

# External counsel investigations

*- when an in-depth investigation is needed*



INSIGHT

# Are there suspicions of irregularities, unacceptable conduct or unlawful activities at your workplace?

An external counsel investigation (in Danish, "advokatundersøgelse") may be the needed remedy to ensure to get all facts straight and to react the right way. Conducting an external counsel investigation may be useful in sorting out a concrete course of events, which will help ensure, that all relevant legal issues are identified and properly assessed. This edition of Insight explains what the gains, the necessary considerations and the typical progression of an external counsel investigation are.

## Why conduct an external counsel investigation?

Suspicious or problematic conduct by employees at different levels or irregularities, errors or negligence in specific processes may cause supervisory authorities, politicians, or the media to level criticism at the organisation in which this conduct occurred. An appropriate way to tackle such potential criticism may be to have an external lawyer conduct an in-depth investigation into the matter.

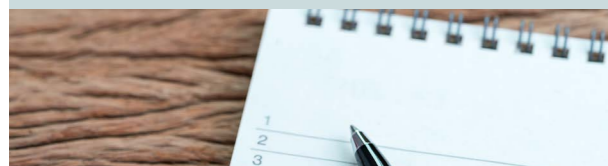
The upside of having external lawyers look into the matter is that the investigation will be conducted by an expert

with the necessary professional skills. In addition, the external lawyer will be able to conduct the investigation on a more neutral basis than if it were performed by the employees of the organisation itself. Also, persons who might have pertinent and relevant information to divulge will often be more comfortable volunteering that information to a lawyer than to have to disclose it to someone who is a colleague of theirs. Besides, the need for an external counsel investigation will often arise in cases involving managerial staff.

Having the counsel investigation conducted by a lawyer highly specialised within the relevant field will enhance the validity of the result of the investigation. Validity is crucial if an organisation wants to regain the trust that it has lost or risks losing in the eyes of its employees, its customers, or the general public as a result of any potentially criticisable circumstances. Also, validity is essential if an organisation wants to ensure a basis for decision which is useful for the organisation when deciding on the further process for the matter concerned.

## What are the benefits of an external counsel investigation?

- The organisation will be ensured action and handling of the matter.
- The organisation will have an opportunity to make arrangements to prevent anything like it from happening again, or to make sure that if it does happen again, it will be handled correctly.
- The organisation will be able to regain whatever trust may have been lost or weakened in the eyes of employees, customers or the general public.



## Why will the retaining of an external lawyer to conduct the investigation ensure the validity of the result?

- The investigation will be performed with the necessary professional expertise.
- The investigation will be performed on a more autonomous and objective basis and in a manner ensuring a certain distancing to the organisation being investigated.
- Individuals will feel safer and more comfortable volunteering information. A safe environment is more conducive to people coming forward to disclose what they know.



## External counsel investigations as an instrument

In any organisation, circumstances or incidents may arise, the internal handling of which will necessitate an in-depth investigation and a clarification of the facts and of the relevant legal rules.

An external counsel investigation is an instrument for investigating and establishing the concrete course of events. With the course of events established, the lawyer can identify and assess legal aspects and present recommendations for the proper handling of them from a legal perspective. The findings and conclusion of the external counsel investigation is by no means a judicial decision; rather, it sets out the lawyer's legal assessment of the matter. The conclusion given therefore does not have the legal effect of a decision rendered by a court of law. The external counsel investigation only serves to form part of the organisation's basis for deciding if any further internal handling of the matter is to take place and what the course of action should be. If any disciplinary action is taken against an employee because of the findings of the investigation, they will therefore be entitled to object and/or bring proceedings in the same way as if the external counsel investigation had not been conducted. Often, however, the employee will be disinclined to do so, precisely because the sanction against them was preceded by an in-depth external counsel investigation.

An external counsel investigation may be used in clarifying whether a given set of established facts is cause for the organisation to seek to hold one or more individuals liable for what has occurred. It can also help clarify whether the organisation should proceed to take any additional procedural steps to get to the bottom of the matter and to be able to hold anyone liable. The purpose of an external counsel investigation does not necessarily need to be to clarify if anyone can be held liable for a given matter or incident. It might be that the organisation merely wishes to receive recommendations as to how, for example, a specific procedure or practice can be changed so as to avoid errors and missteps in the future.

Overall, an external counsel investigation can:

- Uncover lengthy or complex chains of events based on the collection and evidential assessment of information gathered.
- Clarify whether any given set of facts gives cause for legal concerns, including elaboration and recommendation for resolution of any such concerns.

In both cases, the external counsel investigation will provide a basis for deciding on the further handling of the matter or incidents.



