The International Comparative Legal Guide to:

Corporate Investigations 2018

2nd Edition

A practical cross-border insight into corporate investigations

Published by Global Legal Group with contributions from:

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Published by
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London SE1 3PL, UK
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Email: info@glgroup.co.uk
URL: www.glgroup.co.uk

GLG Cover Design
F&F Studio Design

GLG Cover Image Source
iStockphoto

Printed by
Stephens & George
Print Group
January 2018

ISBN 978-1-911367-89-5
ISSN 2398-5623

Strategic Partners

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1 The Decision to Conduct an Internal Investigation

1.1 What statutory or regulatory obligations should an entity consider when deciding whether to conduct an internal investigation in your jurisdiction? Are there any consequences for failing to comply with these statutory or regulatory regulations? Are there any regulatory or legal benefits for conducting an investigation?

There are no provisions in Swiss law that would explicitly direct a company to conduct an internal investigation. However, a number of statutory provisions can make it a practical necessity to do so.

First, duties to cooperate with regulatory authorities and provide them with accurate information can indirectly compel entities to investigate potential misconduct because this may be the only way for the entity to find out what happened and rectify issues. One of the most important Swiss regulators, the Financial Market Supervisory Authority ("**FINMA**"), for example, frequently orders entities to explain incidents and produce information and documents relating to matters under its supervision. Regulated entities are also under an ongoing obligation to immediately notify FINMA of any material event that is significant to its supervision. The Swiss stock exchange, SIX Swiss Exchange, imposes a similar *ad hoc* notification requirement on listed companies, and financial intermediaries also have duties to investigate and report suspicious activity to the Swiss Money Laundering Reporting Offices. Providing FINMA incorrect information, even if only negligently, is a criminal offence, which can attract a fine of up to CHF 250,000, while intentionally doing so bears a maximum sentence of three years' imprisonment. Sanctions against the entity can go as far as a regulatory authority revoking an entity's licence to engage in business, particularly if it fails to remediate the unlawful conduct in issue.

Secondly, companies and those in charge of them can be held liable for failing to take adequate measures to detect or prevent the commission of offences within their organisation. Under the Swiss Criminal Code ("**CC**"), a legal entity may be convicted for failing to implement reasonable measures to prevent the commission of an exhaustive list of catalogue offences (known as primary corporate liability); or for an offence committed during the ordinary course of its business, if the organisation does not have the necessary corporate structures in place to allow it to attribute responsibility for the offence to a single natural person (known as secondary corporate liability). An entity's board of directors and its executive organs also have general duties of care under company law, which are recognised as requiring them to set up compliance and control systems to detect, investigate and remediate misconduct. Employees with enhanced compliance obligations, such as senior management or compliance officers, may also be held criminally liable for failing to take action to prevent the criminal conduct of others in the organisation.

The benefits of conducting an internal investigation in competition law are well-known. Under a statutory leniency programme, companies may be granted complete or partial immunity from sanction if they report unlawful restraint of competition before the other participants to the infringement do so.

In the case mentioned below in question 2.1, the criminal prosecution authorities have shown that they are also willing to reward a company's proactive approach to uncovering misconduct, and consider the initiation of an internal investigation, cooperation with the authorities and implementation of compliance measures to be mitigating factors at sentencing.

1.2 What factors, in addition to statutory or regulatory requirements, should an entity consider before deciding to initiate an internal investigation in your jurisdiction?

An entity should bear in mind that regulators such as FINMA usually have the power, under their overarching authority to remediate unlawful conduct and restore compliance, to order internal investigations. If necessary, FINMA can appoint an independent investigator (usually a law firm or an audit firm) to investigate and implement remedial measures within a regulated entity. By taking the proactive and early decision to investigate, entities have the advantage of preserving a degree of control over the structure and pace of their investigations, and give themselves time to prepare responses to any government or media enquiries before they arise.

