

## Navigating the pitfalls of a cross-border internal investigation – a model case

**Bonasanta** Holding is a Dutch pharmaceutical multi-national company based in Rotterdam, distributing antibiotics all over in Europe. Their clients are mainly public hospitals. Its Spanish subsidiary, **Bonasantita S.A.**, has received on its helpdesk line the following anonymous whistleblower information from Serbia:

Do you want to know how the turnovers were reached in your branch office in Serbia? The European conferences organised by Ludmila in Belgrade were used to bribe doctors into awarding hospital contracts. The scientific part of these conferences was just a farce. Actually the doctors spent most of the time hunting in the Serbian woods, bringing home trophies rather than knowledge. MB knows all about it and is doing nothing.

Bonasantita is represented by **Adriana de Buerba**, who advises the management to immediately start an internal investigation (a compliance review called “project fox”) into the issue.

*Questions to Adriana:*

*What general aspects do you have to think about when carrying out internal investigations abroad?*

*In Spain, are there any reporting duties for companies in case they have reasons to suspect that a crime has been committed?*

*If an offence has been committed by a foreigner in a foreign country (like Serbia through Serbian nationals), does this entail any risk of criminal or regulatory prosecution in Spain for the company?*

Before starting the investigation, she connects to **Vladimir Hrle**, whom she knows via the ECBA’s ACE working group, and consults him for specific Serbian law questions. She closely cooperates with him throughout project fox.

*Questions to Vladimir:*

*Are foreign lawyers permitted to do private investigations in Serbia? If yes, under which conditions?*

*Is the outcome of the investigations (reports, interview notes) covered by legal privilege in Serbia?*

*We would like to offer the whistleblower some protection. What protection measures are available in Serbia?*

The outcome of the investigation is that the allegations were a bit exaggerated, but not all wrong. The Sales Manager of the Serbian Branch Office, **Ludmila Vancovic**, had indeed organized one conference in 2012. Out of the roughly 150 participants, a selected group of 10-15 participants were indeed invited to spend 2 out of the 3 days hunting in **Crni lug** (30 km west of Belgrade). Moreover, each of them received a hunting rifle (Marocchi Cal. 12), a suitcase, totalling a value of 126.295 din (about 1.020 EUR) and a lump sum of EUR 5.000 at the end

of the trip in cash. The invoices for the hunting trips and the equipment were signed off by the former Branch Manager in Serbia, the English citizen **Michael Buchanan**. Shortly after the whistleblower notice came up, Michael Buchanan left the company and went back to the UK, now working for the competitor in London.

Bonasantita S.A. decides, through their lawyers Adriana and Vladimir, to inform the **Serbian authorities** of the outcome of the investigations and offer close cooperation. Michael Buchanan receives a letter from the Serbian authorities notifying him about the investigations against him, and asks **Chris Whalley** for advice.

*Questions to Chris:*

*Does Michael risk criminal prosecution in the UK through the SFO? What about ne bis in idem?*

*If yes, would you advise your client to cooperate with the company in the internal investigation?*

*If the SFO is given access to the internal investigation report, can this be used as evidence in court?*

Project Fox has yet more repercussions. During the e-mail review of Ludmila's Vancovic's data, one mysterious e-mail of 2008 is retrieved from the delete folder, in which Ludmila writes to one of the accountant assistants, **Liese-Lotte Lustig**: *"Prof. Brinkmann called me last night urgently and asked for an advance payment to cover his extra expenses to be transferred to his London bank account. Please call me back so that we can figure out a solution. Please delete this e-mail after reading!!"*

Liese-Lotte is now back in Germany, from where she works for the German branch office of Bonasantita S.A. under a German employment contract. She receives a phone call from her boss informing her that she will be visited by Adriana's firm next week, to whom she should turn in her laptop for the purpose of an electronic data review in the context of a compliance review and be ready for an interview with Adriana's team. Liese-Lotte now seeks advice with her German lawyer, **Tobias Eggers** on the legal protections available against this review.

*Questions to Tobias:*

*Is your client obliged under German labour law to cooperate and turn in the laptop?*

*Are there particular safeguards under German and/or European data protection law against reviewing her data, based on the fact that her laptop is located in Germany?*

*Does Liese-Lotte have to fear any disciplinary consequences if she decides not to answer all questions put to her in the requested interview? Can she ask for assistance by her German lawyer during her interview?*

The compliance department of the Dutch mother company Bonasanta is closely following the investigations, especially because one of their board members happens to be also board member of the Spanish Bonasantita subsidiary. They engage **Jurjan Geertsma** to pursue eventual civil claims against the former employee.

*Questions to Jurjan:*

*What categories of claims can the Dutch mother company as injured party raise under Dutch civil law? (e.g. bribe payments, reputational loss, corporate sanctions, legal fees...)*

*Does a plea agreement in the criminal proceedings have any impact on the civil claims and damages (and vice-versa)?*

*Are there specific actions that ought to be taken in order to avoid civil claims from being statute-barred?*