Global Investigations Review

The Practitioner's Guide to Global Investigations

Volume II: Global Investigations around the World

Third Edition

Editors
Judith Seddon, Eleanor Davison, Christopher J Morvillo, Michael Bowes QC, Luke Tolaini, Ama A Adams, Tara McGrath

2019

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Published in the United Kingdom
by Law Business Research Ltd, London
87 Lancaster Road, London, W11 1QQ, UK

www.globalinvestigationsreview.com

Enquiries concerning reproduction should be sent to: gemma.chalk@lbresearch.com.
Enquiries concerning editorial content should be directed to the Publisher:
david.samuels@lbresearch.com

ISBN 978-1-78915-111-4
Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

Acknowledgements

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Introduction to Volume II

Judith Seddon, Eleanor Davison, Christopher J Morvillo, Michael Bowes QC, Luke Tolaini, Ama A Adams and Tara McGrath[1]

Boards and senior executives have never been more concerned that they or their organisation may come under the scrutiny of enforcement authorities. And with good reason. Recent years have seen an upsurge in confidence among enforcement authorities across the globe, which has manifested and led to increased numbers of investigations, fines of unprecedented orders of magnitude and senior executives facing the much more realistic prospect of investigations concerning their own conduct and, in some cases, prosecution, conviction and imprisonment.

In many jurisdictions, the introduction of new offences and changes to the law of corporate criminal liability have provided enforcement authorities with enhanced opportunities to pursue criminal investigations and ultimately to prosecute corporate entities. Coupled to this has been the incentivisation of corporates to co-operate with investigations and provide information to assist authorities in pursuing culpable individuals through negotiated settlements. In some jurisdictions, notably the United States, these are an established feature of the enforcement landscape and are regularly used to bring investigations to a pragmatic conclusion without the commercially destructive consequences prosecution of a corporate entity can bring. In others, such as the United Kingdom and France, legislation enabling corporates to conclude investigations short of prosecution is still comparatively young.

The law relating to criminal and regulatory investigations shows no sign of standing still. Law and practice across the globe has changed, often in response to highly publicised scandals. Relationships between enforcement authorities continue to grow closer, and there is a marked trend in politicians, prosecutors and regulators carefully watching the way other jurisdictions choose to combat corporate crime, to apply the most effective mechanisms in

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their own national contexts. Recent examples of changes to legislation in terms of either extending corporate criminal liability or legislating for its resolution through deferred prosecution agreements (or both) include significant changes being made in Singapore, Japan, Canada, Australia and Ireland at the time of writing. A similar trend may be observed in the regulatory sphere through the implementation of individual accountability regimes modelled on or drawing from the UK Senior Managers and Certification Regime in, for example, Hong Kong, Australia and Singapore.

All these macro factors, together with important changes to technical local legislation such as the implementation of the EU General Data Protection Regulation, present numerous, significant challenges to corporates and individuals around the world. Both can quickly find themselves the targets of fast-moving and far-reaching investigations, whose possible outcomes may vary significantly in different jurisdictions.

In Volume II of this Guide, which in the third edition now covers 21 jurisdictions, local experts from national jurisdictions respond to a common set of questions designed to identify the local – continually evolving – nuances of law and process that practitioners are likely to encounter in responding to the increasing number of cross-border investigations they face.

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Switzerland

Benjamin Borsodi and Louis Burrus[1]

General context and principles

1 Identify the highest-profile corporate investigation under way in your country, describing and commenting on its most noteworthy aspects as it relates to your country.

Until very recently, the highest-profile corporate investigation in Switzerland was the *Odebrecht* matter. Odebrecht is a major corporate group, active in construction, with operations across the Americas, Africa and elsewhere, with more than 150,000 employees. The company and its directors (mostly family members) were under investigation in the context of Brazil's *Operation Car Wash* investigation centred on state oil company Petrobras. The Office of the Attorney General (OAG) opened domestic proceedings, targeting the group and several individuals with corruption of foreign officials and money laundering. The closely coordinated, speedy and conflict-free (no contradictory decisions, elimination of risk of double jeopardy) resolution spanning the three main jurisdictions (Brazil, the United States and Switzerland) involved in the criminal prosecution was a key achievement. The settlement (a trilateral agreement) was a landmark new approach in international co-operation and resulted in the largest corruption settlement worldwide. It is often described as a 'model case' for future cross-border resolutions. For the Swiss part, the resolution was one of the first corporate criminal liability cases ever settled in Switzerland, and by far the biggest to date.

Other cases that have attracted substantial media attention in the recent past are the FIFA Investigation (still ongoing) and the *Addax* matter. Addax, a commodity trading company, reached an agreement with the Office of the Geneva prosecutors following allegations of a multimillion-dollar corruption scheme in Nigeria. The company ceased operations in

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Geneva shortly after it reached an agreement with the Geneva prosecuting authorities. The settlement included the payment of 31 million Swiss francs against the discontinuation of the proceedings.

