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Contributing Editor:
Reed Brodsky
Gibson, Dunn & Crutcher LLP

glg Global Legal Group

Expert Analysis Chapters

Q&A Chapters

Switzerland

Dr. Roman Huber

Dr. Daniel Lengauer

Cristina Ess

Kellerhals Carrard

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 obligations or with regulatory expectations? Are there any regulatory or legal benefits for conducting an investigation?

Swiss law does not contain any explicit regulatory obligations that would require a company to conduct an internal investigation. Internal investigations are part of an effective compliance management system and serve a variety of objectives and purposes. If there is a suspicion of a compliance violation, the company will often come to the conclusion that it wants to clarify the matter internally. The internal investigation usually holds more advantages than disadvantages for the company. Based on the results of the internal investigation, the company retains control of the matter and can ideally avert an official investigation or, if necessary, cooperate with the authorities in full knowledge of the facts, which can have a positive effect on the assessment of sanctions.

In addition, compliance with certain statutory obligations may implicitly require an entity to cooperate. In particular, the Swiss Financial Market Supervisory ("**FINMA**") imposes regulations on financial service providers, which have a standing duty to proactively notify FINMA of the occurrence of any substantial events. Such notification regularly requires a prior investigation of the facts and an analysis of the legal consequences. Furthermore, FINMA may, and regularly does, order the entities under its supervision to make information and documents available in relation to occurrences that come to its attention. The SIX Swiss Exchange, the Swiss stock exchange, further imposes *ad hoc* notification duties, and financial intermediaries have the duty to investigate and report to the Swiss Money Laundering Reporting Office ("**MROS**") regarding any reasonable suspicion of money-laundering activities.

Regulatory authorities such as FINMA typically also have the authority to order entities to conduct internal investigations and, if deemed necessary, appoint an independent investigator in the matter, with said independent investigator often being an audit or law firm. If an entity is able to demonstrate that a comprehensive and independent internal investigation has already been conducted, they may be able to prevent the appointment of an external investigator, thereby preserving control over the entity's internal affairs. Early investigations also allow for a level of preparation for answers to governmental or media enquiries, should they arise.

Non-compliance with reporting duties can trigger serious sanctions, and thus the conducting of internal investigations remains one of the only means through which an entity is able to systematically gather, process and evaluate the necessary information in order to be in compliance with its respective regulatory obligations. The provision of FINMA with false information by a natural person is a criminal offence bearing a fine of up to CHF 250,000 when done so negligently, and a maximum sentence of three years' imprisonment in the instances of intentional non-compliance. The sanctions against the entity involved may include the disgorgement of unlawfully generated profits and can go as far as the revocation of the entity's licence to conduct business, in particular in cases of repeated misconduct. Comparable sanctions apply in case of the violation of other reporting duties, e.g. to the MROS.

Further, it is also important for legal entities to consider that they may be held criminally liable if they are deemed to have failed to take adequate measures to detect or prevent the commission of crimes within their company. Primary liability is levied for specific offences such as, in particular, money laundering and corruption, if the entity failed to take all the reasonable organisational measures that were required in order to prevent such an offence. Subsidiary liability of the entity arises in respect of any other felony or misdemeanour committed in the exercise of the entity's commercial activity, provided that due to inadequate/inefficient organisation, it is not possible to attribute the offence to any specific natural person acting for the company. The entity's criminal liability may also lead to civil liability.

Finally, the senior management and compliance officers of a company may be held criminally liable for failure to intervene or prevent criminal behaviour within their organisations. They are furthermore subject to civil liability if they violate duties of care imposed by Swiss corporate law in order to protect the financial interests of the company and stakeholders. Timely internal investigations may prevent or mitigate such criminal or civil liability.

Compliance with competition law may also require internal investigation to avoid respective sanctions. In particular, there are statutory leniency programmes within competition law that offer partial or complete immunity from sanctioning if the entity reports the unlawful restraint of competition before the other transgressors. This operates as a further incentive for proactive internal investigation.

1.2 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?

The adequate response to the complaint of a whistleblower will need to be established in each case individually, based on the circumstances. However, any such complaint should be taken seriously and be investigated with due care and diligence.

Corporate entities of a certain size should have internal policies in place that set out the necessary measures for the handling of whistleblower complaints and the assessment of their credibility. These policies ensure, among other things, that the reported facts are expertly reviewed, necessary interviews are conducted, and any further reports that may support the complaint are evaluated. It is additionally important to ensure that such measures are taken in a timely manner in order to preserve any evidence that may be relevant. The investigative process should be sufficiently documented. If a complaint proves to have merit, measures should be taken to sufficiently sanction and mitigate the misconduct internally (especially adaptation of the compliance management system) and prevent negative consequences externally (criminal/civil liability or administrative sanctions).