## Independent external counsel investigation

In some situations, an organisation may need to have the external counsel investigation performed with a certain 'arm's length' between the organisation and the lawyer conducting the external counsel investigation, and to have the arm's-length nature of the investigation be known to the public. In those cases, the organisation may ask one or more lawyers to conduct an 'independent' external counsel investigation (in Danish; uvidlig advokatundersøgelse). An independent external counsel investigation must meet several conditions. The conditions are meant to ensure, among other things, that the proper arm's-length relationship between the client and the lawyer, as implied by the designation 'independent', exists. To that end, it is a condition that the lawyer does not have a regular client relationship with the client and does not otherwise currently represent or work for the client. Furthermore, the lawyer may not accept assignments for the client that are related to the independent external counsel investigation, neither during nor after completion of the independent external counsel investigation.

The downside of conducting an independent external counsel investigation is that it is a costly affair because the commissioning party will be precluded from using the law firm that conducted the independent external counsel investigation in any subsequent process. As an example, the commissioning party may need further legal assistance if an employee were to dispute the conclusion of the investigation and bring proceedings. In that case, the lawyer who is already intimately knowledgeable about the case will be precluded from assisting.

## Procedural framework

Danish law does not provide a specific definition of an external counsel investigation. In practice, the nature of an external counsel investigation varies, including in terms of purpose, subject, type, and process. However, a common feature of all such investigations is that one or more lawyers are asked to investigate and determine a series of incidents and to collect the information necessary for this purpose.

Another common characteristic is that external counsel investigations are initiated based on a written mandate, typically drawn up by the lawyer and the commissioning party together, and that the investigations result in a written report to the commissioning party. The mandate is the formal assignment from the client requesting the external counsel investigation and specifies the purpose and scope of the external counsel investigation. Together with the code of conduct for lawyers and the other applicable rules, the mandate describes the investigation process.

In most cases, the mandate will set a deadline for completion of the external counsel investigation. Setting a deadline is an important part of the client's preparations for an external counsel investigation. Initially, the client should – in cooperation with the lawyer – consider whether the report is to be completed within a certain period and, if so, set the date of completion and decide whether it should be possible to postpone that deadline.

For those considerations, the client should note that the persons who have contributed to the external counsel investigation or who feel affected by it will often perceive the period as stressful. This may give rise to the view that the investigation period should be as short as possible. However, the external counsel investigation should be based on an in-depth review and analysis of all relevant information.

The lawyer should therefore be allowed sufficient time to identify all persons who may contribute to the external counsel investigation and to ensure that they are subsequently given access to contribute. If the persons identified wish to contribute to the external counsel investigation, it is important that the lawyer – to ensure a fair process for the participants – is allowed sufficient time to correspond with them and to coordinate their contributions.

As an example, they must be informed about any consequences of participating in the external counsel investigation. Coordinating an interview will also involve a substantial amount of practical work, as the interviewee's job situation, holiday absence or need for a companion must be taken into account. Where interviews are conducted, the interviewees should be given sufficient time to prepare for the interview and to read and approve the minutes, if any.

### Considerations when conducting an external counsel investigation

An external counsel investigation may be justified by one or more incidents that have taken place in the organisation. The extent and the scope of the external counsel investigation will depend on the number of incidents and their nature.

- In some situations, the nature of the incidents may make it necessary to conduct the external counsel investigation in strict confidentiality. In other situations, the nature of the incidents may justify a more transparent investigation with public access to information about its background, purpose, and conclusion.
- In some cases, the nature of the incidents may require the establishment of a reporting system making it possible to report allegations anonymously. In other cases, the investigation can be based on written information alone.
- In an external counsel investigation, anonymous reporting should always be considered. The possibility of participating anonymously in an investigation will often – depending on the nature of the incidents – increase the likelihood of receiving input from persons who possess valuable information. Conversely, it will be taken into account in the assessment of the evidence that the information has been provided anonymously.

### Collection of information

Depending on the mandate, an external counsel investigation will typically involve collection, organisation, and assessment of a vast amount of information. On that basis, the lawyer will establish the facts of the case, which will then be analysed and assessed in a legal context, and identify one or more legal issues, typically of a highly complex nature, including their legal consequences.

How the specific collection of information takes place will depend on the mandate. The mandate will specify the questions to be answered. Further, the mandate will state if the questions are to be investigated and answered only based on written and digital material, or if information received via a reporting system or from oral interviews should also be included in the external counsel investigation.

### Collection of written and digital material

Before initiating an external counsel investigation, the lawyer will usually collect all relevant written and digital material from the client and other relevant authorities. The lawyer will go through and organise the material like the other information collected.