Before deciding on an investigation, entities should consider the following: whether the wrongdoing is still ongoing; worst-case scenarios in terms of impact on share price and data security; potential employment law consequences; the likelihood that the matter will come to the attention of domestic and/or foreign authorities; whether it should notify insurers; the costs of engaging external lawyers and consultants; and any reputational risks that might arise.

1.3 How should an entity assess the credibility of a whistleblower's complaint and determine whether an internal investigation is necessary? Are there any legal implications for dealing with whistleblowers?

A whistleblower's complaint should be investigated with the same care and diligence as any other report of impropriety. An entity's exact response – and whether it is necessary to appoint external

consultants to assist – will depend on the specific allegation and the whistleblower in question. An entity should normally take immediate measures to preserve relevant evidence, investigate the facts and document the steps in its investigation. If substantiated, steps should be taken to sanction and remediate the wrongdoing.

Although legislative reforms in employment and criminal law are under parliamentary discussion, currently Swiss law does not offer any statutory protection to whistleblowers. Whistleblowers who breach confidentiality and secrecy obligations (for example, by leaking protected information to the public) are subject to criminal sanction. Nonetheless, terminating an employee's engagement solely on the grounds that he has made a whistleblowing complaint can constitute unfair dismissal in civil law. From a compliance perspective, it is considered to be best practice for entities to establish reliable avenues for their employees to report suspected misconduct free from reprisal.

1.4 How does outside counsel determine who "the client" is for the purposes of conducting an internal investigation and reporting findings (e.g. the Legal Department, the Chief Compliance Officer, the Board of Directors, the Audit Committee, a special committee, etc.)? What steps must outside counsel take to ensure that the reporting relationship is free of any internal conflicts? When is it appropriate to exclude an in-house attorney, senior executive, or major shareholder who might have an interest in influencing the direction of the investigation?

The identity of the "client" will vary depending on the specific investigation and the terms of counsel's engagement. As the person who often leads the investigation internally, the client can influence whether an investigation is viewed as being independent and, hence, whether its findings are reliable.

To ensure the reporting relationship is free of internal conflicts, no employees or third parties who were involved in the matters under investigation or who are otherwise personally interested in its outcome, should lead or otherwise be part of the investigation team. This should apply regardless of whether the person is an in-house attorney, senior executive or major shareholder. To facilitate a conflict-free investigation, outside counsel should be granted full and free access to the entity's internal records and to its employees, so it can make recommendations as to the composition of the investigative team.

As a matter of good practice, entities should designate specific individuals or a steering committee with responsibility for the supervision, strategic direction and overall coordination of the investigation, and to whom outside counsel should report its findings. Limiting and defining the number of persons involved in the investigation can help to focus the direction it takes, maximise confidentiality and legal privilege and ultimately make it more cost-efficient.

2 Self-Disclosure to Enforcement Authorities

2.1 When considering whether to impose civil or criminal penalties, do law enforcement authorities in your jurisdiction consider an entity's willingness to voluntarily disclose the results of a properly conducted internal investigation? What factors do they consider?

Yes, they do. As mentioned above, competition law authorities can grant immunity to companies that (first) report unlawful infringements voluntarily. At sentencing in criminal proceedings, law enforcement authorities generally take into account mitigating factors, such as an offender's remorse and whether reasonable efforts have been made to remediate wrongdoing. The voluntary disclosure of the results of an internal investigation can qualify as a mitigating factor. Earlier this year, we saw the first reported instance in Switzerland of a company being rewarded for self-disclosing criminal conduct to the authorities. The company reported its liability for failing to take adequate measures to prevent the bribery of foreign public officials, and shared the investigative reports of its external lawyers. The company's admission of guilt, its full cooperation with the authorities and its investment in improving its compliance systems were reportedly rewarded by the authorities reducing the penalty imposed from CHF 3.5 million to the symbolic sum of CHF 1. As is always the case, the company was nonetheless separately ordered to disgorge its profits from the illegal activity.

2.2 When, during an internal investigation, should a disclosure be made to enforcement authorities? What are the steps that should be followed for making a disclosure?