Currently, there is no specific Swiss law granting protection to whistleblowers in the private sector under Swiss law.

The competent courts decide on a case-by-case basis whether the reporting of irregularities is legitimate. Swiss courts assess in each individual case, applying a balancing of interests test, whether the employee's notification of an irregularity to the employer, the authorities or the media was lawful in the concrete case, and examine the facts of the case primarily in relation to the employee's duty of loyalty. However, it is regarded as best practice to have reporting mechanisms in place which adequately protect the whistleblower from negative consequences. The termination of an employee solely on the grounds of lodging a complaint may constitute an unfair dismissal under Swiss law. In the public sector, under the relevant Cantonal or Federal Personnel Acts, Swiss officials may be required to report crimes and offences to their supervisors or directly to the criminal authorities.

The EU Whistleblower Directive (2019/1937) entered into force in December 2019, and the EU Member States were required to implement the requirements resulting from the EU Directive into national law by December 2021. As Switzerland is not an EU Member State, it was not subject to such obligation. Nevertheless, Swiss companies with business branches in the EU, with at least 50 employees, may fall within the scope of the EU Whistleblower Directive. Compliance with the requirements of the EU Whistleblower Directive can therefore also be of great importance to Swiss companies.

1.3 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 company should clearly define the reporting lines from the outset of the investigation. The specific facts of the investigation will determine who is best suited to be the outside counsel's liaison within the client's corporate structure.

The responsible person will generally internally coordinate the investigation, and outside counsel will report to them. There are various factors that outside counsel should bear in mind when determining who the effective "client" is, such as the events leading up to the initiation of the investigation, the severity of the allegations, the rank of those potentially involved, and whether or not reporting obligations may have been or will be triggered. The potential level of media interest should also be taken into account. Swiss in-house counsel do not enjoy legal professional privilege but may be chosen as the "client" for other reasons. In the case of multijurisdictional investigations, it may be advisable to have, or include, in-house counsel as the client in order to ensure that communication remains privileged. In large-scale or sensitive investigations, it may be prudent to establish a steering committee to oversee the investigation. Furthermore, it is important to plan internal investigations carefully from beginning to end, i.e. remediation.

In order to avoid potential conflicts, it must be ensured that the investigation team, both internal and external, does not include any persons who may be involved with, affected by or hold any other interest in the conclusion of the investigation. In order to ensure this, outside counsel, amongst other things, should request uninhibited access to the relevant internal records and employees.

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?

As for criminal proceedings, the competent authorities take factors such as self-reporting of the offence, cooperation in detecting the facts, and remorse or efforts towards remediation into account. The disclosure of the outcome of an internal investigation may thus qualify as a mitigating factor. There has been one notable case in which a company self-reported the bribery of foreign officials to the authorities shared information from an internal investigation and admitted to being guilty in failing to implement adequate measures to prevent the bribery. Due to such unrestricted cooperation combined with the commitment to improve its compliance systems, the company was sanctioned with a symbolic fine of only CHF 1. However, the company did not avoid the disgorgement of illegal profits in the amount of CHF 30 million.

In its investigations, FINMA has wide discretion to mitigate sanctions in view of the financial intermediary's cooperation during the investigation, including efforts towards reparation.

As mentioned above, in competition law the voluntary disclosure of violations can trigger immunity for the entity that is first to self-report.

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

With the exception of competition law, which requires early disclosure to benefit from statutory lenience provisions, or

other *ad hoc* reporting obligations that may come into play, a company is generally free to determine the appropriate time for disclosure. From a strategic point of view, the factors to be considered when determining the timing are: what effect the disclosure will have on the internal investigation, if still ongoing; what form of support may be needed from the authorities regarding gathering of evidence, asset recovery, interrogations, etc.; and what will be the likely consequences of the self-reporting, such as coercive measures ordered by the investigating authority, legal assistance requests by other domestic or foreign authorities and media coverage. Once the authorities have been informed and involved, the company will lose control over the investigation and will become subject to external pressure. It is thus advisable not to rush into self-reporting, but to first get a clear view of the main facts, the persons involved and the potential legal implications.

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?

If the investigation is ordered by the authorities, they will regularly require a written report. As for voluntary self-disclosure, there are no formal requirements. However, in practice, the submission will usually be in writing: on the one hand, for evidentiary reasons and transparency; and on the other hand, to demonstrate the highest level of cooperation and diligence towards the authorities.

Once a written report is voluntarily submitted to an authority, any related legal professional privilege is considered to be fully or partially waived and, accordingly, the report can be held against the submitting entity. In relation to other authorities or third parties, legal professional privilege may in principle still apply. However, the authority receiving the report may often be obliged to cooperate with other domestic or foreign authorities and, thus, the report may end up circulating beyond the authority to which it was submitted. The risk of media leakage and statutory or contractual obligations to protect employees or third parties should also be taken into account. It is therefore advisable that companies discuss the format, scope and handling of their reports with the authorities and external or internal counsel prior to any disclosure or submission.