2 Outline the legal framework for corporate liability in your country.

Criminal corporate liability was enacted in Switzerland in October 2013. It concerns all offences in the Swiss Criminal Code (SCC). It focuses on the lack of organisation of a corporation. Liability is two-fold, namely primary and subsidiary corporate criminal liability.

The subsidiary liability is found at Article 102, paragraph 1 of the SCC and provides that, for all offences, the company can be found liable if it is not possible to identify a responsible individual within the corporation because of a lack of organisation within the company.

The primary liability is limited to a catalogue of certain financial offences (corruption, bribery, money laundering, financing of terrorism, etc.), in which case the corporation can be found criminally liable, irrespective of the liability of an individual, if that corporation has not taken all necessary measures to prevent an offence being perpetrated.

3 In your country, what law enforcement authorities regulate corporations? How is jurisdiction between the authorities allocated? Do the authorities have policies relating to the prosecution of corporations?

There are no specific law enforcement authorities regulating corporations in Switzerland, except for financial institutions, which are regulated by the Swiss Financial Market Supervisory Authority (FINMA). However, the Criminal Procedure Code (CrimPC) provides for federal jurisdiction for specific offences (see Articles 23 and 24, CrimPC). This is particularly the case in white-collar matters. All other criminal offences fall within the jurisdiction of the cantons. However, the 26 cantonal prosecution authorities are not subordinate to the OAG.

4 What grounds must the authorities in your country have to initiate an investigation? Is a certain threshold of suspicion necessary to trigger an investigation?

Prosecuting authorities must investigate any facts or suspicion that could lead to the finding of a criminal offence. There is no specific threshold, but the authorities must abide by the standard principles of criminal proceedings (such as speediness, due process and the right to be heard).

5 Does double jeopardy, or a similar concept, apply to prevent a corporation from facing criminal exposure in your country after it resolves charges on the same core set of facts in another country?

Switzerland applies the legal doctrine of *ne bis in idem*, which provides that no legal action can be instituted twice for the same cause of action. It is essentially the equivalent of the double jeopardy doctrine found in common law jurisdictions.

This protection is derived in particular from Article 4 of Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, and from Article 14, paragraph 7 of the 1966 International Covenant on Civil and Political Rights. Since January 2011,

this principle is also expressly set out in Article 11, paragraph 1 of the CrimPC. However, this merely provides that no person who has been convicted or acquitted in Switzerland by a final legally binding judgment may be prosecuted a second time in Switzerland for the same offence. Because of the territoriality principle, a foreign prosecution or conviction has generally no effect on the jurisdiction of the Swiss criminal authorities in the context of offences committed in Switzerland. However, the SCC provides that, in certain circumstances, the Swiss criminal authorities must take into account a sentence served abroad and allocate it to the sentence they will impose (see Article 3, paragraphs 3 and 4, and Article 6, paragraphs 3 and 4).

6 Does criminal law have general extraterritorial effect in your country? To the extent that extraterritorial effect is limited to specific offences, describe those which have extraterritorial effect, the statutory basis and any conditions that must be met for extraterritoriality to apply.

The application of criminal law follows the territoriality principle and therefore does not generally have an extraterritorial effect (see Article 3, SCC).

There are only limited situations in which a Swiss court accepts jurisdiction for offences committed abroad. Swiss criminal law provides for extensive jurisdiction based on the nationality of the offender (active personality principle). It also provides jurisdiction over offences committed against its nationals (passive personality principle). Since the complete revision of the general provisions of the SCC in 2007, those principles can be found in the new provision on jurisdiction under Article 7, paragraph 1(a) to (c) of the SCC. They mainly apply in three situations: (1) if the offence is also punishable in the jurisdiction in which the offence was committed (dual criminality); (2) if the alleged offender is in Switzerland or can be brought to Switzerland through extradition proceedings; or (3) if the offence may yield to extradition under Swiss law, yet the alleged offender has not been extradited.

In addition, two further situations in which the Swiss nationality of the offender or the victim is not a requirement have been introduced under Article 7, paragraph 2 of the SCC: (1) when the request for extradition was denied on grounds unrelated to the nature of the offence; and (2) when the offence is a particularly serious felony within the meaning of generally accepted standards in the international community.

7 Describe the principal challenges in your country that arise in cross-border investigations, and explain whether and how such challenges are dependent on other countries involved.

The main challenges in cross-border investigations relate to the ability of Switzerland-based individuals or entities to comply with requests addressed directly to them by a foreign authority, because of several Swiss law constraints. For instance, specific provisions of the SCC protecting Swiss sovereignty and the economic privacy of Swiss citizens may prevent those Switzerland-based individuals or entities from disclosing information to a foreign authority. In addition, Switzerland applies a rather strict data protection regime, which, in particular, affects cross-border data transfer. Those challenges can best be avoided when the foreign authority follows the available mutual legal assistance channels.

