

## Special investigations

Boards and audit committees periodically find it necessary to lead or oversee investigations of cyber breaches, alleged misconduct among executives, and other significant matters. Such investigations are often part of a broader crisis response, requiring speed and agility. The ultimate success of an investigation often depends on a range of factors, including what the company and board did to prepare in advance, how they assigned oversight responsibility, and who they worked with to conduct the investigation.

On November 15, 2019, members of the European Audit Committee Leadership Network (EACLN) met in Paris to discuss board oversight of special investigations.<sup>1</sup> They were joined by Luke Dembosky, partner and co-chair of cybersecurity and data privacy at the law firm Debevoise and Plimpton, and Brenton Steenkamp, managing partner of EY Forensic & Integrity Services for the Western Europe and Maghreb region. *For biographies of the guests, see Appendix 1, on page 9, and for a list of network members and other participants, see Appendix 2, on page 10.*

### Executive summary

Special investigations can be complex undertakings, presenting issues to resolve in each of their successive phases:

- **Positioning the company and the board ahead of time** (*page 2*)

The success or failure of an investigation, especially during a crisis, depends heavily on the work that management and the board have done before it begins. The risks that could lead to crises must be understood and remediated as much as possible, and boards should contribute their judgement and perspective on addressing these risks. Documenting the assessment and remediation efforts is also important.
- **The preliminary inquiry** (*page 3*)

If an investigation becomes necessary, the board should decide on the degree of its involvement. In some cases, that means active leadership, but in most cases the board oversees the efforts led by others. Boards should consider how to delegate leadership or oversight, either to the appropriate committee or the full board. While the company's own resources, such as internal audit, can be helpful, appointing the right independent, external team of lawyers, investigators, and other professionals is critical.
- **Overseeing the investigation** (*page 5*)

Overseeing the investigation entails thorough but efficient communication with the team regarding both scope and progress. Board members leading or overseeing an investigation should also be sure to communicate with other board members and senior management as well as the external auditor. In addition, legal violations must be reported to regulators,

while disclosures to shareholders and the public can benefit from the advice of communications specialists.

*For a list of discussion questions for audit committees, see Appendix 3, on page 11.*

## Positioning the company and the board ahead of time

The number of issues that rise to the board for potential investigation has increased over the years, reflecting trends in regulatory enforcement and legislation. Some laws and regulations that have been on the books for many years, such as the UK Bribery Act (2010) and the US Foreign Corrupt Practices Act (1977), have in recent years been enforced more vigorously,<sup>2</sup> and the EU recently approved a new directive on whistle-blower protection, which could lead to more whistle-blower activity and thereby increase the number of investigations boards will feel compelled to initiate.<sup>3</sup> Meanwhile, other trends have added to the pressure on companies; for example, the rise of major cyberattacks has led to sudden crises requiring companies to investigate and respond quickly to protect their assets, operations, and reputation.

Mr. Dembosky explained that success or failure in these kinds of crises is largely dependent on the work that management and the board do to prepare for them: *“So much of this is about forcing yourself into these areas in advance. It’s like going to the doctor annually to get a baseline so that when something happens, you can home in on the problem right away.”* Management and the board need to review the risks that could lead to problems requiring investigation, and they need to understand how these risks are being addressed.

Mr. Dembosky suggested that directors participate in crisis simulations, make sure critical decision rights are not delegated too far down in the organization, and create a plan for how the board and individual members will communicate during a major event. He underscored that the board cannot leave these issues to management alone. In some areas, such as cyber, managers may have technical knowledge but sometimes lack the strategic perspective to fully understand the risks involved. *“A key point is that you shouldn’t second guess your business judgement or risk assessment. Insert yourself into their space,”* he said. In a pre-meeting conversation, he noted that boards should insist on comprehensive reports from management: *“If you’re not hearing anything bad about cybersecurity challenges at a global company, then you are not hearing the full story.”*

Mr. Steenkamp described the pressure on boards in this area: *“It’s a more heightened regulatory world. Law enforcement have taken a more detailed view about what they expect boards to do in advance. You can’t say you’re not prepared. Demonstrating the right oversight is important.”* Mr. Dembosky cautioned that part of this preparation requires following up on the risks identified: *“It is good and wholesome to do a risk assessment, but it can lead to big problems if you don’t follow through and address any serious issues found. Managing the assessment process is also important. A vendor will hand you a report with 27 vulnerabilities identified with red flags, sometimes without sufficient appreciation of your actual business context and risks; down the road, you might be asked why you only addressed three of the findings.”*

Mr. Dembosky stressed the importance of documentation: *“You need an audit trail in your records.”* He noted that some modes of communication may present problems: if text messages, for example, are not preserved, that could complicate efforts to prove that something did or did not happen. Mr. Dembosky noted that some regulators have *“started to draw a negative inference if those communications aren’t retained.”*

## The preliminary inquiry

If an investigation becomes necessary, the board must first make decisions about the level of board involvement, the leadership at the board, and the selection of external advisors.

