

K&L GATES

K&L Gates and ACC Europe Webinar

# Handling Harassment Investigations in the EU

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# Speakers



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## Case Study

You are an in-house lawyer based in the UK working for a global software business. You receive a complaint of sexual harassment via the company's ethics hotline. The complaint has been raised by an employee based in Italy, against a senior executive based in Germany, relating to incidents which are alleged to have taken place at a Sales Kick Off event in France. The incident refers to witnesses who are based throughout Europe.

You report to the GC in the US, who wants to be kept informed of progress given the seniority of the accused.

# First Steps

- Who should investigate?
  - Consider independence and privilege
  - If you investigate, who decides on sanction (if any)?
- Litigation hold?
- Who needs to know?
  - Internal – circle of trust?
  - External
    - Does this need to be reported to a works council?  
Governmental authorities? Police? Insurers? If so, when?
- First contact with the complainant
  - Making support available
  - Acknowledge complaint and provide assurance of response
  - Confidentiality?
  - Timescale?

# Dealing With the Complainant

- What protections apply to the complainant under local (Italian) law?
  - Any formalities around interviews e.g. right to representation?
- What promises/guarantees can you make regarding retaliation?
- How do you proceed if the employee is on sick leave?
- Other measures of support for the complainant: the role of the Italian Anti-Corruption Authority

<https://www.anticorruzione.it/-/whistleblowing>

# Dealing With Witnesses

- What protection applies to witnesses?
- Can a witness be assisted?
- Can a witness refuse to co-operate?
  - Disciplinary issue?
- How do you handle anonymity requests – can you guarantee it?
- Are they entitled to see the full complaint?

## Dealing With Witnesses (cont.)

- Are there any formalities surrounding meetings with witnesses?
- Is a witness statement required or are notes sufficient?
- Do they have to sign a witness statement for their evidence to be “valid”?
- Can you ask them to hand over electronic evidence – emails, texts, WhatsApps, Slack/Teams messages? Expectation of privacy?
- “Other similar incidents” that come to light – include within your investigation or handle separately?

# Dealing With the Accused

- What protections does the accused have under local (German) law?
- What warnings can you provide regarding retaliation?
- Are they entitled to see the full complaint?
- Are there any formalities surrounding meetings with the accused?
- Are they entitled to see your notes of the meetings with them?
- Do they have to sign a witness statement for their evidence to be “valid”?
- Can you ask them to hand over electronic evidence – emails, texts, WhatsApps, Slack/Teams messages? Expectation of privacy?
- Are they entitled to periodic updates on progress?



# Preparing the Investigation Report

- What format should it take?
  - Consider purpose and therefore need to comply with local law
- Who is going to see it?
- Who would like to see it and can they do so?
  - Complainant?
  - Accused?
  - GC?
- Will the report be privileged? Should it be?

# Concluding the Investigation

- What can/should the complainant or accused be told regarding outcome?
- How will the report be handled/stored – GDPR issues?

## Law Reference: Italy

- Articles 32, 37 and 41 of the Italian Constitution
- Section 2049 of the Italian Civil Code
- Judgement no. 4099/2020 of the Italian Supreme Court
- Legislative Decree no. 81/2008
- Legislative Decree no. 24/2003 (“Whistleblowing Decree”)
- Section 660 of the Italian Criminal Code

## Law Reference: Germany

- Sect. 8 para. 1 no. 2 of the German Whistleblower Protection Act (confidentiality for accused)
- Sect. 9 para. 4 of the German Whistleblower Protection Act (exceptions on confidentiality for accused)
- Sect. 38 of the German Whistleblower Protection Act (damages after wrongful accusation)
- Sect. 84 of the German Works Constitution Act (complaint and support rights with the works council)
- German Federal Employment Court, case reference 2 AZR 961/06 (obligation to hear the accused)
- EU General Data Protection Regulation

## Law Reference: France

- Articles L. 4133-1 to L4133-4; D. 4133-1 to L. 4133-3; L 1132-1 to L. 1132-4 of the French labor code;
- Law No. 2022-401 of March 21, 2022 (transposing the European Directive on whistleblowers protection);
- Decree no. 2022-1284 of October 3, 2022 (procedures for collecting and processing whistleblower alerts);
- French Supreme Court, December 6, 2023, No. 22-14.062;
- French Supreme Court, April 19, 2023, No. 21-19.678;
- Law No. 20216-1691 of December 9, 2016 (on transparency, fight against corruption and the modernization of economic life);
- French data protection authority (“CNIL”) consultation No. 2023-064 of 6 July 2023.

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Questions?

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