04/07/2019, section 24; at the end 50% discount, section 39. This was the first DPA with a parent corporation, section 42.
[197] IDEM at section 47.
[198] Serious Fraud Office, Rolls-Royce PLC, Deferred Prosecution Agreement, 17 Jan. 2017: "The DPA enables Rolls-Royce to account to a UK court for criminal conduct spanning three decades in seven jurisdictions and involving three business sectors." Result: Payments of 497,252,645 £ (including a 258,170,000 £ transfer of profits and a 239,082,645 £ penalty).
[199] For example, the British financial regulator.
[200] Generally on monitorships in Switzerland, NADELHOFER/BÜHR in Barkow/Barofsky/Perrelli (n. 168), p. 118: ZULAUF/WYSS (n. 97), p. 146 et seq.; also ZULAUF/STUDER, GesKR 3/2018, 301 at 318 et seq.
[201] Article 45c of the Banking Act. See also HOPT, ZGR 2020, 373 at 384 et seq.
[202] GEISER in: Emmenegger (n. 97), pp. 165 at 170 et seq. Opposing a more general introduction of a postponed indictment (and thus also a monitor), the Swiss Federal Council, Botschaft zur Änderung der Strafprozessordnung, 28 August 2019, BBl. 2019, 19.048, available at < https://www.admin.ch/opc/de/federal-gazette/2019/6697.pdf, p. 6722 et seq. (last checked 15 February 2021) >.
[203] ZULAUF/STUDER, GesKR 3/2018, 301 at 316. See above IV 1 a on external monitoring in the USA.
[204] ZULAUF/STUDER, GesKR 3/2018, 301 at 305 et seq.
[205] New York State Department of Financial Services (DFS), Consent Order in the matter of Credit Suisse, 18.5.2014, Press Release May 19, 2014, available at < https://www.dfs.ny.gov/reports_and_publications/press_releases/pr1405191 (last checked 15 February 2021) >.
[206] "The DFS Order also requires the installation of an independent monitor of DFS's choosing inside Credit Suisse. The independent monitor will further review the involvement of individual employees in the misconduct, including officers, directors, and other employees; the elements of the Bank's corporate governance that contributed to its wrongdoing; the timeliness and effectiveness of the Bank's efforts to correct the misconduct; and other issues. The monitor will also recommend additional remedial measures based on the findings of that review. DFS intends to install an aggressive and fair monitor who will report directly to DFS in order to further address the deficiencies at the Bank that contributed to this misconduct." Press release n. 217.
[207] This is independent of the $ 715 Mio. fine. Press release n. 217. The monitor and his employees worked at roughly 100 internally provided workstations and, according to media reports, received eight to ten million dollars a month. See ZULAUF/STUDER, GesKR 3/2018, 301 at 306. Hourly fees of $ 1,000 are not uncommon for US monitors, HITZER, ZGR 2020, 406 at 414 n. 49.
[208] On the economic justifications for external monitors, see e.g. ROOT (n. 68), 110 Va. L. Rev. 523 (2014) at 525 et seq., on corporate compliance monitors at 531 et seq.; on court-ordered monitors, IDEM at 531 note 31.
[209] This holds true also for GARRETT (n. 64), p. 172 et seq., though the author does present long-term observations, case compilations and statistics, IDEM, Appendix p. 291 et seq. See also ZULAUF/STUDER, GesKR 3/2018, 301 at 320; ROOT MARTINEZ, Third Party and Appointed Monitorships (2020), available at < https://ssrn.com/abstract=3585725 (last checked 15 February 2021) >, p. 19: "Ripe for Empirical Study", "The most important question surrounding monitorships – are they effective – remains unanswered."
[210] GARRETT (n. 64), p. 176.
[211] E.g. Volkswagen AG Consent Decree (n. 62), First and second annual reports (n. 162).
[212] Critical and offering reform proposals, GARRETT (n. 64), p. 274 et seq., but with the conclusion: "Too big to jail".
[213] For a listing of problems and reform proposals, see KHANNA (n. 68), pp. 229, 236 et seq., 255 et seq.
[214] For a survey of cases and an assessment, see ZULAUF/STUDER, GesKR 3/2018, 301 at 304 et seq.; EPSTEIN, Deferred Prosecution Agreements on Trial, Lessons from the Law of Unconstitutional