### Deciding on the level of board involvement

Board involvement in an investigation can range from active leadership to monitoring of major developments. EACLN members said that it can be challenging for board members to determine which allegations—sourced from hotline calls, government inquiries, press reports, internal audit findings, and elsewhere—should prompt the board to assume leadership of an investigation. However, they brought up several scenarios that typically require more active involvement from the board:

- **Financial irregularities.** Allegations of fraud or other misconduct by management relating to the company’s financials can trigger a board-led independent investigation. These might include, for example, improper accounting for business activities, like manipulation of earnings or falsified books and records.
- **Allegations against senior management.** When a problem involves the highest levels of the organization, it is incumbent upon the board to lead the investigation. One member said, *“When you decide to start an investigation, the first step is to see if the CEO or top management might be involved. This is very difficult to judge.”* Another member agreed: *“The key question is, How close is it to the CEO?”*
- **Patterns of alleged misconduct.** Members regularly sort through allegations that do not warrant the board’s attention, particularly with respect to calls to a company’s hotline. However, a pattern of similar, relatively minor, allegations may cause the board to investigate to determine if there might be a more systemic issue.
- **Allegations against a board member.** Board members may have to investigate their fellow members. One EACLN member was involved in two such investigations: *“One was an allegation by the media that the director had a conflict of interest. The other concerned an allegation by management that there were ethics issues involving the chair of the board.”*

If an investigation involves allegations about activity below the executive level, executives often identify the need for an investigation and may then proceed to lead it. Indeed, many investigations fall into this category. EACLN members and guests said it is uncommon for a board to conduct its own independent investigation.

However, even if the board does not actively lead an investigation, it is likely to exercise some degree of oversight and provide input on important aspects. One member explained in advance of the meeting, *“Management has to report to the audit committee and the board.”*

*The audit committee and the board can ask questions and organize meetings with people in charge.”*

## Determining board leadership

For an investigation that is led or closely overseen by the board, the board must decide who on the board will take charge. Members identified several potential approaches:

- **The audit committee.** The audit committee may lead an investigation when the allegations that trigger the investigation fall under its purview. One member said, *“Normally, the audit committee is not in the forefront until there is a financial impact. This is a trigger for their involvement.”*
- **A special committee.** Some cases warrant enough attention for the board to create a special committee to provide oversight. In fact, members generally favored this approach over an audit committee-led investigation. One said, *“If you have such a situation, maybe you should form a special committee. The audit committee isn’t necessarily better equipped to handle this.”*
- **The full board or its chair.** In cases that are not related to financial information or reporting, the board or its chair may head up the investigation. Members pointed to certain strategic issues requiring full board involvement: *“Responsibility for cyber is the full board. If one of our [operations] is attacked, this is 10 times worse than fraud.”* If the chair is also the CEO, leadership is likely to fall to the senior independent or lead director. Members and guests noted that most investigations are ultimately the responsibility of the full board. *“Even if a committee does the legwork, any major investigation has to end up at the full board level,”* a member said. One member saw time constraints as a factor in delegating responsibility: *“Having all of the board involved may be difficult because of the time required. Maybe you delegate depending on the issue. At the end of the discussion, it comes back to the board.”*

## Selecting resources

In some cases, management or the board can utilize a company’s internal resources to conduct an investigation or support an external advisor. Several members said that directors often work with internal audit. *“Normally,”* a member said, *“the key process relies on the internal audit department. It is essential that the company have a real internal audit organization, as independent as possible, and that they return information to the board and the audit committee.”* Another member said, *“When the alleged misconduct is low in the organization, internal audit can conduct the investigation.”*

However, members said that for significant investigations, it is important to engage independent, outside resources, such as lawyers and forensic accountants. Although the criteria for bringing in outside experts might be a bit murky, members were confident that they would know when the threshold is met. One member said, *“The gravitas of the issue is important. If someone booked a hotel room over the limit, you don’t need an external advisor, but if it is a more important issue, where you are not sure that internal audit can be neutral or objective, you might. It’s a judgment.”*