In competition law, companies may need to disclose any impropriety early on in order to benefit from the statutory leniency programme. Otherwise – and save for any *ad hoc* obligations to notify the authorities of material events – a company is generally free to disclose whenever it feels appropriate. From a strategic point of view, it should only do so once satisfied that it has a clear understanding of the main aspects of the misconduct in issue, its implications and the actors involved, even if it has not yet uncovered all the details. As mentioned in response to question 1.2, once the authorities are involved, the company will no longer have autonomy over the investigation and will be forced to react to external pressures. The following considerations can influence the timing of a self-disclosure: any disruption that disclosure could cause to fact-finding; the desirability of potential state action to secure evidence, freeze assets or interrogate and apprehend suspects; and the likelihood of resulting court proceedings, requests for assistance from domestic or foreign authorities, media coverage or whistleblowers.

2.3 How, and in what format, should the findings of an internal investigation be reported? Must the findings of an internal investigation be reported in writing? What risks, if any, arise from providing reports in writing?

In cases where an investigation has been ordered by the authorities, the findings are usually required to be in writing. If a company's intention is to cooperate fully with the authorities, it should also report the findings of a voluntary internal investigation in writing. While there is no formal requirement to do so, as a matter of common sense, a written compilation of the most salient facts would manifest the greatest degree of transparency, cooperation and contrition.

Although reports prepared by external lawyers may be privileged, the risks associated with written reporting are that the findings may nonetheless be used against the company in domestic or foreign court or regulatory proceedings or that the report is leaked to the press. As is set out in response to question 5.5, the authorities may be subject to duties to cooperate with one another such that the report, or its findings, may be distributed further than its intended audience. While this risk still exists with oral reporting, it is less pronounced. A report may also contain information belonging to or affecting the rights of employees and third parties. Any

unauthorised use of the report and resulting breach of rights could have legal consequences for the company. Companies are advised to engage with the authorities on the format, scope and use of their reports prior to disclosure.

3 Cooperation with Law Enforcement Authorities

3.1 If an entity is aware that it is the subject or target of a government investigation, is it required to liaise with local authorities before starting an internal investigation? Should it liaise with local authorities even if it is not required to do so?

Save for in relation to certain regulated financial markets, entities subject to ongoing or pending government investigations are not required to liaise with the authorities. It is, nonetheless, advisable that they do so. Being in contact and maintaining good relations with the authorities is not only beneficial because of the goodwill it could generate and the potential credit the company may receive in return; the authorities can also be a valuable source of information as to developments that may affect the entity (e.g. planned coercive measures, involvement and collaboration with foreign authorities, etc.). In a best-case scenario, an entity may be able to, for example, minimise the disruption caused by a dawn raid by agreeing mutually beneficial terms for producing evidence. If entities investigate in parallel to the authorities, they risk frustrating the government's fact-finding strategies and, at worst, expose themselves to allegations of tampering with or destroying evidence.

3.2 Do law enforcement entities in your jurisdiction prefer to maintain oversight of internal investigations? What level of involvement in an entity's internal investigation do they prefer?

Law enforcement entities will usually not involve themselves much or at all in an entity's internal investigation. If the subject matter is of interest, they would usually decide to investigate themselves or appoint an independent investigator to report back to them. For internal investigations conducted voluntarily, our observations in question 2.2, on disclosure, apply. The level of involvement that a law enforcement entity is likely to expect post-disclosure will depend on the importance and potential consequences of the investigation. Despite their usual restraint, we have noticed a trend in the authorities following the US model for investigations, such that they may expect to be more involved in investigations in the future.

3.3 If regulatory or law enforcement authorities are investigating an entity's conduct, does the entity have the ability to help define or limit the scope of a government investigation? If so, how is it best achieved?

In criminal proceedings, the prosecuting authorities will define the scope of their investigations independently and without input from the concerned parties. There may be more flexibility and opportunity to informally influence an investigation if it is ordered or conducted by regulators such as FINMA. Regulators will usually define the scope of an investigation; however, it may be possible to discuss with them and agree on a reasonable scope, the most efficient methodology to be used and on realistic reporting deadlines.