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 or progressing an internal investigation? Should it liaise with local authorities even if it is not required to do so?

Entities subject to government investigations are not required to liaise with the authorities, except for government investigations (i.e. by FINMA) related to certain regulated markets. In general, being in contact and maintaining good relations with the authorities can generate goodwill and potential credit at sentencing. If entities investigate in parallel to the authorities, they risk frustrating the government's fact-finding and may expose themselves to allegations of tampering with or destroying evidence. Thus, it may be advisable for entities to inform the authorities that they intend to start their own investigation. In any case, it will be crucial for the entity to carefully weigh whether it will liaise with the authorities or, rather, behave defensively. For example, an entity may be able to minimise the disruption caused by a dawn raid by agreeing mutually beneficial terms for producing evidence in advance.

3.2 If regulatory or law enforcement authorities are investigating an entity's conduct, does the entity have the opportunity to influence the scope of a government investigation? If so, how is it best achieved, and what are the risks?

In criminal proceedings, the prosecuting authorities determine the scope of their investigations independently, i.e. without giving the concerned entity the opportunity to comment on the extent of their investigation. However, in an investigation conducted or ordered by regulators, such as FINMA, there may be more flexibility to discuss the scope of the investigation. In particular, the most efficient methodology and the deadlines may be subject to discussion on a regular basis.

3.3 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?

In recent times, Swiss law enforcement authorities have been regularly cooperating and coordinating their investigations with the authorities of other jurisdictions. Switzerland has ratified multiple treaties and implemented legislation regulating the subject matter and procedure of the cooperation between Swiss and foreign law enforcement authorities. There are numerous cases involving international cooperation (e.g. *GUNVOR SA*, *Siemens*, *Panalpina*, *FIFA*, *Odebrecht* and *PDVSA*).

Where investigations into an entity are pending in multiple jurisdictions, it is beneficial for the entity to coordinate the various proceedings, and to have a strategy in place regarding all related jurisdictions. Coordination and global resolution are mostly in the best interests, and it is necessary for the entity to continuously strategically weigh and coordinate the effects of an investigation in one jurisdiction with regard to possible developments in the other jurisdictions involved. This includes seeking legal advice in all jurisdictions concerned and contacting foreign authorities at an early stage. This will also help to explain the restrictions resulting from Swiss "Blocking Statutes" to foreign authorities (e.g. Art. 271 Swiss Criminal Code ["**SCC**"]), as well as data protection and/or confidentiality.

4 The Investigation Process

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

An investigation plan should typically include the following steps:

- definition of the purpose and the scope of the investigation as well as the legal issues that shall be addressed by outside counsel during the investigation;
- establishment of an investigative team;
- evaluation of the need and, if necessary, implementation of interim measures, in particular in regard to securing evidence;
- identification, preservation and collection of relevant evidence;

- review and analysis of documents (electronic and physical);
- interviews with employees (scoping and substantive);
- reporting milestones (including the structure and format for reporting);
- communication with internal and external stakeholders and, if necessary, the authorities and the media; and
- conclusions and consequences with regard to possible sanctions against employees and the identified weaknesses in the compliance management system.

4.2 When should companies engage 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? To what extent is independence of outside counsel desirable?

The decision to engage outside counsel for the purpose of an internal investigation should be taken at an early stage, in order to give effect to legal professional privilege as early as possible. There are multiple reasons why the engagement of outside counsel could be beneficial. Apart from ensuring that the investigation is conducted independently and lending it credibility, the main purpose of such engagement is to guarantee that the results of the investigation are privileged. For cross-border investigations, it should be noted that Swiss in-house counsel do for the time being not enjoy legal professional privilege (*cf.* question 5.3 below).

When selecting outside counsel, entities should consider the abovementioned reasons, as well as the following: know-how and experience; their reputation for being independent; and their available resources for dealing with the investigations. With respect to cross-border investigations, outside counsel should in particular have experience in conducting large-scale investigations in multiple jurisdictions and in cross-border issues (e.g. in relation to Swiss "Blocking Statutes" under Art. 271 SCC, data protection and confidentiality law). In terms of independence of the outside counsel, the company should decide on a case-by-case basis whether it is preferable to engage a law firm that already has a business relationship with the entity, or rather to engage a law firm with no ties to the daily business of the company.

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?

Internal investigations are covered by attorney-client privilege as long as the internal investigation is conducted by lawyers registered to practise law in Switzerland and, in certain circumstances, in EU and EFTA countries and in the UK, and the investigation is related to the attorney's typical professional activity. In a recent ruling, the Swiss Federal Supreme Court ("**FSC**") confirmed that correspondence and documents with lawyers admitted to practise in jurisdictions outside of these listed countries, in particular the US, are not protected by attorney-client privilege in Switzerland and may be seized (decision 1B_333/2020 of June 2021). Conversely, investigations carried out purely internally, without the involvement of external attorneys, are currently not protected by attorney-client privilege (see below question 5.3).

