GIR

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INVESTIGATIONS REVIEW 2023

As well as daily news, GIR curates a range of comprehensive regional reviews. This volume contains insight and thought leadership from pre-eminent practitioners in Europe, the Middle East and Africa. Inside you will find chapters on France, Italy, Russia, Switzerland and the UAE and overviews on how UK organisations are structuring their investigations teams and the things to think about when considering a self-report.

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Preface

Welcome to the *Europe, Middle East and Africa Investigations Review 2023*, a Global Investigations Review special report.

Global Investigations Review is the online home for all those who specialise in investigating and resolving suspected corporate wrongdoing – telling them all they need to know about everything that matters.

Throughout the year, the GIR editorial team delivers daily news, surveys and features; organises the liveliest events ('GIR Live'); and provides our readers with innovative tools and know-how products (such as the FCPA counsel tracker and the FCPA enforcement official database). In addition, assisted by external contributors, we curate a range of comprehensive regional reviews – online and in print – that go deeper into developments than the exigencies of journalism allow.

The *Europe, Middle East and Africa Investigations Review 2023*, which you are reading, is one such volume. It contains insight and thought leadership from a range of pre-eminent practitioners with their finger on the pulse in these regions.

All contributors are vetted for their standing and knowledge before being invited to take part. Together they capture and interpret the most substantial recent international investigations developments of the past year, with footnotes and statistics where relevant. The result is an invaluable collection that is part aide-memoire and part horizon scanning tool.

This edition covers France, Italy, Russia, Switzerland and the UAE and has overviews on how UK organisations are structuring their investigations teams and the pros and cons of making a self-report.

As so often with these annual reviews, a close read yields many gems. On this occasion, for this reader, they included that:

- France has had a quietly eventful year;
- the prices of Dubai's most expensive homes have jumped 44 per cent as a result of the Russia–Ukraine war;
- a free zone connected to a port is a nightmare for asset-tracers;
- proving that a business partner or possible business partner is not connected to Russia is now a lucrative activity for a number of relevant firms; and
- more jurisdictions are seeking to characterise self-reporting as an extension of compliance (ie, as just what 'good' corporate citizens do). Whether their target audience are going to agree remains to be seen. One suspects probably not (with good reason).

We hope you enjoy the volume. If you have any suggestions for future editions, or want to take part in this annual project, we would love to hear from you. Please write to insight@globalinvestigationsreview.com.

David Samuels
Publisher, Global Investigations Review
May 2023

Conducting interviews for internal investigations in Switzerland

Eric Stupp, Joel Fischer and Nico Lüthi
Bär & Karrer

In summary

This article explores the challenges of conducting interviews for internal investigations in Switzerland. We discuss three key aspects that must be considered: preparation for interviews, due process considerations when conducting interviews and limitations pertaining to the use of the findings obtained from interviews. This article provides guidance in this cross-disciplinary field, highlighting best practices and potential pitfalls to ensure a compliant process when conducting employee or witness interviews.

Discussion points

- Swiss employment law and data protection aspects
- Employees' right to retain legal counsel and privilege against self-incrimination
- Blocking statute in cross-border settings
- Interview invitation and notice period
- Due process warnings and explanations at the outset of an interview
- Swiss legal constraints regarding the use of findings gained from interviews

Referenced in this article

- Code of Obligations of 30 March 1911 (as at 9 February 2023)
- Criminal Code of 21 December 1937 (as at 23 January 2023)
- Federal Act on Data Protection of 19 June 1992 (as at 1 September 2023)
- Federal Act on the Free Movement of Lawyers of 23 June 2000 (as at 23 January 2023)
- Swiss Banking Act of 8 November 1934 (as at 1 January 2023)

Navigating the legal requirements and diverging stakeholder interests can be challenging when conducting interviews in Switzerland. Interviews are an integral part of most internal investigations, especially when it comes to interviewing employees for scoping, fact-finding or assessing contentious matters. This article discusses the most important legal issues, best practices and pitfalls to avoid when preparing for, conducting and using the findings obtained from employee or witness interviews.

Preparing for interviews

Employment law considerations

It is essential to distinguish between interviews with employees and interviews with third-party witnesses because of the different legal implications arising from Swiss employment law. One crucial difference is that third parties, including former employees, cannot be compelled to participate in an interview in the context of an internal investigation. Coercive measures on third parties may only be ordered in Swiss court proceedings or in the execution of a mutual assistance request. It is, however, permissible to reduce a former employee's deferred compensation to the extent the applicable deferred compensation plan foresees that right of the employer.