8 What bearing do the decisions of foreign authorities have on an investigation of the same matter in your country?

Swiss authorities tend to assess their own investigations independently. Although they generally favour international co-operation, Swiss authorities do not really let decisions by foreign authorities influence the conduct of a Swiss proceeding. That being said, one field in which foreign decisions may have an indirect influence is concurrent sentencing (see Article 49, SCC). This rule provides that when a court must pass sentence on an offence that was committed before the offender was sentenced for a different unrelated offence, then the punishment cannot be more harsh than if he or she had been convicted of both offences at the same time.

9 Do your country's law enforcement authorities have regard to corporate culture in assessing a company's liability for misconduct?

While corporate culture is not a factor that is considered specifically by law enforcement agencies in their approach to corporate liability, in the past five to seven years, authorities have conducted investigations and prosecutions in accordance with global legal trends, including harsher approaches for offences related to corruption and money laundering. For instance, the Swiss Federal Tribunal (Switzerland's supreme court) issued a judgment whereby money laundering can be perpetrated by omission when the offender holds some type of guarantor position (i.e., a bank's compliance officer) (see Decision of the Federal Tribunal 136 IV 188). The 2016 enactment of new legislation regarding private bribery also reflects this.

10 What are the top priorities for your country's law enforcement authorities?

Current priorities for law enforcement authorities in Switzerland concern the fight against corruption, including private bribery that can take place in the context of large sport organisations (e.g., FIFA). Through the conclusion of numerous bilateral treaties with the enactment of the Automatic Exchange of Information, Switzerland allows other countries to better fight tax evasion when tainted funds are located in Switzerland. Finally, combating money laundering remains a priority, according to statements made by the OAG in the past three years.

11 How are internal investigations viewed by local enforcement bodies in your country?

Internal investigations are tolerated well. Because of the nature of the Swiss criminal prosecution system, in which an investigation is entirely and actively conducted by the prosecution authorities themselves, internal investigations are still sometimes viewed with caution by local enforcement authorities. However, in many fields, they have now become inevitable and this has entailed a significant learning process for authorities and corporations. In large-scale investigations, some authorities now ask for some form of coordination with parallel internal investigations.

Before an internal investigation

12 How do allegations of misconduct most often come to light in companies in your country?

The two main sources for the initiation of criminal proceedings in Switzerland are the suspicious activity and transaction reports filed by Swiss banks with the Money Laundering Reporting Office of Switzerland (MROS) and criminal complaints filed by private individuals and corporations. An example is the case of the *Petrobras* matter, in which more than 40 banks have reported relationships to the MROS, which has resulted in investigations of thousands of Swiss bank accounts.

Allegations might also be revealed further to a letter rogatory filed by another jurisdiction disclosing certain facts leading Swiss authorities to open a domestic investigation.

13 Does your country have a data protection regime?

Swiss data protection regulations are embodied in the Federal Data Protection Act (DPA) of 19 June 1992. The DPA is applicable to any data that is 'personal' or 'sensitive' when the data is processed (i.e., when data is stored, transferred, used, consulted, modified, disclosed by transmission or destroyed) by a data controller. The 'data controller' is the organisation that (either alone or jointly with other entities) determines the purposes and means of the processing of personal data.

The DPA defines 'personal data' as any information relating to an identified or identifiable natural person (the data subject). An identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person. Personal data includes names, gender, age (birth date), addresses (including dynamic IP addresses), photos, personal identifiers (such as account numbers, personal identification numbers, passwords or credit card numbers).

As a specific category of personal data, sensitive data are generally defined as any data that reveal racial or ethnic origin, political opinions, religious or philosophical beliefs, or trade union membership, genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health, or data concerning a natural person's sex life or sexual orientation.

The DPA is about to undergo a revision, which has been divided into two parts. The first concerns the treatment of data in the context of police co-operation within the Schengen zone. It is expected to be enacted by the end of 2018. The second part is not expected to enter into force before the end of 2019. Its purpose is to replicate the EU legislation and regulations, in particular the General Data Protection Regulation.

14 How is the data protection regime enforced?

The DPA is applicable, among other things, to all processing of personal data in Switzerland by any private person (including legal entities) having a physical presence within the country (territoriality principle).

The DPA sets forth general principles applicable to the processing of personal data (Article 4). According thereto, the processing of personal data must be carried out in good faith and must be proportionate (i.e., the processing has to be suitable and limited to the necessary extent). Personal data can only be processed for the purpose indicated at the time of collection, that is evident from the circumstances, or that is provided for by law. In particular, the purpose of its processing must be evident to the data subject.

Further, processing of personal data must not infringe the privacy of the data subject without justification. Reasons of justification are the consent of the data subject, an overriding public or private interest, or a statutory provision allowing the processing (Article 13, DPA). In particular, an overriding private interest may be considered if personal data is processed in direct connection with the conclusion or the performance of a contract and the personal data is that of a contractual party (Article 13(2)(a), DPA).