Among the many factors that are important when selecting outside resources, independence is essential. One member said, *“We all work in large companies with lists of law firms they use. For a big investigation, I’d want one that doesn’t work with the company.”* Mr. Dembosky agreed, but said that in certain situations there are opportunities for a new firm handling an investigation to coordinate with a firm that has institutional memory: *“You can bring in new counsel to lead the investigation and speak truth to power, but you can also get efficiency by drawing on the institutional knowledge of the existing litigation counsel. Investigation counsel can do so while retaining ultimate control of the fact gathering and taking steps to validate input from other parties to ensure it is getting the full story.”*

Depth of expertise and other qualities are also important. A member noted that the point person should be *“someone with experience, courage, and tenacity.”* Identifying the right legal team in advance can ensure a swift response. *“Board members generally know lawyers and can choose them based on their relationships and knowledge of law firms,”* a member said.

## Overseeing the investigation

Members described challenges that the board and audit committee must address once an investigation begins. Depending on the board’s level of involvement, these may include overseeing the team conducting the investigation, communicating with internal stakeholders and the external auditor, and disclosing information about the investigation to the public.

### Overseeing the team

When the board is leading an investigation, external investigators normally report to the board member or committee charged with oversight, though the board chair may also be involved. One member said, *“The external advisor would report to the audit committee or audit committee chair, but there’s a strong information line between the audit committee chair and the board chair. The board chair has ultimate responsibility; if he concludes that he needs to be involved, it’s his right.”*

Some members said that if a committee is overseeing the investigation, the board should set parameters early on to make the scope of that committee’s authority clear. It can be difficult to know where an investigation will ultimately lead, so ongoing control is critical.

Miscommunication can be avoided by giving outside counsel guidance about how to interact with management as they conduct the investigation. Clear communication with counsel can also ensure the scope of the investigation is clearly agreed upon by the relevant stakeholders.

Mr. Dembosky observed that when management is leading an investigation, the board must keep the team apprised without overburdening them: *“A common mistake is to ask for a bunch of piecemeal briefings. You don’t want your fixers spending all their time on briefings. In a big crisis, we will convene at scheduled times and unless something earth-shattering happens, we stick to that plan.”*

### Communicating with management and the board

The need for good communication extends beyond the immediate circle of participants. Members said it is important for the board members leading or overseeing the investigation to

report to internal constituents on how things are progressing, as appropriate. They mentioned two main internal constituents:

- **Other board members.** Members highlighted the need to communicate effectively with any independent directors who are not part of the group overseeing the special investigation.
- **Senior management.** It is critical for board members to keep senior management informed during an investigation, so long as they can do so while maintaining the appropriate level of independence. Even if an investigation is conducted by internal audit, the audit chair may serve as the liaison to others within management. *“Internal audit was mandated to do the investigation. As they were nearing their conclusions, they asked to get in touch with the audit chair. Then, I talked to colleagues, then the board chair, then management,”* a member explained.

### Communicating with the external auditor

The external auditor will likely be interested in the findings of an investigation, especially if these findings might impact its work and its ability to rely on senior management’s representations, and it may even want to conduct its own “shadow investigation” to assess the investigation and monitor its findings.<sup>4</sup> The external auditor may request timely and detailed updates on the investigation’s work plan and its progress. Keeping the auditor well informed may allow it to offer input on the scope of the investigation and the procedures involved.

Yet there may be limits on what should be shared. Mr. Steenkamp mentioned that legal privilege might be waived when information is shared, so a more circumspect approach may be advisable. Mr. Dembosky explained, *“We share facts, not legal analysis, because they need the facts to do their job.”*

### Disclosing to regulators, shareholders, and the general public

Another issue that companies must face as an investigation unfolds is whether and when to disclose information about the investigation to those outside the company, including the government, shareholders, and the general public. When there is a choice about whether to disclose, members reported wrestling with the inherent complexity of gauging how these groups will interpret and react to disclosures.

