

Global Investigations Review

The Practitioner's Guide to Global Investigations

Second Edition

Editors

Judith Seddon, Clifford Chance

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The Practitioner's Guide to Global Investigations

Second Edition

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Publisher's Note

The Practitioner's Guide to Global Investigations is published by Global Investigations Review (www.globalinvestigationsreview.com) – a news and analysis service for lawyers and related professionals who specialise in cross-border white-collar crime.

The guide was suggested by the editors to fill a gap in the literature – namely, how does one conduct such an investigation, and what should one have in mind at various times?

It will be published annually as a single volume and is also available online, as an e-book and in PDF format.

The volume

This book is in two parts.

Part I takes the reader through the issues and risks faced at every stage in the life cycle of a serious corporate investigation, from the discovery of a potential problem through its exploration (either by the company itself, a law firm or government officials) all the way to final resolution – be that in a regulatory proceeding, a criminal hearing, civil litigation, an employment tribunal, a trial in the court of public opinion, or, just occasionally, inside the company's own four walls. As such it uses the position in the two most active jurisdictions for investigations of corporate misfeasance – the United States and the United Kingdom – to illustrate the approach and thought processes of those who are at the cutting edge of this work, on the basis that others can learn much from their approach, and there is a read-across to the position elsewhere.

Part I is then complemented by Part II's granular look at the detail of various jurisdictions, highlighting among other things where they vary from the norm.

Online

The guide is available to subscribers at www.globalinvestigationsreview.com. Containing the most up-to-date versions of the chapters in Part I of the guide, the website also allows visitors to quickly compare answers to questions in Part II across all the jurisdictions covered.

The publisher would like to thank the editors for their exceptional energy and vision in putting this project together. Together we welcome any comments or suggestions from readers on how to improve it. Please write to us at: co-publishing@globalinvestigationsreview.com.

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Preface

The history of the global investigation

Over the past decade, the number and profile of multi-agency, multi-jurisdictional regulatory and criminal investigations have risen exponentially. Naturally, this global phenomenon exposes corporations and their employees to greater risk of potentially hostile encounters with foreign law enforcement authorities and regulators than ever before. This is partly owing to the continued globalisation of commerce, as well as the increasing enthusiasm of some prosecutors to use expansive theories of corporate criminal liability to extract exorbitant penalties against corporations as a deterrent, and public pressure to hold individuals accountable for the misconduct. The globalisation of corporate law enforcement, of course, has also spawned greater coordination between law enforcement agencies domestically and across borders. As a result, the pace and complexity of cross-border corporate investigations has markedly increased and created an environment in which the potential consequences, both direct and collateral, for individuals and businesses are of unprecedented magnitude.

The guide

To aid practitioners faced with the myriad and often unexpected challenges of navigating a cross-border investigation, this book brings together for the first time the perspectives of leading experts from across the globe.

The chapters that follow in Part I of the guide cover in depth the broad spectrum of the law, practice and procedure applicable to cross-border investigations in both the United Kingdom and United States. Part I tracks the development of a serious allegation (whether originating from an internal or external source) through its stages of development, considering the key risks and challenges as matters progress; it provides expert insight into the fact-gathering stage, document preservation and collection, witness interviews, and the complexities of cross-border privilege issues; and it discusses strategies to successfully resolve cross-border probes and manage corporate reputation throughout an investigation.

Preface

In Part II of the book, local experts from national jurisdictions respond to a common set of questions designed to identify the local nuances of law and practice that practitioners may encounter in responding to a cross-border investigation.

In the first edition we signalled our intention to update and expand both parts of the book as the law and practice evolved. For this second edition we have revised the chapters to reflect recent developments. In the United Kingdom, some eagerly awaited English court decisions have raised significant legal privilege implications, and new corporate offences related to tax evasion have been introduced. In the United States, despite a new administration, the FCPA's enhanced enforcement project – the Pilot Program – has been extended. We have also included substantive chapters covering extraterritoriality considerations from both the US and UK perspectives. Further, Part II now covers 16 jurisdictions, including China and Nigeria, and we expect subsequent editions to have an even broader jurisdictional scope.