The DPA provides for criminal liability and fines of up to 10,000 Swiss francs if a private person intentionally fails to comply with the following obligations under the DPA:

- to provide information when collecting sensitive data and personality profiles;
- to safeguard the data subject's right to information;
- to notify the Federal Data Protection and Information Commissioner (FDPIC) with regard to contractual clauses or binding corporate rules in connection with data transfers abroad;
- to register data files; or
- to co-operate in an FDPIC investigation.

Criminal proceedings must be initiated by the competent cantonal prosecution authority.

15 Are there any data protection issues that cause particular concern in internal investigations in your country?

The most important issue encountered with regard to data protection relates to cross-border disclosures. Swiss regulation on data protection provides, for instance, that no personal data can be transferred to a foreign country except in limited circumstances, one of them being that the concerned person has given express consent to the disclosure (see Article 6, DPA).

16 Are search warrants or dawn raids on companies a feature of law enforcement in your country? Describe any legal limitations on authorities executing search warrants or dawn raids, and what redress the company has if those limits are exceeded.

Dawn raids and search warrants are common features when prosecutors conduct investigations in Switzerland; the only limitations concern the professional secrecy of certain professions (e.g., lawyers and doctors). In the case of seizure of information or documents subject to such privilege, the holder of the secrecy may request that the information be placed under seal, and it will be then up to the prosecutor to request the lifting of the seal from the competent court.

17 How can privileged material be lawfully protected from seizure during a dawn raid or in response to a search warrant in your country?

Documents or records and property that may not be searched or seized because of a person's right to remain silent or to refuse to testify, or for other reasons, must be placed under seal during a dawn raid or in response to a search warrant (see Article 248, CrimPC). Sealed documents and records may neither be inspected nor used by a law enforcement authority, unless it has successfully obtained an order lifting the seal from the competent court. Various forms of secrets, including attorney professional secrecy, might be alleged as a ground to request a seal order.

18 Are there any privileges in your country that would prevent an individual or company from providing testimony? Under what circumstances may an individual's testimony be compelled in your country? What consequences flow in your country from such compelled testimony?

Generally, every person who is capable of testifying must do so and tell the truth (see Article 163, CrimPC). Only in limited circumstances may a person refuse to testify. The most common situation is when a person would incriminate himself or herself by testifying (the right against self-incrimination). The right to refuse to testify also applies if a testimony would incriminate a relative.

19 What legal protections are in place for whistleblowers in your country?

The Swiss legal system enjoys no specific protection for whistleblowers. This topic has been discussed for several years before the Swiss parliament without reaching a compromise to date.

20 What rights do employees possess under local employment law that determine how they are treated within a company if their conduct is within the scope of an investigation? What employment rights would attach if they are deemed to have engaged in misconduct? Does it differ for officers and directors of the company?

Employees must participate in internal investigations as part of their employment obligations. They do not enjoy specific rights in this respect, except for the duty of the employer to respect employees' essential rights (i.e., the right to be treated fairly and the right to be heard). It is debated by scholars whether employees are entitled to be assisted during interviews by counsel or a trusted adviser (who might not be a lawyer). Any right they could claim if they are deemed to engage in misconduct would derive from criminal proceedings rather than employment laws.

21 Are there disciplinary or other steps that a company must take in your country when an employee is implicated or suspected of misconduct, such as suspension or in relation to compensation? Can an employee be dismissed for refusing to participate in an internal investigation?

There is no formal step that a company must take in Switzerland when an employee is implicated in or suspected of misconduct. Companies tend to release employees from their day-to-day duties and place them on garden leave during an investigation. Employees will often be

reminded that they remain subject to loyalty and confidentiality duties, and that they might be asked to co-operate in the investigation. Under Swiss law, an ordinary dismissal is possible at any time without specific grounds. Only immediate dismissals require a material ground (i.e., all circumstances on the basis of which the continuance of the employment relationship cannot be reasonably expected). The refusal to participate in an internal investigation does not generally, on its own, constitute a sufficient ground for immediate dismissal.

Commencing an internal investigation

22 Is it common practice in your country to prepare a document setting out terms of reference or investigatory scope before commencing an internal investigation? What issues would it cover?

Switzerland-based clients often expect to receive clear indications on the process that will be followed before the launch of the investigation. It is therefore advisable to prepare an action plan or fact sheet, or both, outlining the scope of the investigation and the work that will be performed. These documents will mainly contain a description of the investigatory measures, an estimate of the necessary resources and the anticipated time frame. Of equal importance is status reporting on progress in the investigation.

23 If an issue comes to light prior to the authorities in your country becoming aware or engaged, what internal steps should a company take? Are there internal steps that a company is legally or ethically required to take?

There is no specific duty incumbent on a company when it becomes aware of misconduct. On the contrary, there is a right against self-incrimination. However, the authorities are likely to give credit for the spontaneous reporting of misconduct once it comes to light.

24 At what point must a company in your country publicly disclose the existence of an internal investigation or contact from law enforcement?

Corporations are not expected to publicly release information regarding investigations or formal proceedings that are ongoing.