In contrast, current employees must participate in interviews as part of their general duty of loyalty and care under Swiss employment law.[1] This duty encompasses the employee's obligation to truthfully disclose to the employer any facts or circumstances that they learn of while employed. Furthermore, the employer may issue specific instructions, including when, how and where it intends to make use of its right to information.[2] It, therefore, may compel an employee to participate in an interview conducted by external legal counsel, be it as a subject-matter expert, witness or suspect in the case of alleged misconduct. Refusal to cooperate by an employee, despite having been given valid instructions, amounts to a violation of the employment agreement, and the employer may impose disciplinary measures[3] and claim compensation if monetary damages arise because of the lack of cooperation.

The employer has a duty of care, which entails the provision of additional safeguards to protect employees' personality rights.[4] Under this duty of care, the employee must be provided with certain information and warnings at the outset of an interview.

1 Code of Obligations (CO), article 321a(1).
2 CO, article 321d. The instructions must be reasonable and not contrary to other Swiss laws (eg, an employee may not be ordered to participate in an interview on a public holiday).
3 This may include a formal warning, a reduction of discretionary compensation or, in severe or repeated cases, termination of the employment agreement or threat thereof.
4 CO, article 328.

Employees' right to retain legal counsel and privilege against self-incrimination

Balancing the employee's duty of loyalty and the employer's duty of care has practical consequences for the set-up and conduct of employee interviews. One example is whether an employee who is being interviewed for suspected misconduct should be granted similar procedural guarantees as those in Swiss criminal proceedings, namely the right to retain legal counsel and invoke the privilege against self-incrimination.

This matter is controversial in legal doctrine, and there is hardly any conclusive case law on this topic.[5] In our opinion, it needs to be carefully evaluated in each case whether the employer's duty of care warrants the procedural safeguards mentioned before.

For example, this may be the case if an employee has violated the law, and the employer intends to submit the interview results and the name of the interviewee to criminal prosecution proceedings or other authorities with enforcement powers (eg, by filing criminal charges). In those cases, a prudent approach that is frequently seen in practice is to allow the employee to retain legal counsel and refuse to answer questions to which the answer may result in self-incrimination or lead to a professional ban by a supervisory authority. In doing so, a company further mitigates the risk that interview notes or minutes will be deemed inadmissible or of low evidential value in criminal proceedings at a later stage.

Regarding an employee's right to retain legal counsel, it is often more pragmatic considerations (eg, the expectation of more cooperative behaviour) rather than a legal right of the employee that guide an employer's decision to allow an employee to retain independent legal counsel or to be accompanied by a neutral third person during an interview. Nevertheless, those rights may also be provided for in internal guidelines and policies or the employee's employment agreement.

For expert witness or fact-finding interviews, in which an employee merely provides information about business-related transactions, there is generally no need for legal representation of an employee.

5 In consideration 2.4 of Federal Supreme Court (FSC) Decision No. 4A_694/2015, dated 4 May 2016, the FSC suggested in an obiter dictum that an employee who is faced with accusations of criminal misconduct in an internal investigation should be entitled to procedural guarantees similar to those in criminal proceedings, such as legal representation; however, it also held that an assessment of the specific circumstances of each case remains necessary. On the other hand, the FSC held in consideration 3.3.1 of its Decision No. 131 IV 36, dated 22 December 2004, that the privilege against self-incrimination enshrined in constitutional and international law only applies in relation to state authorities.

Data protection considerations

The handling of personal data in connection with the conduct of interviews outside court proceedings must comply with the provisions of the Federal Data Protection Act (FDPA).[6] As personal data is collected and otherwise processed when preparing for and conducting interviews, it is essential to ensure adherence to the general principles of Swiss data protection law and the duty to provide information to the interviewee and other affected individuals from the outset. Further data protection considerations apply to the use of findings obtained from an interview.

Under article 6 of the FDPA, personal data must be processed lawfully and proportionally and only for the purpose for which it was initially collected and that was evident to the affected individual, or for a purpose that is compatible with the initial purpose of collection. Article 19 of the FDPA requires that interviewees be appropriately informed of all processing of their personal data when their data is collected. These requirements are generally fulfilled if an entity has general terms and conditions, an employee handbook or agreement, or a policy stipulating that personal data may be processed for investigative purposes, including in situations of suspected misconduct, provided that the interviewee was made aware of those rules. Compliance with these requirements is further facilitated by providing the interviewee with certain information and warnings at the outset of an interview.