3.4 Do law enforcement authorities in your jurisdiction tend to coordinate with authorities in other jurisdictions? What strategies can entities adopt if they face investigations in multiple jurisdictions?

A multitude of treaties and legal provisions deal with the Swiss enforcement authorities' cooperation with their international counterparts. Particularly in recent times (e.g. numerous tax evasion matters involving Swiss banks, the most recent FIFA scandal in which officials were arrested in Zurich, or the multi-jurisdiction investigations in the Petrobas/Odebrecht affair, etc.), we have observed an increase in cases involving international cooperation and coordination.

Where an entity is simultaneously investigated by authorities in multiple jurisdictions, it is usually in its best interests for the various proceedings to be coordinated and, if possible, resolved comprehensively. Parallel investigations bring with them: the risk of delays; repeated and increased business disruption; overlapping sanctions; and sustained reputational damage. Although an entity cannot control the authorities' willingness to coordinate, it can attempt to influence them by making appropriate disclosures. The best course of action will always depend on the circumstances of the case and will almost inevitably require an entity to seek legal advice in all the jurisdictions concerned.

4 The Investigation Process

4.1 What unique challenges do entities face when conducting an internal investigation in your jurisdiction?

A unique challenge for internal investigations in Switzerland is that co-operating with foreign authorities outside the realm of administrative assistance proceedings can have criminal law consequences. The same criminal law provisions can restrict the fact-finding activities that can lawfully be conducted in Switzerland, if the intention is to use the findings in court or regulatory proceedings abroad. These challenges arise from the operation of so-called "blocking provisions" intended to protect Swiss sovereignty. Of these, article 271 CC is the most relevant. This provision prohibits foreign states from, either directly or indirectly, performing in Switzerland any act which falls within the exclusive competence of the Swiss public authorities. As is the case in a number of civil law jurisdictions, Switzerland views the taking of evidence as a judicial function within the exclusive competence of its public authorities. As such, collecting documentary evidence and interviewing witnesses located in Switzerland can require government authorisation.

In cross-border investigations, it is also worth noting that Swiss in-house counsel do not enjoy legal privilege. This can impact the procedural protection given to their communications and work product in foreign jurisdictions.

4.2 What steps should typically be included in an investigation plan?

An investigation plan should clearly set out the scope of the investigation (e.g. jurisdiction, subject matter, business area, time-frame, etc.), its purpose and the legal issues that should be addressed by outside counsel during the investigation.

It should typically include and address the following steps: (i) formation of an investigative team; (ii) reporting milestones (including the structure and format for reporting); (iii) taking interim or immediate measures at the start of the investigation (e.g. to secure evidence); (iv) identification, preservation and collection of relevant evidence; (v) scoping interviews; (vi) (physical and electronic) document reviews and analysis; (vii) engagement of experts; (viii) substantive interviews; (ix) preparation of investigation reports; and (x) communications with the authorities and the media.

4.3 When should companies elicit the assistance of outside counsel or outside resources such as forensic consultants? If outside counsel is used, what criteria or credentials should one seek in retaining outside counsel?

If companies decide to elicit the assistance of outside counsel, they should do so early on in an investigation. The nature, scope and budget of an investigation will determine whether additional external consultants should be engaged. The main reasons for using outside counsel are to maximise the chances of the investigation results being privileged; to ensure the investigation is independent and free from conflicts of interests; to obtain an independent perspective on the issues; to lend the factual findings and legal conclusions neutrality and credibility; and to engage with the authorities. The criteria for selection should reflect those reasons. Outside counsel should be selected based on their know-how and experience in conducting investigations; their reputation for being independent; their history of engaging with the authorities; the resources they have to deal with investigations; and, in international investigations, their track record for collaborating with foreign counsel and dealing with cross-border issues.