25 When would management typically brief the board of a company in your country about an internal investigation or contact from law enforcement officials?

Management would typically brief the board when the decision to conduct an internal investigation is taken and then once the results or recommendations are available. The internal investigation report typically contains an executive summary for the board. However, in certain circumstances, an internal investigation can be commissioned by the board directly or, more frequently, by the board's audit committee or risk committee.

26 What internal steps should a company in your country take if it receives a notice or subpoena from a law enforcement authority seeking the production or preservation of documents or data?

Corporations are expected to take all necessary measures to preserve documents and information from being destroyed in case they are required by law enforcement authorities.

Certain provisions from the SCC make it an offence for an individual or company to interfere with the good course of justice, which could be the case if evidence is being tampered with. Therefore, the corporation must have a proper IT system in place and provide proper instructions to all employees for the safe keeping of documents and information.

27 How can the lawfulness or scope of a notice or subpoena from a law enforcement authority be challenged in your country?

Orders issued by law enforcement authorities can be challenged by individuals and corporations before the competent courts. Both the lawfulness and the scope of the order are subject to review.

Attorney–client privilege

28 May attorney–client privilege be claimed over any aspects of internal investigations in your country? What steps should a company take in your country to protect the privilege or confidentiality of an internal investigation?

An internal investigation may be protected only if it is conducted by people subject to legal privilege. Under Swiss law, only Swiss attorneys, or EU lawyers authorised to practise in Switzerland, enjoy legal privilege (attorney professional secrecy). However, there is some discussion as to the exact extent of the privilege in the context of the work performed during an internal investigation (i.e., when some of the work would fall outside an attorney's core business). The Federal Tribunal ruled that legal privilege does not prevent prosecutors from accessing material prepared by external counsel in the context of an internal investigation based on alleged regulatory and money laundering offences (see Decision of the Federal Tribunal 1B_85/2016 of 20 September 2016). However, the scope of the access was limited to documents specifically related to compliance tasks that were deemed 'delegated' by the financial institution to its external lawyers. In other words, the bank must conduct its own anti-money laundering duties and cannot invoke legal privilege if these tasks are 'outsourced' to a law firm, as they fall outside the attorney's core business.

29 Set out the key principles or elements of the attorney–client privilege in your country as it relates to corporations. Who is the holder of the privilege? Are there any differences when the client is an individual?

The attorney professional secrecy is generally interpreted more restrictively than in other jurisdictions, in particular as compared to attorney–client privilege in common law jurisdictions. However, a distinction is made as to whether the client is an individual or a corporation.

In terms of documents, correspondence with external counsel regarding a current case – independent of its location – is protected by the attorney's legal privilege. Furthermore, only Swiss attorneys, or EU lawyers authorised to practise in Switzerland, can enjoy legal privilege.

30 Does the attorney–client privilege apply equally to in-house and external counsel in your country?

The attorney's legal privilege only applies to external counsel. More specifically, it only applies to Swiss attorneys, or EU lawyers authorised to practise in Switzerland. In-house counsel do not benefit from any type of protection. In the recent past, the Swiss legislature tried to introduce a certain level of protection for in-house counsel but the proposed bill (the Act on Corporate Counsel Regulation) was not accepted by the Swiss legislature.

31 To what extent is waiver of the attorney–client privilege regarded as a co-operative step in your country? Are there any contexts where privilege waiver is mandatory or required?

The common law concept of attorney–client privilege does not apply. Essentially, information entrusted to lawyers is protected by professional secrecy. The lawyer controls this form of privilege, and it cannot be waived by the client. Therefore, there is no situation in which a company can waive this privilege and obtain credit in exchange.

32 Does the concept of limited waiver of privilege exist as a concept in your jurisdiction? What is its scope?

The concept of waiver of privilege does not exist in Switzerland, precisely because of the different concept of legal privilege. The client is the holder of the secrecy to be kept by the external counsel. In other words, the client can freely decide to disclose information provided by external counsel. Voluntarily producing some information will not result in making all information produced by a Swiss external counsel subject to disclosure.

33 If privilege has been waived on a limited basis in another country, can privilege be maintained in your own country?

The extent of professional secrecy is not dependent on privilege raised or waived in another jurisdiction. However, the issue of good faith could be at issue if a party were to invoke it in Switzerland after it has been waived in another country.

34 Do common interest privileges exist as concepts in your country? What are the requirements and scope?

There is no common interest privilege available in Switzerland. Rather, defendants sometimes agree to liaise informally and exchange information and strategy.

35 Can privilege be claimed over the assistance given by third parties to lawyers?

Third parties assisting lawyers in the lawyers' core business will be bound by the same secrecy duty and enjoy the same legal privilege. Their work-product should therefore attract privilege. However, this issue has not yet been fully tested by Swiss courts. Existing case law shows uncertainties in this respect.