While the conduct of internal investigations potentially qualifies as providing legal services, due to decisions of the FSC, there is uncertainty as to which activities are specifically protected by legal privilege. Caution should be applied in the case of investigations involving money laundering or banking regulatory compliance. According to the FSC, the work product of attorneys in an investigation is not privileged if the client was obliged by statute or regulation (i.e. anti-money-laundering regulations) to undertake the investigative measures (decision 1B_433/2017 of March 2018 and reiterated in 1B_453/2018 of February 2019 and 1B_509/2022 of 2 March 2023). How this precedent will unfold outside of money-laundering compliance remains to be seen. In two recent decisions (7B_158/2023 [intended for publication] and 7B_874/2023, both dated 6 August, 2024) the FSC addressed relevant questions regarding the applicability and scope of legal privilege in internal investigations. The FSC affirmed the applicability of attorney-client privilege to internal investigation reports and dispelled doubts that had existed based on previous rulings by the FSC. The FSC in particular found that the voluntary disclosure of findings in a report to a regulatory authority does not constitute a waiver of client-attorney privilege. However, the FSC also held that client-attorney privilege did not extend to the third party to whom the documents were disclosed. This meant in the cases at hand that the bank concerned was able to successfully invoke legal privilege, but the Public Prosecutor was able to obtain the information it sought from FINMA.

Careful planning of the investigation is required to counteract this uncertainty and to preserve privilege. The best practices to follow include:

- The scope of the attorney's engagement and the purpose of the investigation must be carefully defined at the outset of the investigation.
- Documents of a highly sensitive nature are best kept in the custody of outside counsel and are only shared on a "need-to-know" basis.
- By means of personnel or organisational measures, potentially unprotected tasks may be separated from privileged tasks, thus ensuring attorney-client privilege.
- The term "Privileged & Confidential" should only be used when appropriate.
- Companies who retain lawyers from outside the EU, EFTA or the UK must be aware that their communications may not be protected under attorney-client privilege.

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, such as forensic experts or accounting firms, supporting outside counsel may fall under the legal privilege of the instructing attorney if they can be categorised as a person assisting an attorney. For a third party to be equally bound by the professional rules of confidentiality, as applicable to the attorney, they must qualify as a person assisting the attorney in the performance of their duties in some form. The main requirement for privilege to be applicable is that the attorney exercises the required amount of direction and supervision.

To make sure that the third party ensures adequate confidentiality measures, and to preserve privilege, the scope of the

assistance provided by the third party should be established in writing. To exercise and comply with the required amount of direction and supervision, reports to the attorney should be made on a regular basis and the attorney should be copied into all correspondence.

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

No, legal privileges do not apply to in-house counsel when directing the internal investigation. Legal professional privilege in Switzerland is currently reserved for attorneys who are registered with the Bar Association, and does not extend to in-house counsel (see question 5.1 above).

Foreign proceedings have shown that Swiss companies may suffer procedural disadvantages due to the lack of legal privileges for in-house counsel. In particular in proceedings in the U.S., Swiss companies have been obliged to disclose the correspondence of their in-house counsel, if they were employed in Switzerland. This is because Swiss law does not contain anything corresponding to the U.S. legal privilege for in-house counsel. However, after more than a decade of political discussions, the Swiss Parliament has now amended the Swiss Civil Procedure Code ("**nCPC**") with a new provision in Art. 167a nCPC, introducing an exception to the general obligations to cooperate in civil court proceedings for in-house counsel. It is expected that the new article in the CPC will become applicable on 1 January 2025.

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

As mentioned above (see above question 5.3), in-house counsel are not allocated attorney-client privilege, and therefore the use of external attorneys is recommended in internal investigations. It is further recommended to follow the best practices outlined in question 5.1.

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 agencies are bound by official secrecy. The disclosure of the results of an internal investigation depends on whether the enforcement agency has a duty to notify another authority of any unlawful conduct they may have become aware of. If submitted, the manner of obtaining these findings – whether voluntarily or involuntarily – is not important.

However, the disclosure of voluntarily submitted investigation results to other enforcement authorities discourages voluntary submitting and affects cooperation in the long run. Entities are torn between disclosure and criminal self-incrimination. The approach of agencies dealing with voluntarily disclosed results is not uniform. In the past, FINMA has refused requests by criminal prosecuting authorities to divulge internal investigation reports that were submitted to them on a voluntary basis. Other agencies, however, strictly follow their obligation to report. It is therefore recommended to consult with the relevant enforcement agency before voluntarily disclosing the results of an internal investigation. As mentioned above (see above question 5.1), client-attorney privilege does not extend to the third party to whom documents were disclosed (e.g. FINMA).