5 Confidentiality and Attorney-Client Privileges

5.1 Does your jurisdiction recognise the attorney-client, attorney work product, or any other legal privileges in the context of internal investigations? What best practices should be followed to preserve these privileges?

Yes, Swiss law recognises the confidentiality of documents and material relating to the attorney-client relationship. The scope of the privilege can vary depending on the type of proceedings but, typically, it only applies when lawyers registered to practise law in Switzerland are engaged and, under certain circumstances, in EU and EFTA countries. Provided the documents and material relate to an engagement for the provision of typical legal services, privilege can extend to: confidential information that a client shares with his lawyer; information from other sources; the lawyer's own work product; and even work product of the client or third parties; but it does not cover pre-existing evidence created outside the scope of a lawyer's engagement.

Although conducting internal investigations can qualify as the provision of typical legal services, one must tread carefully in investigations involving statutory anti-money laundering ("**AML**") obligations. The highest Swiss court, the Federal Supreme Court, recently decided that lawyers' work product (reports and notes of employee interviews) was not privileged because it resulted from investigations which the client was under statutory obligation to undertake in any event. The performance of delegated AML compliance obligations is thus unlikely to constitute a typical legal service that attracts privilege.

In criminal proceedings, both legal entities and natural persons are also entitled to claim privilege against self-incrimination. The principle is usually interpreted restrictively for legal entities and cannot be used to circumvent their statutory obligations to keep records, such as under AML legislation.

Best practices to preserve legal privilege include defining the scope of a lawyer's engagement and the legal issues to be addressed at the outset of an investigation, and keeping particularly sensitive documents in an external lawyer's custody.

5.2 Do any privileges or rules of confidentiality apply to interactions between the client and third parties engaged by outside counsel during the investigation (e.g. an accounting firm engaged to perform transaction testing or a document collection vendor)?

Third parties who are engaged to support outside counsel can fall under their instructing legal counsel's privilege if they qualify in law as a person assisting them. Anyone from administrative staff, forensic experts, accounting firms or private detectives can qualify as a "person assisting" a lawyer, provided the lawyer exercises the requisite degree of direction and supervision over them. If so, the third party would be bound by the same professional rules of confidentiality as the lawyer. Best practices for engaging third parties include: defining the scope of the collaboration in writing; regular reporting to the outside counsel; copying counsel in all communications with the third party; and ensuring the third party agrees to adequate confidentiality undertakings.

5.3 Do legal privileges apply equally whether in-house counsel or outside counsel direct the internal investigation?

No, they do not. The current position under Swiss law is that legal professional privilege and professional duties of confidentiality do not extend to in-house counsel. Although legislative reforms have been proposed to change the law, two such proposals have recently failed. A third proposal to extend privilege to dealings with in-house counsel in civil proceedings is currently being deliberated. Note, however, that communications with patent attorneys may be privileged regardless of whether they are in-house or not.

5.4 How can entities protect privileged documents during an internal investigation conducted in your jurisdiction?

Legal privilege is best ensured by engaging independent counsel early on in an investigation and clearly defining the legal services they must provide. As a general rule, all communications and work product should be shared on a confidential basis and with a pre-defined circle of persons, on a "need-to-know" basis only. Privileged material should be marked accordingly and stored separately because this will make it easier to claim privilege over it during any government attempts to seize evidence.

5.5 Do enforcement agencies in your jurisdictions keep the results of an internal investigation confidential if such results were voluntarily provided by the entity?

Enforcement agency employees are usually bound by official secrecy and must keep information they become aware of during the exercise of their duties confidential. At the same time, agencies may also be bound to notify other authorities, including criminal prosecutors, of any unlawful conduct that comes to their attention, be it in the context of information provided voluntarily or otherwise.

While this can discourage companies from volunteering the results of their investigations, the Swiss authorities have shown that they can be sympathetic to companies torn between regulatory compliance and criminal self-incrimination. FINMA, for example, has often refused requests by criminal prosecutors to share internal investigation reports that have been provided to it voluntarily, on the basis that this would discourage cooperation and thus compromise it ability to supervise in the long term. We recommend carefully reviewing the applicable regulatory rules prior to any disclosure and, if necessary, addressing concerns directly with the relevant enforcement agency.