Witness interviews

36 Does your country permit the interviewing of witnesses as part of an internal investigation?

Internal investigations are not subject to specific laws and regulations. External counsel must refrain from influencing possible witnesses (a principle seen as a professional duty under Article 12(a) of the Free Movement of Lawyers Act) and are therefore in general not authorised to conduct formal interviews of witnesses. However, discussions may take place with employees in the context of fact-finding in an internal investigation when required.

37 Can the attorney–client privilege be claimed over internal witness interviews or attorney reports in your country?

The approach of Swiss courts to internal investigations is not fully tested. An example of a case of concern is the Federal Tribunal decision in which a bank's confidential report to FINMA was declared accessible to the OAG (see Decision of the Federal Tribunal 1B_249/2015 of 30 May 2016).

38 When conducting a witness interview of an employee in your country, what legal or ethical requirements or guidance must be adhered to? Are there different requirements when interviewing third parties?

Because internal investigations are not regulated in Switzerland, there is no specific requirement or guidance when interviewing employees or executives of a corporation. However, the practice is largely influenced by systems in common law jurisdictions; therefore, employees are usually informed of their rights at the outset of the interview, including the fact that there is no specific privilege attached to the product of the interview, namely the minutes or transcript. For the reasons set out in question 36, interviewing third parties is usually not possible.

39 How is an internal interview typically conducted in your country? Are documents put to the witness? May or must employees in your country have their own legal representation at the interview?

In normal circumstances, interviews conducted in internal investigations are operated rather informally (i.e., without recording). There is no specific guidance, so the normal course of action is to present documents to the witnesses if the situation requires it. Employees have no right to legal representation, but it is often encouraged to facilitate the conduct of the interview and allow the employee to feel more protected.

Reporting to the authorities

40 Are there circumstances under which reporting misconduct to law enforcement authorities is mandatory in your country?

Individuals and corporations have no duty to report misconduct to law enforcement authorities. It is up to the corporation to decide whether reporting could be construed favourably.

41 In what circumstances might you advise a company to self-report to law enforcement even if it has no legal obligation to do so? In what circumstances would that advice to self-report extend to countries beyond your country?

External counsel should conduct a review of the specific case prior to suggesting that the corporation should self-report. When it appears that the misconduct is likely to surface, self-reporting may be encouraged as a means of seeking leniency from the authorities. In the financial sector, banks and financial institutions are expected to report to FINMA. The decision on whether to report should be assessed globally, and not be limited to the boundaries of Switzerland.

42 What are the practical steps you need to take to self-report to law enforcement in your country?

An evaluation is made as to whether contact with the authorities should be initiated informally or through written submissions. Experience shows that organising a meeting with the authorities prior to filing an explanation brief is often preferable.

Responding to the authorities

43 In practice, how does a company in your country respond to a notice or subpoena from a law enforcement authority? Is it possible to enter into dialogue with the authorities to address their concerns before or even after charges are brought? How?

In many instances, companies must provide information before being targeted by the investigation. Orders issued by authorities are usually subject to specific sanctions so that the corporation must comply with the orders. It is normal to approach the authorities to initiate a dialogue in the hope of mitigating the potential charges. In most circumstances, prosecuting authorities agree to meet external counsel and discuss the way forward.

44 Are ongoing authority investigations subject to challenge before the courts?

Two levels of jurisdiction co-exist for challenging decisions or actions, depending on the nature of the challenge. On the one hand, the court of appeal rules on challenges against procedural acts and decisions of prosecuting authorities (Article 20, CrimPC). On the other, the court for compulsory measures has jurisdiction for ordering the accused's remand and ordering or approving specific additional compulsory measures (Article 18, CrimPC). This is, for instance, the court that rules on a sealing order on documents.

45 In the event that authorities in your country and one or more other countries issue separate notices or subpoenas regarding the same facts or allegations, how should the company approach this?

In large-scale cross-border matters, investigative authorities from various countries increasingly tend to anticipate and coordinate their actions. A company receiving similar requests in separate countries could address this with the respective authorities to ensure effective co-operation and avoid duplication. This is particularly important given that disclosure out of Switzerland to a foreign authority is often challenging, mainly because of the SCC provisions protecting Swiss sovereignty, the Swiss economy and the economic privacy of Swiss citizens (Articles 271 and 273, SCC). In addition, the company considering complying with a disclosure request needs to make sure that this is done in compliance with the DPA. In terms of international co-operation, foreign authorities will have to revert to the channels of mutual legal assistance.

46 If a notice or subpoena from the authorities in your country seeks production of material relating to a particular matter that crosses borders, must the company search for and produce material in other countries to satisfy the request? What are the difficulties in that regard?

Orders seeking the production of material must relate to documents and information located in Switzerland. Whenever prosecuting authorities wish to access material located abroad, they have to revert to the channels of international mutual assistance.