#### Self-reporting to the government

Special investigations are often focused on allegations that, if confirmed, constitute legal violations. As an investigation proceeds, it may become evident that appropriate authorities need to be notified. One member said the audit committee *“has the responsibility to immediately report irregularities to authorities. They don’t necessarily take it on, but they will follow it.”*

Boards sometimes report to the government that an investigation is pending long before it concludes or reaches clear results. One member said, *“We told them very early in the process that we were having an issue, investigating it, and would give access. Was it the right thing to do? I don’t know. We thought the agency would take our willingness to be totally open as a good thing.”* Another member mentioned the leniency companies might earn from regulators,

which is a factor in Europe as well as the United States: *“Maybe incentives in the United States are more important, but in principle, it’s the same. You get credit and improve your credibility. If the investigation might reveal something, go to authorities as soon as possible. You can’t wait.”*

### Disclosure to shareholders and the public

In the past, boards typically chose to disclose the results of an investigation to the public after it was finished, and some boards still take this approach. Until the investigation is complete, *“you try to keep it confidential in the board,”* a member said. *“But as soon as there are clear results, you inform the public.”* Another member said that after an investigation that resulted in the termination of high-profile managers, *“we had a press release to communicate all of that. That was at the audit committee and board level.”*

Given the dynamics of social media today, however, the guests suggested that it is increasingly important to report on an investigation as it proceeds rather than only after it concludes. An external communications plan and strategy may be necessary to protect the board and the company from the rumor and hearsay that can spread as a crisis unfolds. That might entail hiring an outside specialist in this area, Mr. Steenkamp noted: *“We had a matter where we appointed an external communications firm because, day to day, it became a crucial element.”*

### Closing down an investigation

While establishing and communicating clear objectives at the beginning of an investigation can facilitate the process of bringing it to a close, it may still be difficult to determine exactly when the investigation is complete. *“You know when you start the investigation that you have no clue where it will end,”* one member said. The member noted that boards overseeing investigations often face a great deal of scrutiny, so there is pressure to do a thorough job.

Defining boundaries for the investigation helps prevent it from running on too long. *“Avoid as much as possible the investigator expanding on misconduct not related to the alleged misconduct,”* a member said. *“That could just become another investigation. Be very specific on questions.”* If the investigation does not reach a logical conclusion on its own, board members may have to confer to achieve resolution. *“Closure is generally a board decision, when you’re sure that you have taken the actions that are needed and are satisfied with the outcome. The board members might not be in full agreement, so there can be discussion. But you reach a point where the legal counsel says they’ve done everything there is to do,”* a member said.

Negotiations with regulators may continue after the company’s investigation is complete. Regulators may initiate or continue their own investigation or evaluation, requiring audit committee and board involvement. The board may also need to maintain oversight over any deferred-prosecution and nonprosecution agreements, as well as the company’s overall legal strategy in negotiating settlements. The audit committee may provide oversight of remediation activities, such as improving controls.

## Conclusion

Special investigations—often conducted in response to a company crisis—can be fraught with challenges, but certain measures by the company and the board can promote better outcomes. One is simply to plan ahead, as Mr. Dembosky noted: *“It’s important to prepare the battlefield for the board and management.”* Boards should understand the risks that might spawn a crisis, and they should insist that these risks be remedied to whatever extent possible, with remedies clearly documented. These steps will boost success when the board decides later that a special investigation is necessary.

When an issue requiring investigation emerges, boards should determine the appropriate level of engagement by the board and its committees, and they should oversee the involvement of external expertise, which will likely include forensic and communications specialists as well as lawyers. Over the course of an investigation, effective communication with internal stakeholders and the auditor is important. Reporting on outcomes to external stakeholders, including regulators, presents another set of challenges, but members suggested that transparency is generally the best guiding principle.

## About this document

The European Audit Committee Leadership Network is a group of audit committee chairs drawn from leading European companies committed to improving the performance of audit committees and enhancing trust in financial markets. The network is organized and led by Tapestry Networks with the support of EY as part of its continuing commitment to board effectiveness and good governance.

*ViewPoints* is produced by Tapestry Networks to stimulate timely, substantive board discussions about the choices confronting audit committee members, management, and their advisors as they endeavor to fulfill their respective responsibilities to the investing public. The ultimate value of *ViewPoints* lies in its power to help all constituencies develop their own informed points of view on these important issues. Those who receive *ViewPoints* are encouraged to share it with others in their own networks. The more board members, management, and advisors who become systematically engaged in this dialogue, the more value will be created for all.

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## Appendix 1: Biographies of guests

**Luke Dembosky** co-chairs Debevoise & Plimpton’s global Cyber and Data Privacy Practice. He advises companies on managing cyber risks, responding to cyber incidents, and handling related internal investigations and regulatory defense. He is ranked among the top privacy and data security attorneys by Chambers and as an industry leader by the Legal 500 US. He was named by the National Law Journal to its list of “Cyber Security Trailblazers” and by Cybersecurity Docket to its “Incident Response 30”—the 30 “best and brightest data breach response lawyers.”