Regarding the duty to inform the interviewee, certain exceptions[7] apply that may be relevant for interviews conducted for internal investigations. This is the case if the information would defeat the purpose of processing (eg, if it is in connection with an ongoing internal investigation) or the controller is a private person bound by a legal obligation to secrecy (eg, if Swiss external legal counsel conduct an investigation).

For employee interviews, a special data protection-related provision applies. Under article 328b of the Code of Obligations, employee-related data may only be processed if it concerns the employees' suitability for their job or it is necessary for the performance of the employment contract. The latter also includes data to assess an employee's conduct (including misconduct) or data required to litigate against an employee. Because of its broad nature, the prerequisites of article 328b are typically met if the subject matter of an interview relates to an employee's work in performing their contractual duties.

6 This article solely refers to the revised Federal Data Protection Act (FDPA) entering into force on 1 September 2023, given that the days of the current FDPA are numbered and that processing activities compliant with the revised FDPA generally also comply with the current FDPA. One exception is that the revised FDPA (like the General Data Protection Regulation) will no longer protect the personal data of legal entities, while the current FDPA protects the personal data of both individuals and legal entities.

7 FDPA, article 20.

Blocking statute in cross-border settings

For any investigation initiated in Switzerland in a cross-border setting, especially if a foreign authority is involved, it is advisable to assess the implications of article 271 of the Criminal Code (CC) as early as possible. This provision limits the possibility of cross-border cooperation with, and the collection of evidence located in Switzerland for, foreign authorities. It, therefore, is generally referred to as a blocking statute. The purpose of the blocking statute is to protect Swiss territorial sovereignty and avoid the circumvention of mutual civil, criminal or administrative assistance proceedings.

Article 271 of the CC prohibits, under criminal consequences, any person from carrying out, without authorisation, activities on behalf of a foreign state on Swiss territory if the activities are reserved to a public authority or a public official under Swiss law. Article 271 further applies to any person that facilitates those activities through encouragement or acts of aiding and abetting (eg, by offering assistance, even if from abroad).

The scope of the blocking statute is broad and covers 'official' acts on Swiss territory that are reserved to a Swiss authority (ie, any acts that have the characteristics of an official act from a substantive, Swiss law point of view). Pursuant to applicable case law, whether the act is carried out by a foreign official or a private person and whether that person is allowed to exercise coercion under foreign law is irrelevant.[8] It, therefore, is irrelevant whether the act would be permissible or lacks official character from a foreign perspective. As the blocking statute protects a public legal interest, the consent or waiver given by the person against whom the act is performed does not preclude criminal liability; however, criminal liability can be avoided if a previous authorisation is obtained from the competent Swiss authority.[9]

In the context of interviews conducted for internal investigations, the scope of activities covered by article 271 of the CC is often unclear and subject to a considerable degree of legal uncertainty; however, the scenarios outlined below may serve as practical guidance, and, in any case, legal certainty can be achieved by filing an authorisation request.[10]

On one end of the spectrum, the blocking statute is triggered by any interviews conducted for or on behalf of a foreign government, or if an interview is conducted with the intent of disclosing the findings to a foreign government or within a foreign administrative or court proceeding. This includes the conduct of common law witness depositions (ie, formal hearings of witnesses by foreign authorities or lawyers). In its guidelines, the Federal Office of Justice explicitly states that '[a]nyone who questions persons or examines documents on Swiss

8 FSC Decision No. 148 IV 66, dated 1 November 2021.
9 CC, article 271(1).
10 If no authorisation is required for the intended acts, this is usually stated in the decision rendered in response to a request.

territory in order to testify before a foreign court must expect to be the subject of criminal proceedings on the grounds of illegal actions for a foreign state'.[11] These interviews must be conducted through the official mutual legal assistance channels without authorisation under article 271(1) of the CC. No distinction is made between on-site and remote interviews (eg, interviews conducted by videoconference).