Mutual assistance in criminal matters with foreign authorities is well developed in Switzerland. This is because Switzerland has always been a place where information was sought by foreign authorities, in particular in terms of bank documents and records. Switzerland will co-operate with other authorities provided that specific requirements are met, such as due process, fair trial, the principle of proportionality and reciprocity and the rules of speciality. Since 2013, the MROS enjoys the ability to communicate directly with its foreign counterparts. In this respect, the MROS can share information (including data on individuals such the identity of the beneficial owner of an account) with other financial intelligence units, subject to the latter complying with the possible conditions and restrictions imposed by the MROS, and guaranteeing that (1) it will use the information solely for the purpose of analysis in the context of combating money laundering and its predicate offences, organised crime or terrorist financing, (2) it will reciprocate on receipt of a similar request from Switzerland, (3) official and professional secrecy will be preserved, and (4) it will not pass on the information received to third parties without the express consent of the Reporting Office.

47 Does law enforcement in your country routinely share information or investigative materials with law enforcement in other countries? What framework is in place in your country for co-operation with foreign authorities?

There are two main types of co-operation: international mutual assistance in criminal matters and police co-operation. Mutual assistance encompasses all measures aimed at facilitating the prosecution and punishment of criminal offences and is generally requested by prosecution authorities. Police authorities generally communicate with foreign states via their national

Interpol offices. The main difference is that in police co-operation, the dual criminality principle does not apply. In addition, there is no possible challenge proceeding available to the persons concerned.

48 Do law enforcement authorities in your country have any confidentiality obligations in relation to information received during an investigation or onward disclosure and use of that information by third parties?

Law enforcement authorities often share and exchange information available to them. Co-operation between domestic enforcement authorities is regulated by the CrimPC under Article 43 et seq. We have witnessed an increasing level of co-operation between the OAG and FINMA in various enforcement proceedings (see, for instance FINMA's communication of 23 June 2017 on sanctions for insider trading and market manipulation: 'FINMA also immediately shared its findings with the Office of the Attorney General of Switzerland (OAG), which instituted criminal proceedings against the individual in question. If the OAG's criminal proceedings ultimately result in the disgorgement of profits, these take precedence.'

The situation is different in international mutual legal assistance matters, in which Swiss law strictly applies the rule of speciality, whereby evidence transmitted pursuant to a request for assistance may only be used for the purpose for which it was sought. In the event of a breach, Swiss authorities may suspend international co-operation with the concerned jurisdiction, as has happened in the past, for instance in matters involving administrative assistance between the Federal Banking Commission (FINMA's predecessor) and the US Securities and Exchange Commission.

49 How would you advise a company that has received a request from a law enforcement authority in your country seeking documents from another country, where production would violate the laws of that other country?

In a situation where the production of documents would potentially violate the laws of another country, the corporation could challenge the order issued by the law enforcement authority before the Swiss competent court.

50 Does your country have blocking statutes? What related issues are implicated by complying with a notice or subpoena?

Requests from foreign authorities addressed directly to individuals or companies in Switzerland (with or without a court order or a subpoena) without having recourse to formal administrative channels (e.g., the European Convention on Mutual Assistance in Criminal Matters or the Hague Evidence Convention) can create severe difficulties for the Swiss individuals or companies concerned, given the stringent requirements of Swiss law. The SCC contains two provisions protecting Swiss sovereignty, the Swiss economy and the economic privacy of Swiss citizens (Articles 271 and 273, SCC). Article 271 of the SCC, for instance, prohibits all acts on Swiss territory that fall within the jurisdiction of Swiss authorities and that are performed for or on behalf of a foreign government (e.g., gathering of evidence ordered by and for use in foreign proceedings). Article 273 of the SCC prohibits the disclosure of trade or business secrets to foreign authorities and private persons. In addition, the DPA contains a

specific provision on the requirements for cross-border data transfer. One of the main specificities of the Swiss data protection mechanism is that it provides the same level of protection to individuals and legal entities.

51 What are the risks in voluntary production versus compelled production of material to authorities in your country? Is this material discoverable by third parties? Is there any confidentiality attached to productions to law enforcement in your country?

There is no specific risk as long as the production of material is made to a Swiss authority. In the case of a criminal investigation by a prosecution authority, the parties' access to the material produced by them during the investigation depends on the requirements of the CrimPC (see Article 101).

Global settlements

52 Prior to any settlement with a law enforcement authority in your country, what considerations should companies be aware of?

The Swiss legal system offers the possibility of settlement with authorities. Our experience has shown that prosecuting authorities can be pragmatic in approaching global settlements.

53 What types of penalties may companies or their directors, officers or employees face for misconduct in your country?

The maximum sanction that a company may face in the application of Article 102 of the SCC is a fine that cannot exceed 5 million Swiss francs. The court could also order other types of penalties, such as publication of the judgment, if required by reason of public interest or in the interests of the injured party (Article 68, SCC). The SCC also generally provides for the possibility of forfeiting assets (Articles 69 to 73). Directors, officers or employees could face jail sentences or monetary penalties, depending on the offence.