6 Data Collection and Data Privacy Issues

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

Data collection and processing are regulated by the Federal Act on Data Protection ("**FADP**"). Recently, the FADP underwent a substantial overhaul, with the revised act becoming effective on 1 September 2023. The primary objective of this comprehensive revision was to modernise the existing FADP to align it with social and technological advancements and harmonise it with the more recent and advanced regulations within the European data protection landscape, particularly the General Data Protection Regulation ("**GDPR**"). The GDPR applies to Swiss companies when they handle personal data in connection with providing goods or services to, or monitoring the behaviour of individuals within the EU. The fundamental principles of Swiss data protection law remain consistent and include legality, good faith, the principle of transparency, purpose limitation, proportionality, data accuracy and the safeguarding of data security. The revised FADP has introduced extensive amendments across various domains and there have been enhancements and adjustments to the penalties for non-compliance.

In accordance with the employer's duty of care outlined in the Swiss Code of Obligations ("**CO**"), employers are obligated to ensure the protection of the personal rights of the employees. The Employment Ordinance limits workplace surveillance systems, permitting their use under strict conditions, including proportionality and a compelling interest like employee safety and operational security. Additionally, employment law may impose restrictions on the processing of employee data during internal investigations. Cross-border disclosure of personal data is strictly prohibited if it poses a significant risk to the privacy of the individuals involved, particularly in the absence of legislation guaranteeing sufficient protection. This is particularly relevant when dealing with the United States, where data transfers are only allowed when legally justified. Ensuring adequate personal data protection frequently presents a significant challenge in cross-border investigations.

In the context of cross-border internal investigations, compliance with the Swiss "Blocking Statutes" (Art. 271 SCC) is imperative. Swiss law stipulates that any unauthorised conduct on Swiss territory carried out on behalf of a foreign state, foreign entity or organisation, where such actions fall under the purview of a public authority or official, is subject to imprisonment or monetary penalties. Consequently, Art. 271 SCC prevents any "official act" from being executed on behalf of a foreign authority within Swiss borders, potentially obstructing the collection of evidence located in Switzerland intended for use in foreign legal proceedings. This prohibition extends to formal employee interviews conducted on behalf of foreign investigative authorities or if the resulting work products from these interviews are later made available to a foreign state's authority. However, under specific circumstances, the competent federal department may issue permits for cooperation with foreign state authorities on a case-by-case basis.

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?

While there is no general requirement for document preservation when conducting a corporate investigation, it may be mandated by specific legislation (e.g. tax or corporate law) or as directed by an authority. International companies operating in Switzerland often face the U.S. obligation to preserve relevant data when litigation or investigation is imminent or reasonably expected. To ensure a credible investigation and in anticipation of regulatory or legal proceedings, companies typically issue preservation notices. The formal requirements for issuing such notices are not specified.

Data protection regulations, particularly concerning employee data, can limit the scope of data preservation. Typically, only employee data of individuals likely to hold business-related information relevant to the investigation should be preserved. The FADP requires that, unless there are reasonable grounds to believe that preserving the information would lead to data deletion or compromise the investigation's confidentiality, employees must be informed about the purpose and anticipated use of data preservation. Exceptions to disclosure can be found in the FADP.

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.)?

Cross-border investigations present numerous challenges for Swiss companies, as they must navigate the legal requirements of multiple jurisdictions simultaneously. They face various challenges associated with Swiss blocking statutes per Art. 271 SCC, as well as compliance with the FADP and employment regulations. Depending on their specific industry, they may also need to navigate industry-specific confidentiality laws, including Swiss banking secrecy. Companies should also be attentive to regulations that protect manufacturing and trade secrets, especially under Art. 273 and Art. 162 SCC. Disclosing such secrets to foreign authorities can lead to criminal liability. Art. 273 SCC aims to protect not only the secret's owner but also Switzerland's broader economic interests. Even if a company conducting an internal investigation decides to waive its own trade secrets, Art. 273 SCC may still apply in certain situations, especially if Switzerland's economic interests or a third party's business secrets are at stake. Companies must also clarify the scope of attorney-client privilege in all relevant jurisdictions and ensure that data collection, processing and transfer comply with local legal requirements.

Practical experience has shown that successful cross-border investigations require comprehensive strategies that address legal challenges in all the involved countries. To address these various legal requirements in handling documents, companies conducting cross-border investigations must be diligent in their adherence to the respective regulations and statutes of each jurisdiction involved. Companies should continuously assess the impact of their investigative actions and coordinate their approach to accommodate developments in different jurisdictions. It is also important to inform regulators early about local provisions that could limit the sharing of information across borders (see question 6.1 above).