Conditions, in: Barkow/Barkow (n. 68), p. 38, with examples p. 48 et seq., 52 et seq. on US monitors in German companies, e.g. Siemens, Daimler, Bilfinger, Volkswagen, WALTENBERG, CCZ 2017, 146.
[215] See for instance the annual report of the Volkswagen monitor, THOMPSON (n. 162), p. 9 et seq.
[216] On the costs, see above, IV 1 a at n. 188 and IV 1 b at n. 207; GARRETT (n. 64), p. 10: $ 800 Mio. for a New York law firm investigation (figures as reported in the media); MENZEL, Volkswagen und die US-Justiz, Millionen für den Monitor, Handelsblatt, 2 September 2019, No. 168 p. 15: the costs to the parent company were 30 billlion Euro, the costs just for the monitor amounted to a three digit figure: Handelsblatt, 27 May 2020, No. 101 p. 17. Hourly fees of $ 1,000 have been accepted by courts in the USA, LISSACK ET AL. (n. 168), ch. 32.6 at p. 600. Also KAISER, Wie deutsche Konzerne mit US-Aufpassern klarkommen, Manager Magazin, 11.1.2017: Freeh, formerly head of the FBI, monitor at Daimler with staff of twenty; costs of up to 25 Mio. Euro annually. This is apart of the monetary fine imposed on Volkswagen, extending into the billions.
[217] Statements from Siemens according to GARRETT (n. 64), p. 194: "role model"; p. 195: "[has] apparently been good for its business". See also HARTWIG in Moosmayer/Hartwig (n. 1, both editors are affiliated with the Siemens Corporation), O comments 1 et seq., p. 201 et seq. good data, comments 22 et seq., p. 207 et seq.
[218] GARRETT (n. 64), p. 194 et seq.
[219] "Golden standard" achieved, according to WALTENBERG, CCZ 2017, 146 at 152.
[220] ZULAUF/STUDER, GesKR 3/2018, 301 at 320: a positive effect is plausible according to the authors estimation and experience.
[221] Examples for the formulation of monitor mandates: VW (n. 62), section 27: Independent Compliance Auditor; US v. Daimler AG, Deferred Prosecution Agreement, U.S. District Court for the District of Columbia, March 22, 2010, attachment D Independent Corporate Monitor, available at < https://www.gibsondunn.com/wp-content/uploads/documents/publications/daimler.pdf (last checked 15 February 2021) >. Further references in WALTENBERG, CCZ 2017, 146 at 147 et seq.
[222] The agreements with the US authorities allow companies to submit a proposal list, e.g. VW (n. 62), section 27a: Recommendation of Candidates for the Independent Compliance. Ultimately, however, the US authority usually prevails in installing US monitors; see also KHANNA/DICKINSON (n. 68) at 1723: "the agency, in effect, chooses the monitor, even though it is the firm that pays for the monitor's services".
[223] If possible, using fixed budgets for individual periods or work packages. But the monitor's usage period is often extended.
[224] WALTENBERG, CCZ 2017, 146 at 155 recommends having as unrestricted and as trusting a cooperation with the monitor as possible.
[225] KHANNA (n. 68), p. 256. In addition, German companies have had very negative experiences with US monitors.
[226] HARTWIG in Moosmayer/Hartwig (n. 1), O comments 22 et seq., p. 207 et seq.

about ECGI

The European Corporate Governance Institute has been established to improve *corporate governance through fostering independent scientific research and related activities.*

The ECGI will produce and disseminate high quality research while remaining close to the concerns and interests of corporate, financial and public policy makers. It will draw on the expertise of scholars from numerous countries and bring together a critical mass of expertise and interest to bear on this important subject.

The views expressed in this working paper are those of the authors, not those of the ECGI or its members.

ECGI Working Paper Series in Law

https://ecgi.global/content/working-papers

Electronic Access to the Working Paper Series

The full set of ECGI working papers can be accessed through the Institute's Web-site (https://ecgi.global/content/working-papers) or SSRN:

Finance Paper Series	http://www.ssrn.com/link/ECGI-Fin.html
Law Paper Series	http://www.ssrn.com/link/ECGI-Law.html