54 What do the authorities in your country take into account when fixing penalties?

In the specific context of Article 102 of the SCC, a court must take into account the seriousness of both the offence and the organisational inadequacies, as well as the loss or damage caused. The ultimate penalty should also be based on the economic ability of the company to pay the fine. More generally, criminal courts fix penalties based on an assessment of the level of culpability. They also take into account the motives, the seriousness of the damage, previous conduct, personal circumstances and the potential effect of the sanction.

55 Are non-prosecution agreements or deferred prosecution agreements available in your jurisdiction for corporations?

Non-prosecution agreements and deferred prosecution agreements are not available in the Swiss legal system. However, in the context of settlements with law enforcement authorities, different solutions can be found, such as disgorgement with a view to transferring part of the proceeds to a charitable organisation. For instance, in February 2017, in a settlement with

the OAG further to a self-disclosure in a corruption matter, the Swiss subsidiary of German printing press manufacturer Koenig & Bauer agreed to disgorge 30 million Swiss francs of the company's profits and to pay another 5 million Swiss francs to a new fund supporting the strengthening of ethical business standards and compliance procedures.

56 Is there a regime for suspension and debarment from government contracts in your country? Where there is a risk of suspension or debarment or other restrictions on continuing business in your country, what are the options available to a corporate wanting to settle in another country?

Debarment from government contracts is not part of the Swiss legal system. In certain circumstances, corporations and executives may be prohibited from operating in that line of business for a certain period as part of the sanction.

57 Are 'global' settlements common in your country? What are the practical considerations?

Global settlements are not very common, although they are becoming more frequent. The main difficulty lies in the expectations of each authority involved. Another frequent difficulty arises from the procedural differences between the various proceedings (the same party might not have the same standing in one proceeding as in another).

58 Are parallel private actions allowed? May private plaintiffs gain access to the authorities' files?

The filing of a criminal complaint by private individuals and corporations is routine practice in Switzerland. When the individual or corporation is admitted to participate as a plaintiff (victim of the offence), it may access the file of the prosecuting authority and take an active role in the proceeding. This includes the possibility of being present during hearings of parties and witnesses, putting questions to the parties and witnesses, requesting the authorities to appoint experts, taking copies of the file and lodging appeals when necessary.

Publicity and reputational issues

59 Outline the law in your country surrounding publicity of criminal cases at the investigatory stage and once a case is before a court.

There is no publicity surrounding criminal cases at the investigatory stage. On the contrary, criminal investigations are covered by secrecy. The main reason is the presumption of innocence. In the case of an overriding public interest, criminal authorities consider that they can decide to disclose information to the general public.

60 What steps do you take to manage corporate communications in your country? Is it common for companies to use a public relations firm to manage a corporate crisis in your country?

The necessity of using a public relations (PR) firm depends on the in-house resources available within the company. It is becoming more common to build a small task force, including

a communications expert, to provide guidance on PR strategy. It is also becoming more frequent for large corporations to have a person in charge of public affairs who will maintain close connections with government authorities.

61 How is publicity managed when there are ongoing, related proceedings?

The existence of those proceedings needs to be taken into account when defining the global communication strategy. However, companies tend not to communicate on proceedings to which they are not a party.

Duty to the market

62 Is disclosure to the market in circumstances where a settlement has been agreed but not yet made public mandatory?

There is no mandatory disclosure to the market when a settlement is reached with an authority, except for publicly traded companies if the settlement qualifies as a material event.

Appendix 1

About the Authors

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Benjamin Borsodi is Schellenberg Wittmer's managing partner. As head of the internal corporate investigations group in Geneva, his areas of practice cover fraud and business crime, international mutual legal assistance, corporate investigations, asset tracing and recovery and compliance as well as banking litigation. With extensive experience in complex fraud matters, Benjamin is recognised as a highly recommended practitioner in white-collar crime by *Chambers Europe*, *Global Investigations Review* (GIR, *Expert Guides*) and *Who's Who Legal*, which ranks him in its Global Elite and Thought Leader List. According to *Chambers*, Benjamin is 'dynamic, responsive and very client-friendly'. Sources say he 'brings a fresh and imaginative approach to cases' and is 'bright and articulate'. *Who's Who Legal* additionally describes Benjamin as 'internationally renowned' for his extensive expertise in investigations and corporate crime.

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Louis Burrus (dual-qualified in Switzerland and in England and Wales) (solicitor of the Senior Courts) is a partner in Schellenberg Wittmer's dispute resolution group, based in Geneva. Louis specialises in domestic and international commercial litigation, in particular in banking and financial disputes. He has extensive experience in conducting cross-border corporate internal investigations, including white-collar matters, and regularly represents companies and individuals before Swiss and foreign authorities.

According to *Who's Who Legal*, Louis is 'a great talent' in cross-border corporate investigations. In its litigation future leaders analysis, it states that Louis is 'a highly active figure in the investigations and white-collar crime space' with 'a great reputation in Switzerland'. Louis is ranked in *Global Investigations Review*'s 40 under 40 and as a 'Rising Star' in the Litigation category by Expert Guides (Euromoney Legal Media Group).

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ISBN 978-1-912377-34-3