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

Document collection procedures in internal investigations are typically tailored to the specific nature of each case. In investigations conducted by enforcement agencies, a broad range of evidence forms is admissible. Consequently, it is advisable for companies to collect all evidence they deem necessary for the investigation, including electronically stored information (e.g. emails, SMS, chats and office data), hard-copy materials (e.g. policies, minutes, HR files), and legally obtained telephone and audio-visual recordings.

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

In any investigation, careful planning and documentation of critical decisions during the review process should be the foundation. Data collected on a processing platform should be reviewed based on search criteria aligned with the investigation's objectives. The tools and resources used for document collection and processing vary depending on the scale, budget and the nature of the investigation. In large-scale investigations, the latest scientific technologies come into play for data collection and processing.

Given the exponential growth in data volume, modern review techniques and analytical tools have become increasingly indispensable. These approaches leverage statistical, mathematical and linguistic methods. Beyond fundamental practices like data deduplication and email threading (where only the final email in a chain is retained for review), Technology-Assisted Review ("**TAR**") is gaining prominence. TAR incorporates machine learning, allowing computers to learn from the decisions made by human data analysts and apply them automatically to the entire dataset. It is becoming more and more common to integrate TAR and Artificial Intelligence ("**AI**") into the review process, utilising algorithms to categorise data, recognise conceptually similar information, and visually present it for a more efficient review.

To maintain an unbroken chain of custody and prevent data alteration during preservation and investigation, it is advisable to engage trained forensic specialists right from the start for electronic evidence securing.

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?

Currently, Switzerland has not enacted specific legislation pertaining to TAR or broader AI applications, and there are no specific restrictions on the utilisation of TAR or predictive coding techniques mandated by Swiss judicial or enforcement authorities. If the company plans to collaborate with investigating authorities, the search criteria used should be approved before the review begins. For best practices on handling extensive document collections, refer to question 6.5.

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?

Requirements for interviews of employees arise from, among others, the provisions on employment law in the CO. The admissibility and parameters of these interviews derive from the employer's overarching duty of care. Interviews must be directly related to the interviewee's employment, conducted fairly, and avoid any form of pressure or coercion. Furthermore, it is essential to inform the employee of specific details at the outset, including the purpose, content and any allegations, ensuring the employee's defence rights such as the right to be heard is respected, affording them the opportunity to respond to the accusations.

In a recent landmark decision (4A_368/2023 of 1 January 2024) concerning an employee termination dispute, the FSC held that criminal procedural guarantees are not applicable within the realm of corporate internal investigations. Nevertheless, companies conducting internal investigations are well-advised to continue to follow certain principles of due process, in particular if the findings of an investigation shall be used in subsequent or parallel proceedings (refer to question 7.4 below).

General data protection provisions are applicable to interviews involving employees, former employees and third parties. Formal questioning of employees within internal investigations conducted on behalf of a foreign authority or with the intent to present interview-related work products as evidence to the authority may raise concerns under the Swiss Blocking Statutes under Art. 271 SCC (*cf.* question 6.1).

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?

In contrast to former employees or external individuals, the obligation for current employees to actively participate in internal investigations is grounded in their duty of loyalty and the obligation to account for and return company property. Additionally, current employees are bound by a general duty of truthfulness towards their employers. An obligation to cooperate is also derived from the employee's obligation to report all facts and circumstances of which they have become aware in the course of their employment. Based on their authority to issue instructions, employers may request current employees' participation in interviews related to business matters. However, this authority to issue instructions does not apply to former employees.

Nevertheless, the employee's obligation to participate and provide truthful statements is not absolute. Their general duty of loyalty is circumscribed by their legitimate interests. Presently, there is a lack of clarity concerning whether employees have the right to decline specific questions or withhold cooperation, citing the right against self-incrimination. Although the FSC recently (see question 7.1 above) decided that the principles of criminal procedure are not applicable in internal investigations, it is best practice that a right against self-incrimination must be granted in particular if there is a likelihood that the interviewee might face criminal prosecution. Therefore, in certain situations, the employer's duty of care towards the employee may entail the communication of their right to remain silent.

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?

There is no general obligation to provide legal representation to witnesses prior to interviews. The assessment of whether legal representation is necessary should be carried out on a case-by-case basis. While legal representation may not be required when a witness primarily functions as an information source without personal stakes, it becomes essential when conflicts of interest arise between the entity and the witness or other substantial consequences affecting the witness become apparent. If there is a risk of employment-related sanctions or if the employee is in a situation that makes them especially vulnerable, it may be prudent, in line with the employer's duty of care, to consider allowing or advising the presence of legal counsel.