Mr. Dembosky joined Debevoise in March 2016 after serving as Deputy Assistant Attorney General for National Security at the US Department of Justice (DOJ), where he oversaw the DOJ’s first national security cyber portfolio. Prior to that, he served in various roles over 14 years with the DOJ, including as Deputy Chief for Litigation at the Computer Crime and IP Section; DOJ representative at the US Embassy in Moscow, Russia; and as a federal cybercrime prosecutor in Pittsburgh.

Mr. Dembosky co-chairs the International Bar Association’s Cyber Crime Subcommittee and has taught cyber issues at the Naval Postgraduate School Center for Homeland Defense and Security’s Executive Leadership Program.

**Brenton Steenkamp** is the lead partner of EY’s Forensic & Integrity Services in the Netherlands and Western Europe and Maghreb region. As a forensic consultant in professional services for some 20 years, he has gained extensive experience across multiple industries including financial services, consumer products and manufacturing, energy and resources, and telecommunications.

Mr. Steenkamp has led various engagements across risk mitigation projects, compliance reviews and disputes, complex fact-finding investigations (including regulatory reviews), and cyber-risk remediation for global blue-chip companies. He has provided evidence and testimony in criminal courts and at internal tribunals while having extensive experience in dealing with C-suite stakeholders, boards of directors, and shareholders, advising on sensitive and complex matters.

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## Appendix 2: Participants

The following EACLN members participated in all or part of the meeting:

- Carolyn Dittmeier, Assicurazioni Generali
- Renato Fassbind, Nestlé and Swiss Re
- Byron Grote, Tesco, AkzoNobel, and Anglo American
- Catherine Guillouard, Airbus
- Sian Herbert-Jones, Air Liquide
- Dagmar Kollmann, Deutsche Telekom
- Nasser Munjee, Alumnus
- Helman le Pas de Sécheval, Bouygues
- Pierre Rodocanachi, Alumnus
- Guylaine Saucier, Wendel
- Erhard Schipporeit, RWE
- François Thomazeau, Bolloré

The EY organization was represented in all or part of the meeting by the following:

- Jean-Yves Jégourel, EY EMEIA Assurance Leader
- Alain Perroux, EY Managing Partner, Western Europe & Maghreb Region
- Julie Teigland, EY EMEIA Area Managing Partner

### Appendix 3: Discussion questions for audit committees

- ? What kinds of issues tend to be investigated by the board? How does the board select who oversees the investigation?
- ? When does an investigation require the assistance of outside resources? Who should be on the team, and what criteria should be applied in selecting them?
- ? What aspects of an investigation can be planned in advance? What aspects should be decided when the investigation is actually initiated?
- ? What practices and processes have you used to oversee the investigative team? What has worked well? What has not?
- ? How should the board members leading or overseeing an investigation communicate with internal stakeholders, such as other board members and senior management? How should they communicate with the external auditor?
- ? What factors should be considered when deciding whether to self-report the findings of an investigation to the government?
- ? What factors should be considered when evaluating disclosures to shareholders and the broader public about an ongoing investigation?
- ? How do you know when an investigation should be concluded? How can you be sure it is comprehensive but not excessive?
- ? What are best practices for overseeing remedial measures and evaluating their longer-term success?
- ? Do you evaluate the board's effectiveness in overseeing a concluded investigation? What lessons have you learned from such reviews?

# European Audit Committee Leadership Network



EACLN



VIEWPOINTS

## Endnotes

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<sup>1</sup> *ViewPoints* reflects the network's use of a modified version of the Chatham House Rule whereby comments are not attributed to individuals or corporations. Quotations in italics are drawn directly from conversations with network members and other participants in connection with the meeting.

<sup>2</sup> EY, *Integrity in the Spotlight: The Future of Compliance; 15th Global Fraud Survey* (London: EYGM Limited, 2018), 13; Jim Letten and Caroline B. Smith, "[2019 Developments and Trends in the Foreign Corrupt Practices Act \(FCPA\) & Global Anti-Corruption Efforts, Part 1 of 3](#)," *BizLitNews Blog*, Butler Snow, June 26, 2019.

<sup>3</sup> Neil Hodge, "[EU Whistleblower Protection Law Gets Go-Ahead](#)," *Compliance Week*, October 8, 2019.

<sup>4</sup> Frank M. Placenti et al., *The Audit Committee's Evolving Role in Overseeing Corporate Investigations* (New York: Ernst & Young LLP and Squire Sanders [US] LLP, 2013), 10–11, 15.