On the other end of the spectrum, any company-internal interviews of personnel or directors are generally considered to fall outside the scope of article 271 of the CC, provided that there is no intent to disclose any interview findings to foreign authorities subsequently. This is in line with the majority view in the literature and a decision rendered by the Federal Criminal Court that outlined that a company does not infringe article 271 of the CC if it collects internal information of which it may freely dispose and the collection of which would be lawful for the purposes of Swiss proceedings.[12] Nevertheless, if foreign authorities gain access to work products deriving from the interviews at a later stage, there is a residual risk that Swiss criminal authorities may allege that the interviews were conducted while knowing and accepting the risk (ie, with conditional intent) that the collected information may eventually be accessed or requested by foreign authorities.

Interviews conducted in their entirety outside Switzerland will not trigger the territorial requirement of article 271 of the CC. In practice, the question of whether an employee or a third-party witness may be asked to travel abroad for an interview often arises. Case law indicates that for a criminal conviction, only a part of an activity falling under article 271 need be conducted in Switzerland.[13] Although this is untested terrain, this means that even if a witness embarks on a journey abroad for the purpose of an interview, the act may potentially be deemed an infringement or unlawful circumvention of the blocking statute by Swiss courts.

Against the backdrop of the expansive scope of article 271 of the CC and the limited case law in this regard, it is highly advisable to assess at an early stage whether an exemption authorisation pursuant to article 271(1) of the CC should be obtained from the competent authority[14] to exclude the risk of criminal liability.

11 Federal Office of Justice, International Mutual Assistance in Criminal Matters, Guidelines, 9th edition 2009, p. 61, www.rhf.admin.ch/rhf/de/home/strafrecht/wegleitungen.html (accessed 11 April 2023)
12 Federal Criminal Court (FCC) Decision No. SK.2017.64 dated 9 May 2018, consideration 4.2.1.
13 FCC Decision No. CA.2019.6, dated 5 December 2019, considerations 1.1.1.5 and 1.1.3.4; FSC Decision No. 104 IV 175, dated 3 May 1978, consideration 3a.
14 Under article 31 of the Government and Administration Organisation Ordinance, the departments and the Federal Chancellery decide on the authorisations to perform acts on behalf of a foreign state within their area of responsibility. In the field of international mutual legal assistance, the Federal Department of Justice and Police is the competent authority, while cases of political or other fundamental importance are to be submitted to the Federal Council.

Interview invitation

A recurring question is whether employees must be given advance notice of an interview and, if so, whether there are any particular notice periods to comply with when setting up interviews.

As there is no specific procedural law that applies to interviews in internal investigations, there are no express statutory notice requirements or periods to be observed. If there are no exceptional circumstances (eg, if important evidence might otherwise be irretrievably destroyed), and pursuant to the employer's duty of care, it is uncommon to interview employees without prior notice or to invite employees to an interview under a pretence.

In general, it is advisable to review internal regulations or past practice that may provide for specific notice periods. In the absence of any regulations or past practice, there are several factors to consider when determining the appropriate length of the notice period, including whether there is a risk of collusion, whether an employee may potentially suffer negative consequences as a result of the interview and whether a witness should be granted time to prepare in advance. While there are no formal best practices, notice periods often range from one or two weeks in normal circumstances to a few days in mere scoping interviews.

The invitation generally states the time, location and general context of the interview. For employee interviews, the invitation may state that the interviewee must participate in the interview under their employment agreement and Swiss employment law and, in most cases, that the invitation must be kept strictly confidential.

Conducting interviews

In a decision rendered in 2020, the Federal Supreme Court (FSC) held that the obligation to inform suspects of their procedural rights during criminal proceedings (commonly referred to as *Miranda* warnings) does not apply to interviews conducted in the course of an internal investigation.[15] While the non-observance of these warnings does not necessarily lead to the inadmissibility of the respective interview notes or minutes in Swiss criminal proceedings, the FSC held that the corresponding evidential value would be low and be considered as mere party allegations.

To increase the evidential value of the interview notes or minutes for potential subsequent Swiss criminal proceedings (eg, if the company intends to file a criminal charge), companies should follow certain best practices pertaining to procedural safeguards in Swiss internal investigations. Observing the procedural safeguards outlined below further facilitates compliance with the employer's

15 FSC Decisions Nos. 6B_48/2020 and 6B_49/2020, dated 26 May 2020.

duty of care for employee interviews, the general principles of fairness and due process and the duty to provide information under data protection laws.

