

Internal investigations industry prepares for a shake-up in the Netherlands

Alice Johnson

04 July 2023



The Hague, the Netherlands (Credit: shutterstock/NAPA)

A recent ruling in the Netherlands says defence lawyers cannot provide independent internal investigations for their clients.

A disciplinary appeal court in the Hague [ruled on 2 June](#) that a lawyer cannot provide such services to clients whose interests they have previously represented or are going to represent on the same facts.

The decision arose from an appeal by a lawyer against two strong warnings issued against himself and another lawyer by a disciplinary board in Amsterdam in 2022 for allegedly misleading the Dutch financial markets regulator (AFM) about the independence of an internal investigation they conducted for a tax consultancy in 2014.

The complaint against the two lawyers was filed by the head of the Amsterdam Bar Association. The body accused the lawyers of breaking legal requirements of independent investigations by presenting an internal report to the AFM as if it were impartial, despite knowing they were advising the tax company on issues related to that report. The defendant had argued in his appeal that the board wrongly applied the principles that independent investigations must abide by and said that the final report was only ever intended for internal use and never published externally.

The appeal court ruled in June that for an internal investigation to qualify as independent it cannot be conducted by lawyers who are representing the company in related proceedings. The court also laid out certain requirements for an independent investigation, including that the client has no control over the content of the report and that the document is transparent about the scope of the investigation and the information chosen to be included.

“The Defendant created the appearance that it was an objective and impartial report when it was not,” the judge said. “Through his actions, he has damaged confidence in the legal profession and has therefore not acted as befits a proper lawyer,” they added.

Dutch lawyers welcomed the decision as it clears up long-standing confusion about the rules governing independent investigations.

“The ruling provides more clarity on what circumstances lawyers can conduct an internal investigation and when they can’t,” said Marianne Bloos at Houthoff in Amsterdam.

The judgment does restrict the ability of defence counsel to carry out internal investigations for their clients. Companies will be expected to hire a separate law firm for any lawyer-led internal probe to be qualified as independent, practitioners said.

Han Jahae at Jahae Raymakers in Amsterdam said the separation of the two roles may be a game changer for the internal investigations industry, where it is currently not uncommon for companies to use the same set of lawyers for the investigation and related defence.

“The whole internal investigation industry whereby the company's own lawyer claims to conduct an impartial investigation has come to an end by this ruling,” said Jahae. “Internal investigations are a huge money maker so this ruling will limit the possibility of them being done by defence counsel,” he added.

Lawyers also said that the ruling could encourage companies to steer away from lawyer-led internal investigations altogether to avoid any misunderstandings with the regulator. They said companies might prefer to hire forensic accountancy firms to carry out such work because of the strict objectivity and public interest requirements accountants have to meet when conducting internal probes.

Alice Johnson

Author | News reporter

Alice.Johnson@globalinvestigationsreview.com

Global Investigations Review

Copyright © Law Business Research Company Number: 03281866 VAT: GB 160 7529 10