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

To conduct effective witness interviews, careful planning is crucial, and several key considerations should be taken into account:

- Determine whether the interview serves to scope out information *vs.* clarify the role of an urgent suspect.
- Establish the intended use of the investigation's outcomes.
- The interests of the individuals involved should be taken into account as early as possible. Assess the likelihood of criminal proceedings and identify any particularly exposed employees who need to be questioned. Also consider other legal consequences for the employees involved (e.g. employment law).
- Consider whether interview transcripts might be seized and used in subsequent criminal proceedings.
- Determine whether the company intends for the internal investigation findings to be integrated into subsequent or parallel regulatory and/or criminal proceedings.
- Depending on the responses to these critical questions, the company may need to adjust its approach to the employee's defence rights (e.g. right against self-incrimination, affording the witness the opportunity to retain legal counsel), the comprehensiveness of the instruction, and the recording of the interviews. The employee should be informed about how and where the results of the inquiry are intended to be used.

To ensure the interview process aligns with best practices, the following guidelines should be followed:

- Begin by introducing the interviewers and clarifying their roles.
- If attorneys are present, make it clear that they represent the entity's interests, not the witnesses being interviewed and that such interviews are privileged and confidential and that the decision to waive this privilege and share information with authorities is up to the employer ("Upjohn"-Warning).
- Provide a clear understanding of the investigation's purpose and background.

- Communicate any allegations against the witness, ensuring transparency.
- Assurance: reiterate the confidentiality of the interview to maintain trust and privacy.
- Clarify how the information gathered will be used.
- Offer the witness an opportunity to respond to the allegations.
- If there is a likelihood that the interviewee might face criminal prosecution, approach the situation cautiously, evaluating whether legal representation and the right against self-incrimination should be extended.
- Ensure that the interview is documented in some form, and inform the witness about the documentation method. If interview minutes are prepared, they should be provided to employees for verification of accuracy and should be signed not only by the interviewee but also by the interviewer.

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

Cultural aspects can have a significant influence on the success and quality of the interview.

It is for example advisable to choose the interviewees carefully so that the interviewee feels sufficiently comfortable and confident to provide truthful information. This is particularly relevant in cases of sexual harassment. In such cases, it can be beneficial if the interviewee is interviewed by a person of the same sex.

Furthermore, it is recommended to choose a neutral location for the interviews and not the company's facilities, where other employees might be able to perceive the internal investigation and the interviewees could be exposed.

In cross-border investigations, cultural factors have an even greater value and it is even more important to adapt the modalities of the interview and/or the questioning technique to cultural differences (e.g. by considering religious festivities, suitable translators, etc.).

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

While legislation in the USA and the EU actively supports whistleblowing, for example by establishing protective regulations for whistleblowers, there is still no regulation of whistleblowing in Switzerland. Nevertheless, the establishment of anonymous reporting systems is increasingly becoming the standard in Switzerland too. Anonymous reporting systems can protect whistleblowers from consequences by the employer and/or other employees.

In cases of a non-anonymous whistleblower report in Switzerland, the employer's duty of care and the protection of personality rights under civil law offer possibilities to uphold the rights of the whistleblower, for example by redacting his name in the internal investigation report and the interview minutes.

7.7 Can employees in your jurisdiction request to review or revise statements they have made?

Following best practice, entities should ensure that the interviews are documented in some form. If interview minutes are prepared, they should be provided to employees for verification of accuracy and should be signed not only by the interviewee but also by the interviewer. In this context, protocol errors can be corrected by mutual agreement. However, once a statement has been made and documented correctly, it can only be revised with a new, different statement. The change in statement is then evaluated in the report concluding the internal investigation.

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

In Switzerland, internal investigations are not conducted by the authorities, but by the company itself or by a third party appointed by the company, such as a law firm. It is therefore not required that enforcement authorities are present during witness interviews.

Regarding the presence of a legal representative, see question 7.3.

8 Investigation Report

8.1 How should the investigation report be structured and what topics should it address? Is it always desirable or recommended that a formal written report is prepared?

The report is the key result of the internal investigation in Switzerland. Any further measures depend on it, such as measures to improve internal compliance and controls, labour law or disciplinary sanctions against the persons involved, or regulatory or criminal reporting to the authorities.

In Switzerland there are no regulations on the form and scope of the report. Reports can therefore also be provided orally. The entity and the appointed party should agree on the requirements of the report at the beginning of the internal investigation. When deciding on the form of the report, it is important to consider that a written report can be confiscated by law enforcement authorities and used as evidence in a criminal investigation. However, this risk can be prevented by technical measures, at least in the case of digital versions of the report. Furthermore, regulated entities are obliged under Art. 29 para. 2 Financial Market Supervisory Act to report to the supervisory authority any incidents that are of significance for their monitoring activities. In this case, a written investigation report is required.

A written investigation report generally consists of three parts: a description of the assignment; the methodology/procedure of the investigation; and the results. In addition, it is often required that the results are legally assessed and suggestions for improvement are provided.