At the outset of an interview, the interviewee should generally be given the following information and warnings, although a case-by-case assessment remains indispensable:

- Once the interview begins, the interviewee should be informed of the context, background and purpose of the interview. The level of detail provided on the subject matter of the interview should be sufficient to allow the interviewees to defend themselves if confronted with allegations.
- If applicable, and to mitigate any risk under article 271 of the CC, the interviewer should state that the interview is not part of any proceeding or investigation conducted in response or otherwise related to any request from a foreign authority.
- In the case of allegations against an employee, the interviewer should inform the employee that if an assessment of all the relevant facts and the circumstances, including the employee's answers in the interview, lead to the conclusion that a breach of a policy, internal regulation or other legal obligation has occurred, disciplinary action may be taken. If external legal counsel conducts the interview, the employee should be informed that the employer will unilaterally decide whether and, if so, what sanction shall be taken against the employee.
- If external legal counsel conducts the interview, it should inform the interviewee that it solely represents the company's interests and not the interviewee's. This includes information that the company alone may elect to waive the attorney-client privilege.
- Current employees should be reminded that they must participate in the interview and answer any business-related questions to the best of their knowledge and belief exhaustively and truthfully and that a refusal to do so would expose them to employment law sanctions; however, in certain situations, it may be necessary to allow employees to refuse to answer questions to which the answers could expose them to criminal prosecution or a ban from their profession by a supervisory authority.[16] In those cases, employees should be asked to expressly state that they are refusing an answer on the foregoing grounds. In this context, employees may also be informed that they are free to consult with a legal counsel of their choice.
- The interviewee will often be asked to keep the interview and all information arising out of or in connection with it confidential, subject to customary exceptions.

16 Such as the Swiss Financial Market Supervisory Authority.

- The interviewer should inform the interviewee of how their answers will be recorded (eg, summary interview memorandum or verbatim transcript). Unauthorised taping of conversations is a criminal offence.[17]
- Finally, it is often explained to the interviewee that they may ask for clarifications if a question is unclear and a break at any time during the interview.

These due process introductory remarks must be duly reflected in the interview notes or minutes.[18]

Use of findings gained from interviews

After an interview has been conducted, the results are usually recorded in various work products, such as notes, minutes or memoranda, including draft versions thereof (interview work products). These are then used to fulfil the mandate of an investigation, be it by integration into reports or by disclosure to domestic or foreign authorities or third parties. In this respect, five main areas of Swiss law represent the key legal constraints when disclosing, or protecting from disclosure, information gained from interviews:

- legal professional privilege (Federal Act on the Free Movement of Lawyers (FMLA));
- the protection of Swiss sovereignty (articles 271 and 273 of the CC);
- data protection (FDPA);
- manufacturing and business secrets (articles 162 and 273 of the CC); and
- banking secrecy (article 47 of the Banking Act).[19]

Each of these constraints is outlined below, including recommendations to address and mitigate any risks resulting therefrom.

17 CC, articles 179-bis and 179-ter. Regarding employee interviews, it is unclear whether a Swiss court would uphold an employee's consent for recording an interview, given the employee's substantially weaker position.

18 To further increase the evidential value of the interview notes or minutes for potential subsequent Swiss (criminal) proceedings, the following additional measures may be taken: (1) permitting the interviewee to review the notes or minutes and confirm by signature the accuracy thereof; (2) having an additional witness attend the interview who confirms in writing the accuracy of the notes or minutes; or (3) having the drafter of the notes or minutes sign a written confirmation of the accuracy thereof and calling the drafter as a witness in potential subsequent proceedings.

19 In addition, certain other types of data may not be freely disclosed to third parties without the consent of the affected persons, such as data covered by contractual secrecy obligations or information covered by professional privilege in the sense of article 321 of the CC (limited to the listed professions, such as doctors).

Legal professional privilege

Under Swiss law, attorney–client privilege only applies to attorneys subject to the FMLA (ie, attorneys registered in any of the Swiss cantons and attorneys admitted to the bar in member states of the European Union or the European Economic Area that are providing legal services in Switzerland, subject to certain conditions under the FMLA). There is currently no attorney-client privilege with respect to attorneys from other jurisdictions or in-house attorneys, although Parliament has moved to introduce in-house privilege in Swiss civil proceedings.[20] If Swiss prosecutors seize any interview work products drafted without the involvement of attorneys subject to the FMLA, they are allowed to access the full, unredacted content of the materials.