### Establishment of reporting system

If a reporting system is to be established for the purpose of the external counsel investigation, the system design and settings should be carefully considered. It is crucial for the outcome of the investigation that the information received through the system is relevant and valuable to the questions to be answered. To ensure that the persons who may contribute relevant knowledge use the system, it should further be considered how they are made aware of the system, including whether anonymous reporting should be possible.

### Interviews

Often, it will be helpful to interview individuals who may contribute relevant knowledge to the external counsel investigation. The lawyer will engage in a dialogue with the relevant persons with a view to planning the interview and providing information about the process and their rights as participants in the investigation. Minutes will typically be taken of the interviews for subsequent use in the investigation. The lawyer will be in charge of the subsequent correspondence for the purpose of obtaining the interviewee's approval of the minutes.

### Consultation of relevant persons

When the lawyer has reviewed the information received, the lawyer will – where the information involves accusations against specific persons – in some situations, have to contact the relevant persons and inquire into the accusations. In these cases, the lawyer's work will also include correspondence with the relevant persons, planning and participation in the interview, and minutes-taking.

### Preparation of the report

The lawyer will draw up the report, when the necessary information has been collected and analysed and the legal issues have been identified, including the possible legal consequences. How and when the findings are to be presented to the client will be described in the mandate. It will also be stated in the mandate if the conclusion or part of the conclusion is to be made available to the public. Further, the lawyer will, together with client, decide if specific persons are to be notified of the completion of the external counsel investigation and the findings before preparation and (if applicable) publication of the report.

### Identification of and handling GDPR issues

An external counsel investigation is almost bound to involve privacy issues as a result of the processing of personal data that generally takes place in connection with the collection of information for the investigation. Before collecting the material and throughout the investigation, both the lawyer and the client should prepare for meeting their obligations as data controllers under the GDPR rules and principles. This work may – depending on the extent and circumstances of the case – prove substantial and complicated.

### Typical case flow

An external counsel investigation involves several procedural elements. Overall, the process will in most cases include the following:

- Drafting of the mandate
- Compliance with GDPR regulation
- Establishment of a reporting system
- Collection, organisation and description of information
  - Review of written and digital material
  - Receipt and review of reports
  - Participation in interviews and minutes-taking
  - Hearing of relevant people
- Assessment of evidence
- Analysis and assessment of facts in a legal context
  - Identification of legal issues
  - Analysis of legal consequences
- Preparation of report
- Presentation of findings
- Information to relevant persons about completion of the investigation and the conclusion
- Publication

### Kromann Reumert's experience with external counsel investigations

At Kromann Reumert, we offer general assistance in conducting external counsel investigations and other internal investigations. We have the expertise and capacity to ensure an efficient process, protecting both the legal rights and right to confidentiality of those involved. Over the years, we have gained extensive experience in conducting external counsel investigations in the fields of employment law, public law, financial crime, competition law, and other areas. We have assisted both public and private entities, including ministries, municipalities, trade unions, housing associations, and clients in most industries. We have i.a. investigated allegations of harassment, breach of official duties, financial irregularities, and administrative errors and omissions in a case processing context.

Our experience enables us to balance the various interests that need to be taken into consideration in connection with the investigations. External counsel investigations have – i.a. because of the many interests involved – been the subject of much public debate, and on 1 September 2022 the Council of the Danish Bar and Law Society incorporated specific rules on such investigations in its Code of Conduct. On 5 September 2022, the Society also issued a guide for lawyers providing a new ethical framework for independent external counsel investigations. The guide offers best practice guidance in relation to independent counsel investigations. We monitor the rules and best practices in the area closely to ensure that the investigation is conducted properly from a due process perspective and according to high professional standards.

### Our competencies include:

- Advice before the decision to initiate an investigation
- Advice on the drafting of a mandate
- Advice on privacy and data protection issues
- Collection, review and organisation of large amounts of information with a view to a legal assessment, including:
- Establishment and management of a reporting system or other customised IT tools, including data security management
- Review and organisation of written and digital material as well as reports and other data
- Correspondence with individuals who may contribute information, preparations for and participation in oral interviews, and minutes-taking.
- Analysis and legal assessment of reported incidents in lengthy and complex cases
- Reparation of reports, etc.

As part of our services, we often cooperate with authorities, auditors and other professionals who may provide relevant input in the investigation.

### Want to learn more?

If you have any questions, or if you would like to talk to one of our specialists, please feel free to reach out. We look forward to hearing from you.



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## KROMANN REUMERT

We are here to serve our clients. We are proactive, ambitious in the pursuit of our clients' interests and proud to offer advice that makes a genuine difference. We can do that because we invest in understanding our clients' businesses and needs. Our advice is customer-oriented and innovative – always building on attentiveness and credibility.

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