6 Data Collection and Data Privacy Issues

6.1 What data protection laws or regulations apply to internal investigations in your jurisdiction?

The collection and use of personal data is generally governed by the Federal Data Protection Act of 19 June 1992 ("**DPA**") and the Data Protection Ordinance. Employment law provisions in the Code of Obligations also impose duties of care on employers, which may restrict the handling of employee data. As described in answer to question 4.1, Swiss blocking provisions can also affect the collection and transfer of data from Switzerland.

6.2 Is it a common practice or a legal requirement in your jurisdiction to prepare and issue a document preservation notice to individuals who may have documents related to the issues under investigation? Who should receive such a notice? What types of documents or data should be preserved? How should the investigation be described? How should compliance with the preservation notice be recorded?

Specific legal provisions impose general document retention obligations, such as in corporate and federal tax law (10 years); however, unless an authority has specifically ordered evidence to be preserved, there is no legal requirement to preserve documents in connection with litigation and/or regulatory proceedings. Nonetheless, it is common practice for companies to issue data preservation notices when litigation and/or regulatory proceedings become reasonably foreseeable, particularly because this ensures compliance with obligations in other jurisdictions. It follows that there are no formal requirements on how such notices are issued, although the provisions of the DPA continue to apply. Data preservation notices should accordingly only be issued to employees who are likely to have business-related information that is relevant to the investigation. Unless there are reasonable grounds to believe that doing so would risk data destruction and/or compromise the confidentiality of an investigation, the notice should inform the recipient of the background to the investigation, the purpose of preservation and the anticipated use of the preserved data. A common-sense approach should be taken to recording compliance with the notices to ensure that the data is admissible in legal, regulatory or other proceedings in Switzerland and abroad.

6.3 What factors must an entity consider when documents are located in multiple jurisdictions (e.g. bank secrecy laws, data privacy, procedural requirements, etc.)?

Different jurisdictions bring with them: differing blocking statutes, data privacy and employment law rules; varying provisions on legal professional privilege and confidentiality; and diverging data processing standards. The most important factor to consider in cross-border investigations is that the collection, transfer and use of documents complies with the requirements in each applicable legal system. This requires time and careful planning. Cross-border data transfers can require: consents or waivers to be obtained from data subjects; notification of or authorisation from the authorities; the agreement of a data transfer framework; and/or document redaction.

The most relevant restrictions to consider in Switzerland are: blocking provisions in articles 271 CC and 273 CC; restrictions in the DPA on transferring personal data to countries deemed to have insufficient safeguards for data privacy (such as the US); provisions of employment law, which may require employee notification prior to data processing; article 162 CC, which penalises the breach of a statutory or contractual duty of confidentiality to a third party; article 47 of the Banking Act on banking secrecy; and other professional secrecy obligations.

6.4 What types of documents are generally deemed important to collect for an internal investigation by your jurisdiction's enforcement agencies?

There are no specific guidelines governing document collection in internal investigations. The types of documents that could be important depend on the nature of the investigation. In their own investigations, the criminal authorities must consider all relevant evidence that has been obtained lawfully and in accordance with current scientific technology and practices. Admissible evidence can include anything from GPS data, to internet scripts, to any type of electronically stored information. Companies are therefore advised to collect any and all the evidence that is necessary to investigate the issues, including: hard copy data (e.g. archives, files, minutes of meetings, policies, HR files, etc.); electronically stored information (e.g., email records, databases, online servers, locally stored data repositories, journals/logbooks, back-up and legacy systems); lawfully obtained telephone and audio-visual recordings; oral evidence (e.g., from current and former employees and third-party witnesses); and any expert or specialised data (e.g., analyses on price movements, payments transactions, etc.).

6.5 What resources are typically used to collect documents during an internal investigation, and which resources are considered the most efficient?