In principle, internal investigation work by Swiss external counsel can be covered by attorney-client privilege; however, the FSC takes a restrictive stance and only considers typical or core attorney work, such as providing legal advice or representation in contentious matters, as being covered by Swiss legal privilege. In its recent jurisprudence, which is heavily criticised in practice, the FSC considered internal investigations related to suspected violations of a bank's anti-money laundering (AML) obligations as mixed mandates in which (protected) attorney-specific work and (unprotected) accessory work overlap.[21] Although rendering legal advice in an internal investigation clearly qualifies as protected attorney-specific work, the FSC refused to apply legal privilege to other investigative activities (including interviews with various employees and analysis and evaluation of numerous transactions, documents, emails and phone calls) that, in its view, effectively amount to a controlling or auditing exercise in the realm of (banking) compliance outside core attorney work.

The above case law relates to the financial industry, specifically investigations conducted in the field of regulatory compliance and AML, in which companies are required to duly investigate, document and disclose to the authorities certain activities by law. It, therefore, remains to be seen whether these findings can be generalised for internal investigations outside of banks' AML obligations or even conducted for non-financial or non-regulated companies.

20 On 17 March 2023, Parliament decided to protect in-house privilege in Swiss civil proceedings, although this revision may be subject to a referendum and is not expected to enter into force before 1 January 2025. According to the new article 167a of the Civil Procedure Code, which is to be introduced, Swiss companies may refuse to cooperate and produce documents relating to the activities of their in-house legal department. To invoke this right, the company must be registered in the Swiss commercial register or in a comparable foreign register, the legal department must be headed by a person with a licence to practise law in Switzerland or in the person's country of origin, and the activity must be considered as typical or core attorney work. In addition, in-house privilege will be limited to Swiss civil proceedings and subject to the same caveats regarding internal investigations as those laid out for Swiss external counsel. It remains to be seen whether foreign jurisdictions will recognise this in-house privilege if asserted by Swiss companies in proceedings conducted abroad.

21 FSC Decision No. 1B_85/2016, dated 20 September 2016; FSC Decision No. 1B_433/2017, dated 21 March 2018; FSC Decision No. 1B_509/2022, dated 2 March 2023.

In light of the FSC's disputed jurisprudence, there is an inherent risk that minutes and notes from witness interviews may not be protected by attorney-client privilege in Switzerland, especially in AML or regulatory compliance matters. To mitigate the risk of unintentionally having to disclose interview work products if authorities get involved, it is advisable to structure an investigation clearly into separate processes and products for protected attorney-specific work and (potentially) unprotected non-attorney-specific work.[22] All documents must be drafted by attorneys subject to the FMLA to assert attorney-client privilege.

Blocking statute

Article 271 of the CC prohibits the disclosure of information or documents gathered in Switzerland in foreign proceedings if the act would have required the involvement of a public authority under Swiss law. This means that if the information or documents to be disclosed cannot be freely disposed of, or if failure to comply with the request for disclosure could lead to sanctions that are not solely of a procedural nature (eg, being charged with the criminal offence of contempt of court), the disclosure to a foreign authority or within foreign proceedings falls under the scope of article 271 of the CC. Information that is not at a party's free disposal may include, in particular, non-public information relating to third parties.

Absent an authorisation under article 271(1) of the CC, such information may only be produced through official channels of legal assistance; however, according to the practice of the Swiss authorities, the authorisation will not be granted solely to obtain the information or evidence located in Switzerland, given that mutual legal assistance proceedings are available. If an authorisation under article 271(1) is granted to conduct interviews in Switzerland, it also generally allows for disclosure of the interview results to foreign authorities, subject to further legal constraints.

Data protection constraints

Virtually all interview work products contain personal data related to employees, customers or third parties. In this respect, two key considerations from a data protection perspective following the conduct of the interview are the interviewees' right to gain access to interview work products and the transfer of interview work products abroad.

22 In consideration 3.1.4 of its Decision No. 1B_509/2022, dated 2 March 2023, the FSC held that a law firm may be required to not only keep separate files (eg, memoranda, e-mails, interview reports and any other documents) but set up separate teams to avoid any overlap of legal advice and internal control and audit tasks concerning compliance with anti-money laundering obligations.

Under Swiss data protection law, any person with a legitimate interest may submit a request to a data controller to find out whether data concerning them are being processed.[23] The controller must then generally provide information on the data being processed regarding the enquirer;[24] however, it may invoke certain exceptions to limit the enquirer's access right.[25]

In the context of witness interviews, the investigating entity may try to invoke legal privilege with the risks and limitations outlined above. Furthermore, other overriding interests could be invoked, such as the protection of an ongoing investigation, business or trade secrets or other overriding interests of third parties.