The Practitioner's Guide to Global Investigations has been designed for external and in-house legal counsel; compliance officers and accounting practitioners who wish to benchmark their own practice against that of leaders in the fields; and prosecutors, regulators and advisers operating in this complex environment.

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The Editors would also especially like to thank Clifford Chance lawyers Tara McGrath (who went above and beyond to bring this book together) and Kaitlyn Ferguson for their significant contributions.

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Part II

Global Investigations around the World

53

Switzerland

Benjamin Borsodi and Louis Burrus¹

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.

In Switzerland, until very recently, the highest-profile corporate investigation was the Odebrecht matter. Odebrecht is a major corporate group, active in construction, with operations across the Americas, Africa and elsewhere, with over 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 as well as money laundering. The closely coordinated, speedy and conflict-free (no contradictory decisions, elimination of risk of double jeopardy) recent resolution spanning the three main jurisdictions (Brazil, the United States and Switzerland) involved in the criminal prosecution was a key achievement. The settlement (trilateral agreement) was a landmark novel 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.

¹ Benjamin Borsodi and Louis Burrus are partners at Schellenberg Wittmer Ltd.

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 due to a lack of organisation of 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, provided that the corporation has not taken all necessary measures to prevent the perpetration of such offence.

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 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 (speediness, due process, the right to be heard, etc.).

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, as well as 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 the Criminal Procedure Code at Article 11, Paragraph 1, 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 impact 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 3-4, and Article 6, Paragraph 3-4 SCC).

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.

In Switzerland, 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, impacts 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 of 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 the offender committed before he or she was sentenced for a different one, then the punishment cannot be more harsh than if he or she had been convicted 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?

Recently, authorities have conducted investigations and prosecutions in accordance with the recent developments in the law, including harsher approaches for offences related to corruption and money laundering. For instance, the Swiss 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 DFT 136 IV 188). The recent 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 in Switzerland for law enforcement authorities concern the fight against corruption, including private bribery that can take place in the context of large sport organisations (e.g., FIFA). Switzerland has also revised its legislation to allow other countries to better fight tax evasion when tainted funds are located in Switzerland. Finally, the combat against money laundering remains a priority, according to recent statements made by the OAG.

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

Internal investigations are well tolerated. Because of the nature of the Swiss criminal prosecution system, in which the 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 process in recent years. In large-scale investigations, some authorities have even started to 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 where over 40 banks have reported relationships to the MROS, leading to investigations of thousands of Swiss bank accounts.

- 13 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, 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.

- 14 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 law enforcement authorities, unless they have 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.

- 15 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 (right against self-incrimination). The right to refuse to testify also applies if a testimony would incriminate a relative.

- 16 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.

- 17 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 the employee's personality. Any right they could claim if they are deemed to engage in misconduct would derive from criminal proceedings rather than employment laws.

- 18 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 also 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

- 19 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 as well as the anticipated time frame. Of equal importance is status reporting on the investigation's progress.

- 20 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.

- 21 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.

- 22 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.

23 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 to be 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 tempered 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.

24 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

25 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). There is, however, 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 the attorney's core business). Recently, the Swiss Federal Tribunal (Switzerland's supreme court) ruled that legal privilege does not prevent prosecutors from accessing material prepared by outside counsel in the context of an internal investigation based on alleged regulatory and money laundering offences. 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 (Decision of the Federal Tribunal 1B_85/2016 of 20 September 2016).

- 26 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?**

Generally, in Switzerland the attorney professional secrecy is interpreted more restrictively than in other jurisdictions, in particular compared to attorney–client privilege in common law jurisdictions. A distinction is, however, made as to whether the client is an individual or a corporation. In terms of documents, correspondence with outside 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.