9 Trends and Reform

9.1 Do corporate investigations tend to lead to active government enforcement in your jurisdiction? Has this increased or decreased over recent years?

The results of an internal investigation may lead to the initiation of regulatory or criminal proceedings if the entity decides to publish the results of the investigation or to forward its results to the authorities. According to our experience, there

is no clear trend as to whether government enforcement in Switzerland has increased or decreased due to internal investigations conducted by companies.

9.2 What enforcement trends do you currently see in your jurisdiction?

Recently, an increase in criminal investigations against companies (in particular in the banking and energy sector) based on Art. 102 SCC can be observed. If a felony or misdemeanour is committed in a company in the exercise of commercial activities and if it is not possible to attribute this act to any specific natural person due to the inadequate organisation of the company, Art. 102 SCC attributes the felony or misdemeanour to the company itself. These criminal investigations are regularly preceded by an internal investigation within the company. As a result, internal investigations are becoming increasingly important.

9.3 What (if any) reforms are on the horizon?

Internal investigations in Switzerland are as such not particularly regulated by specific law in Switzerland and as a result, various regulations in criminal, corporate, employment and data protection law apply when an internal investigations is being conducted. As part of the revision of the Swiss Criminal Procedure Code ("**SCCP**"), which came into force on 1 January 2024, the Federal Prosecutor's Office proposed the inclusion of a Deferred Prosecution Agreement ("**DPA**") in the revised SCCP. The DPA is an out-of-court settlement option in criminal proceedings, whereby the prosecutor's office refrains from bringing charges against companies to court, provided they fulfil the agreed obligations. However, the Federal Council rejected the proposal as it would further expand the position of the prosecutor's office whilst not providing any control mechanisms. There are currently no reforms in sight. However, various practitioners as well as representatives from corporation would generally be in favour of a statutory regulation with regard to the availability of a DPA in the SCCP.

Dr. Roman Huber is partner at Kellerhals Carrard and specialises in complex domestic and international litigation and arbitration proceedings, with a particular focus on international and cross border matters. He represents private and corporate clients in white-collar criminal law matters and administrative and regulatory litigation, in particular enforcement and other regulatory proceedings. He has extensive experience in international and cross-border disputes and in conducting internal investigations relating to white-collar crime and regulatory issues. Roman has an in-depth knowledge of the financial services industry, based on his prior experience at a major Swiss Bank and at the Enforcement Division of the Swiss Financial Market Supervisory Authority (FINMA). He holds a Ph.D. in law from the University of Zurich (2013) and received an LL.M. from the University of New South Wales, Sydney (2012) and a Master of Laws degree from the University of Lucerne (2006). Roman is also a lecturer at the University of St.Gallen (HSG).

Kellerhals Carrard
Rämistrasse 5
CH-8024 Zürich
Switzerland

Tel: +41 58 200 39 00
Email: roman.huber@kellerhals-carrard.ch
LinkedIn: www.linkedin.com/in/romanhuber2022

Dr. Daniel Lengauer is managing partner at Kellerhals Carrard. He advises national and international clients on merger and acquisition transactions, corporate law as well as financial market and capital market law. He is recognised by the SIX Swiss Exchange as a qualified issuer representative for equity and debt securities. Daniel Lengauer has extensive experience in antitrust law and compliance issues. With an extensive legal career spanning several roles, he previously headed KPMG Legal for more than 15 years, and worked for both Swiss and UK law firms. He is a graduate of the University of Zurich.

Kellerhals Carrard
Raemistrasse 5, P.O. Box
CH-8024 Zurich
Switzerland

Tel: +41 58 200 39 00
Email: daniel.lengauer@kellerhals-carrard.ch
LinkedIn: www.linkedin.com/in/daniel-lengauer-8b98b434

Cristina Ess is a member of the Kellerhals Carrard White-Collar Crime practice group. After graduating from the University of Zurich she gained experience in a law firm in Zurich specialised in criminal defence, in particular in white-collar crime. After passing the Bar exam, Cristina Ess joined Kellerhals Carrard Zurich's White-Collar Crime team and now primarily represents and advises clients in all areas of white-collar crime, particularly in relation to fraud, misappropriation and money laundering, as well as in international legal assistance and administrative assistance proceedings. In addition, she co-leads Kellerhals Carrard Zurich's team combatting fraud and forgery related to Swiss federal Covid-19 loans and conducts numerous criminal proceedings throughout the eastern part of Switzerland.

Kellerhals Carrard
Raemistrasse 5, P.O. Box
CH-8024 Zurich
Switzerland

Tel: +41 58 200 39 00
Email: cristina.ess@kellerhals-carrard.ch
LinkedIn: www.linkedin.com/in/cristina-ess-4988a5256

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