Against this background, and given that Swiss courts tend to side with the data subjects in data protection matters, there is a risk that an interviewee's access to interview work products cannot be permanently avoided, particularly after the conclusion of an investigation; however, there is no duty to proactively offer access to interview work products. Especially for matters that may turn litigious, such as in cases of employee misconduct, it is advisable to draft interview work products carefully and in a way that minimises harm if disclosed.[26]

Before interview work products are transferred abroad (be it to another group entity or a third party), the transferring party should assess whether all recipients are located in countries that are on the list of countries that are deemed to have an adequate level of data protection from a Swiss perspective.[27] These include all EU member states and the United Kingdom. If data is to be transferred to a country that is not included in the list (eg, the United States, China and India), sufficient safeguards for the transfer must be put in place, such as the revised EU standard contractual clauses amended to comply with Swiss law (SCCs) or binding corporate rules for group-internal transfers.[28] In addition, a data transfer impact assessment must generally be conducted to ensure the requirements of the SCCs can be met and to assess the necessity of supplementary measures (eg, granting read-only access to electronic information hosted in Switzerland or the European Union). Finally, the data subject must be informed of all recipient countries and, where necessary, safeguards for transferring data abroad.

23 FDPA, article 25. Similar considerations apply specifically regarding employee interviews, given that the FSC held in its landmark Decision No. 120 II 118, dated 8 April 1994, that an employee generally has access to the personnel file kept by the employer as part of their personality rights.
24 FDPA, article 25, paragraph 2.
25 FDPA, article 26.
26 Interview work products should be drafted by attorneys subject to the FMLA to assert Swiss attorney-client privilege.
27 The list is available in the annex of the revised Swiss Federal Data Protection Ordinance entering into force as of 1 September 2023. Until then, you may refer to the Swiss Federal Data Protection and Information Commissioner (FDPIC)'s country list, which is available at: www.edoeb.admin.ch/edoeb/en/home/data-protection/handel-und-wirtschaft/transborder-data-flows.html (accessed on 20 March 2023) but which is non-binding.
28 FDPA, article 16, paragraph 2.

In individual cases, relying on an exception pursuant to article 17 of the FDPA to share personal data with recipients in countries such as the United States may be feasible. For interviews conducted within internal investigations, the most relevant exceptions are:

- when the explicit consent of all affected individuals is obtained. The consent must be given voluntarily on a fully-informed basis and may be withdrawn at any time; and
- if the transfer is necessary for the establishment, exercise or enforcement of legal claims before a court or other foreign authority (including, foreign law enforcement agencies, such as the US Department of Justice).

Alternatively, any personal data contained in interview work products may be anonymised or redacted prior to the transfer abroad so that the receiving party has no way of identifying the data subject.

Manufacturing and business secrets

Article 162 of the CC is designed to protect the business secrets of companies against unauthorised disclosure by persons bound to confidentiality by contract or law. It prohibits any disclosure of a secret by which it is rendered accessible to a third party, irrespective of how the disclosure is made. A business secret within the meaning of article 162 is a fact that is not publicly known, has economic value to its owner and of which disclosure may damage the owner or increase competition from rivals (ie, the disclosure may influence the owner's earnings). This may include information related to manufacturing processes, formulae, inventions, plans, suppliers and customer lists.

If the disclosing company has a contractual or statutory duty to keep confidential a third party's manufacturing or business secrets, it must not disclose information in that regard that is contained in the interview work products to any third party, unless the disclosure is made in the course of official legal assistance proceedings or the affected third party consents to the disclosure; otherwise, appropriate redactions must be applied. Business secrets of the disclosing party, and disclosed by itself, do not trigger any issues with respect to article 162.

Economic espionage

Business secrets may be protected under article 273 of the CC, which prohibits, under criminal liability, any attempt to retrieve manufacturing and business secrets for disclosure to foreign authorities or private persons and the act of disclosure itself. As article 273 serves to protect the interests of Switzerland as a sovereign state, the information covered by article 273 must have a sufficient nexus with Switzerland. In this respect, it is sufficient that the holder

of the protected information is domiciled in Switzerland or that the relevant commercial activity affects the Swiss economy.

Business secrets in the sense of article 273 are given a broader definition than those under article 162 of the CC and encompass all information relating to facts of economic relevance, over which the owner of the secret is presumed to have an interest in confidentiality, provided that the information is of sufficient importance to Swiss state interests (eg, information relating to a large number of a Swiss bank's customers).