The resources used to collect documents during an investigation vary greatly depending on its scope and funding. In larger investigations, it is commonplace for the latest scientific technology to be used to collect and process data (e.g. electronic imaging, e-discovery solutions and specialist IT or forensic accounting methods). It is usually considered most efficient to use comprehensive e-discovery programmes, which enable multiple data processing functionalities, such as searching, threading, tagging and redaction.

6.6 When reviewing documents, do judicial or enforcement authorities in your jurisdiction permit the use of predictive coding techniques? What are best practices for reviewing a voluminous document collection in internal investigations?

There are no specific restrictions on using technology-assisted review or predictive coding techniques to assist and simplify investigations. The usual e-discovery solutions and software used on the international market are also widely used by larger organisations and law firms here. The golden rule when reviewing a voluminous document

collection is to plan carefully and to document each step and important decision made during the review process. The population of data for review should first be collected on a data processing platform. Clear objectives should be set for the investigation before the review commences, and the search criteria should be defined based on those objectives and agreed with all the relevant stakeholders. The review process should be guided and supervised by qualified lawyers to ensure compliance with the applicable law.

7 Witness Interviews

7.1 What local laws or regulations apply to interviews of employees, former employees, or third parties? What authorities, if any, do entities need to consult before initiating witness interviews?

Employment law, as contained in the Code of Obligations, does not impose specific rules on how to conduct employee interviews. An employer's main duty, under its general obligations and duties of care, is to respect its employees' personal rights. The ground rules for conducting an interview should always be fairness, objectivity and respect for the interviewee. In particular, employers must not exert any coercive control during the interview. Third parties (e.g., former employees) can be interviewed if their participation is voluntary. Using the findings from such an interview in foreign proceedings may, however, breach article 271 CC unless prior government authorisation for the interview is obtained (the appropriate department to grant authorisation can depend on the subject matter in issue). The authorities may also need to be consulted prior to interview if they are investigating the same matter so as not to frustrate their fact-finding efforts.

7.2 Are employees required to cooperate with their employer's internal investigation? When and under what circumstances may they decline to participate in a witness interview?

Employees have general duties of loyalty to their employer, which require them to comply with their employer's instructions. They are also under a duty to account for all their activities during employment and must share with their employer all the products of their work (correspondence, analyses, contracts, etc.). These two obligations are widely recognised as entailing a duty to cooperate with employer's internal investigations and, more specifically, to participate in witness interviews. In return, the employer must safeguard the employee's personal rights during the course of the investigation, just as it would have to do during the ordinary course of employment. If an employee is targeted by an investigation and at risk of criminal prosecution, he should arguably be granted the privilege against self-incrimination and, consequently, have the right to refuse participation or to answer specific questions. The authorities on this point are divided.

7.3 Is an entity required to provide legal representation to witnesses prior to interviews? If so, under what circumstances must an entity provide legal representation for witnesses?

The question of whether an employee has a right to legal representation at an interview during an internal investigation is disputed in academic literature. The usual practice is to not provide representation unless the employee's own conduct is in issue and he is at risk of criminal prosecution. In such cases, as a matter of good practice, the employee may be allowed the opportunity to seek advice but there is no obligation on the entity to provide or finance it.

7.4 What are best practices for conducting witness interviews in your jurisdiction?

Best practices include giving the interviewee sufficient information about: the background to the investigation; the purpose of the interview; any allegations made against him; the intended use of information he provides; and giving an "Upjohn Warning" to disclose that the company's lawyers do not act for him. Witnesses should also be directed to keep the contents of the interview, and the fact that is being conducted, strictly confidential. The contents of the interview should be recorded in a memorandum, protocol or even *verbatim* minutes. In order to ensure a proper record of what is said, interviews should always be attended by two interviewers. If it is likely that an interviewee may expose himself to criminal prosecution, entities should carefully consider whether to grant the interviewee access to legal advice and representation.