- 27 Does the attorney–client privilege apply equally to inside and outside 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 some level of protection for in-house counsel but the proposed bill (the Act on Corporate Counsel Regulation) was not accepted by the Swiss parliament.

- 28 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 where a company can waive this privilege and obtain credit in exchange.

- 29 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 outside 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 outside counsel subject to disclosure.

- 30 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 was to invoke it in Switzerland while it has been waived in another country.

31 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.

32 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

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

Internal investigations are not subject to specific laws and regulations. Outside 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.

34 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. A recent case of concern is the decision of the Federal Tribunal where a bank's confidential report to FINMA has been declared accessible to the OAG (Decision of the Federal Tribunal 1B_249/2015 of 30 May 2016).

35 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 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 reasons set out above, interview of third parties is usually not possible.

36 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

37 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 if reporting could be construed favourably.

38 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?

Outside counsel should conduct a review of the specific case prior to suggesting to the corporation to self-report. When it appears that the misconduct is likely to surface, self-reporting may be encouraged to seek the authorities' leniency. 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.

39 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 first be initiated informally or through written submissions. Experience shows that organising a meeting with the authorities prior to filling an explanation brief is often preferable.

Responding to the authorities

40 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 outside counsel and discuss the way forward.

41 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.

42 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 Data Protection Act. In terms of international co-operation, foreign authorities will have to revert to the channels of mutual legal assistance.

43 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, principle of proportionality and reciprocity, the rules of specialty, etc. Recently, new laws have been enacted to allow the Swiss financial intelligence unit (MROS) to communicate directly with its foreign counterparts.

44 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 mainly two 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 persons concerned.

45 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 recently 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 where 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 case of 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 CFB (FINMA's predecessor) and the US Securities and Exchange Commission.

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

47 Does your country have data protection statutes or 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 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 SCC prohibits the disclosure of trade or business secrets to foreign authorities and private persons. In addition, the Swiss Federal Data Protection Act 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 alike.

48 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 his express consent to the disclosure (see Article 6 of the Swiss Data Protection Act).

49 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 Criminal Procedure Code (see Article 101 CrimPC).

Global settlements

50 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. Recent experiences have shown that prosecuting authorities can prove pragmatic in approaching global settlements.

51 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 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 by the interests of the injured party (Article 68 SCC). The SCC also generally provides for the possibility of forfeiting assets (Articles 69–73 SCC). Directors, officers or employees could face jail sentences or monetary penalties, depending on the offence.

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

In the specific context of Article 102 SCC, the court must take into account the seriousness of the offence and the seriousness of 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.

53 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 a recent 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.

54 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.

55 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).

56 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

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

In Switzerland, 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.

- 58 **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 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.

- 59 **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

- 60 **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 and head of the internal corporate investigations group in Geneva. His areas of practice include fraud and business crime, international mutual legal assistance, corporate investigations, asset tracing and recovery, as well as compliance. With extensive experience in complex fraud matters, Benjamin is recognised as a highly recommended practitioner in white-collar crime by both Chambers Global and Chambers Europe, and Who's Who Legal. According to quotes from Chambers Global, Benjamin is 'dynamic, responsive and very client-friendly'. Sources say he 'brings a fresh and imaginative approach to cases' and is 'bright and articulate'.

Louis Burrus

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Louis Burrus is a partner in Schellenberg Wittmer's dispute resolution group in Geneva. He is dual-qualified in Switzerland and in England and Wales (Solicitor of the Senior Courts). He specialises in domestic and international commercial litigation, in particular in banking and financial disputes. He also has extensive experience in conducting corporate internal investigations, including in cross-border white-collar matters. He 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 and "wins praise as a very knowledgeable and practical lawyer." Louis is also ranked as a 'Rising Star' in the Litigation category by Euromoney Legal Media Group (Expert Guides, Legal Media Group's Rising Stars 2016 and 2017) and was recognized as a top global investigations practitioner in GIR's 40 under 40 list in 2017.

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