As in the case of article 162, disclosing information covered by article 273 through official mutual legal assistance channels eliminates criminal liability issues; however, unlike other secrecy obligations, a secrecy rights waiver of the owner of a secret may only preclude criminal liability under article 273 if no vital public interest of Switzerland is at stake (for political, economic or other reasons).

Finally, any anonymisation or redactions of secrets in the sense of article 273 also exclude the risk of criminal prosecution.

Banking secrecy

In the case of internal investigations conducted for or within Swiss banks, it is essential to safeguard Swiss bank-client privilege when dealing with interview work products. According to article 47 of the Banking Act, a person who discloses a secret that has been confided to them in their capacity as a bank functionary or representative (eg, external legal counsel acting for a bank), or a person who attempts to induce a breach of professional confidentiality, is subject to criminal prosecution.

The duty of confidentiality anchored in article 47 is broad. It covers all data relating to the business relationship between a client and its bank, including information from which a third party could infer that the bank-client relationship exists and any other information in connection with, or relating to, that relationship.

If the interview work products contain information subject to Swiss bank-client privilege, such as client-identifying information, a bank secrecy waiver must generally be obtained from the respective client prior to disclosure to third parties to exclude any risks under article 47. In the absence of a waiver and other exceptional circumstances permitted by law, the bank or any agents acting on its behalf must apply appropriate redactions before transferring client data to third parties, including foreign supervisory authorities.

Concluding remarks

The conduct of interviews for internal investigations has a transversal legal dimension, and advance planning is required to navigate the potential pitfalls under Swiss law. Recognising that there is no one-size-fits-all approach and that a case-by-case assessment involving specialised legal counsel remains indispensable, this article outlined some of the key aspects to consider when conducting interviews in Switzerland. From an operational perspective, it is vital to:

- assess early on whether an exemption authorisation under the Swiss blocking statute is required in cross-border settings. The Swiss authorities typically respond to those requests rather quickly;
- prepare templates reflecting appropriate due process safeguards tailored to the specifics of an investigation (eg, the interview invitation, template minutes or memoranda, confidentiality statements and consent forms);
- given the increasing importance of data protection considerations, assess data flows in connection with the conduct of interviews at an early stage and ensure that sufficient safeguards are put in place, if necessary; and
- given the various constraints regarding the further use and disclosure of interview findings, assess whether consent must be obtained from affected parties in some instances or whether, and if so, how redactions must be applied (preparation of a redaction protocol).

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Eric Stupp heads Bär & Karrer's financial services department and co-heads the internal investigations and cross-border proceedings team. His practice focuses on advising banks, insurance companies, asset managers and other financial intermediaries on regulatory matters, enforcement proceedings and M&A transactions.

In recent years, he has regularly advised financial institutions and regulatory bodies in connection with internal investigations on cross-border issues. In particular, he has assisted clients in numerous proceedings initiated by the US Department of Justice, the New York Department of Financial Services and other US and European authorities.

Eric is a regular speaker at expert conferences addressing these matters. He was a member of Bär & Karrer's management committee for eight years. He is the vice chair of the board of directors of Goldman Sachs Bank AG, Zurich and a member of the boards of other financial and non-profit institutions.

IFLR 1000 2016 and *Who's Who Legal* 2015 listed Eric as one of the leading banking lawyers in Switzerland. He is listed as a leading lawyer by The Legal 500 in the Hall of Fame category. In 2018, the Weizmann Institute of Science awarded Eric the Doctor of Philosophy *honoris causa* for his professional achievements and his support of scientific research carried out in the Institute.

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Joel Fischer co-heads Bär & Karrer's internal investigations practice group and is a leading partner of the financial services team.

He has extensive experience in assisting global corporations and high-ranking executives in large-scale internal investigations and complex white-collar criminal and regulatory enforcement proceedings before Swiss and foreign authorities. His practice includes advising financial institutions, media conglomerates and construction companies, among others, on various compliance issues, including in relation to money laundering, sanctions, fraud, corruption, tax evasion, the implementation of compliance programmes and environmental, social and governance issues.

Before joining Bär & Karrer, Joel worked for the President of the Supreme Court of Israel and as a management consultant with a leading global consulting firm. He graduated from the University of Zurich and obtained a master's degree in law and finance from the University of Oxford and a PhD from the University of Berne.

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