7.5 What cultural factors should interviewers be aware of when conducting interviews in your jurisdiction?

Interviewers should note that professional interactions in Switzerland tend to be formal and conservative. Employment relationships can to be hierarchical but they are also stable, with employees often having worked at the same company for many years. This, together with the fact that internal investigations are still a relatively new phenomenon, may necessitate increased sensitivity and respect when handling witnesses during interviews.

Although most Swiss employees tend to speak English to a relatively high standard, out of fairness, interviewees should always be offered the option of responding to questions in their native language. Four official languages are spoken in Switzerland, so care should be taken to engage translators for the correct language.

7.6 When interviewing a whistleblower, how can an entity protect the interests of the company while upholding the rights of the whistleblower?

Whistleblowers should generally not be treated differently from any other interviewee, particularly if they are company employees. If there are reasonable grounds to fear an adverse reaction against the whistleblower, an employer's duty of care may oblige it to take measures to protect the whistleblower's identity.

7.7 Is it ever appropriate to grant "immunity" or "amnesty" to employees during an internal investigation? If so, when?

Under exceptional circumstances, granting immunity or amnesty can be a means of finding out important information, which an entity would have no other way of uncovering. This should, however, be granted sparingly and as a last resort only so that employees are discouraged from holding the entity hostage to their cooperation.

7.8 Can employees in your jurisdiction request to review or revise statements they have made or are the statements closed?

Under data protection law, an interviewee should be granted the right to review and amend the minutes of an interview. In the interests of accurate fact-finding, the records of an interview should be shown to the interviewee immediately or shortly after the interview so as

to avoid any misunderstandings or later disputes as to their veracity. However, to reduce the risk of dissemination, the minutes should not necessarily be provided to the employee, in order to protect the integrity and confidentiality of the investigation.

7.9 Does your jurisdiction require that enforcement authorities or a witness' legal representative be present during witness interviews for internal investigations?

No, there is no requirement that enforcement authorities be present at witness interviews. Such attendance would be unusual, if not detrimental to the purpose of an investigation because it is likely to inhibit the free communication of information. Equally, there is no requirement that a witness be legally represented. However, if there is a chance that a witness risks criminal sanction and/or incriminating himself during the interview, it is recommended, as a matter of good practice, and in keeping with an employing entity's duty of care if the witness is an employee, that the interviewee either be advised that he can refuse to answer questions that would tend to incriminate himself or be given the chance to seek legal advice or representation.

8 Investigation Report

8.1 Is it common practice in your jurisdiction to prepare a written investigation report at the end of an internal investigation? What are the pros and cons of producing the report in writing versus orally?

Yes, it is. The advantage of written reporting is that the findings can be used as evidence in any related or ensuing proceedings (e.g. to impose disciplinary sanctions), particularly if the investigation is conducted by an external and independent expert. The cons of producing a written report are that it may be used against the entity, as set out in answer to question 2.3. Depending on the sensitivity of the subject matter, an oral presentation of the conclusions and findings in the investigation may be appropriate. The disadvantages of this are that: oral reporting may not be suitable to communicate complex factual findings and legal analysis; the findings and conclusion are more likely to be misinterpreted than a printed message; it may not convey the necessary urgency; the message given may be short-lived; and a follow-up is less likely.

8.2 How should the investigation report be structured and what topics should it address?

There are no rules on how to structure an investigation report. As a matter of best practice, a report should include the following: (i) an executive summary of the main findings and conclusions; (ii) a summary of the background to the investigation, its triggers, scope, purpose and the legal issues it addresses; (iii) information as to the members of the investigative team and all consultants who were engaged, including their responsibilities; (iv) a description of the document preservation, collection and review processes; (v) a chronology of relevant facts; (vi) a summary of the underlying subject matter and the persons involved; (vii) the investigative findings from the various reviews and interviews; (viii) an overview of the applicable legal and regulatory framework; (ix) an analysis of the relevant events pursuant to the applicable laws; (x) conclusions as to responsibilities and liability; and (xi) recommendations for next steps and remediation. As far as practically possible, the report should attach any evidence referred to in the body of the report in an appendix.

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