
THE
INTERNATIONAL
INVESTIGATIONS
REVIEW

FIFTH EDITION

EDITOR
NICOLAS BOURTIN

LAW BUSINESS RESEARCH

THE INTERNATIONAL INVESTIGATIONS REVIEW

The International Investigations Review
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This article was first published in The International Investigations Review - Edition 5
(published in July 2015 – editor Nicolas Bourtin)

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LAW BUSINESS RESEARCH LTD

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Published in the United Kingdom
by Law Business Research Ltd, London
87 Lancaster Road, London, W11 1QQ, UK
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www.TheLawReviews.co.uk

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Enquiries concerning reproduction should be sent to Law Business Research, at the address above. Enquiries concerning editorial content should be directed to the Publisher – gideon.roberton@lbresearch.com

ISBN 978-1-909830-55-4

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

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ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following law firms for their learned assistance throughout the preparation of this book:

ALUKO & OYEBODE

ANAGNOSTOPOULOS

CASSELS BROCK & BLACKWELL LLP

DE PEDRAZA ABOGADOS SLP

DEBEVOISE & PLIMPTON LLP

ELIG, ATTORNEYS-AT-LAW

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EDITOR'S PREFACE

In the United States, it continues to be a rare day when newspaper headlines do not announce criminal or regulatory investigations or prosecutions of major financial institutions and other corporations. Foreign corruption. Financial fraud. Tax evasion. Price fixing. Manipulation of benchmark interest rates and foreign exchange trading. Export controls and other trade sanctions. US and non-US corporations alike, for the past several years, have faced increasing scrutiny from US authorities, and their conduct, when deemed to run afoul of the law, continues to be punished severely by ever-increasing, record-breaking fines and the prosecution of corporate employees. And while in past years many corporate criminal investigations were resolved through deferred or non-prosecution agreements, 2014 saw a significant increase in the number of guilty pleas sought and obtained by the US Department of Justice.

This trend has by no means been limited to the United States; while the US government continues to lead the movement to globalise the prosecution of corporations, a number of non-US authorities appear determined to adopt the US model. Parallel corporate investigations in multiple countries increasingly compound the problems for companies, as conflicting statutes, regulations and rules of procedure and evidence make the path to compliance a treacherous one. What is more, government authorities forge their own prosecutorial alliances and share evidence, further complicating a company's defence. These trends show no sign of abating.

As a result, corporate counsel around the world are increasingly called upon to advise their clients on the implications of criminal and regulatory investigations outside their own jurisdictions. This can be a daunting task, as the practice of criminal law – particularly corporate criminal law – is notorious for following unwritten rules and practices that cannot be gleaned from a simple review of a country's criminal code. And while nothing can replace the considered advice of an expert local practitioner, a comprehensive review of the corporate investigation practices around the world will find a wide and grateful readership.

The authors of this volume are acknowledged experts in the field of corporate investigations and leaders of the bars of their respective countries. We have attempted

to distil their wisdom, experience and insight around the most common questions and concerns that corporate counsel face in guiding their clients through criminal or regulatory investigations. Under what circumstances can the corporate entity itself be charged with a crime? What are the possible penalties? Under what circumstances should a corporation voluntarily self-report potential misconduct on the part of its employees? Is it a realistic option for a corporation to defend itself at trial against a government agency? And how does a corporation manage the delicate interactions with the employees whose conduct is at issue? *The International Investigations Review* answers these questions and many more and will serve as an indispensable guide when your clients face criminal or regulatory scrutiny in a country other than your own. And while it will not qualify you to practise criminal law in a foreign country, it will highlight the major issues and critical characteristics of a given country's legal system and will serve as an invaluable aid in engaging, advising and directing local counsel in that jurisdiction. We are proud that, in its fifth edition, this volume covers 24 jurisdictions.

This volume is the product of exceptional collaboration. I wish to commend and thank our publisher and all the contributors for their extraordinary gift of time and thought. The subject matter is broad and the issues raised deep, and a concise synthesis of a country's legal framework and practice was in each case challenging.

Nicolas Bourtin

Sullivan & Cromwell LLP

New York

July 2015

Chapter 22

SWITZERLAND

Daniel Lucien Bühr and Marc Henzelin¹

I INTRODUCTION²

Swiss law demands that corporate leaders (i.e., the members of governing bodies and top management) manage their companies diligently and in good faith. In particular, corporate leaders are required to prevent criminal conduct of employees in business matters. Implicitly, corporate leaders have a duty to investigate actual or suspected (serious) misconduct by corporate bodies or employees.

Various federal and cantonal agencies are competent to investigate corporate offences and offences committed by corporate employees and agents.

Suspected or actual corporate criminal offences fall within the competence of the cantonal public prosecutors. Some cantons, such as the Canton of Zurich, have special prosecutors for the investigation of corporate offences.

At the Federal level, the Office of the Attorney General (OAG) is the competent investigative and enforcement agency regarding Switzerland's national security. In particular, the OAG investigates suspected or actual violations of Switzerland's sovereignty and neutrality, its economy, or violations which represent a severe threat to Switzerland's population, the country's stability or the integrity of the democratic system. In particular, the OAG investigates cases of espionage, crimes involving the use of explosives or radioactive materials, and corruption of Swiss federal or foreign officials.

In corruption cases, the OAG is competent to investigate the misconduct if:

- a* it involves Swiss federal authorities; or
- b* if the misconduct – to a substantial degree – has been committed abroad (bribery of foreign officials).

1 Daniel Lucien Bühr and Marc Henzelin are partners at Lalive.

2 The research was supported by Matthias Weger, trainee at Lalive in Zurich.

Insider trading and market price manipulation, as well as money laundering, also fall within the competence of the OAG. The OAG has all of the investigative power common to a public prosecutor – the power to search, seize and arrest.

When the offences of insider trading, market price manipulation and money laundering are committed by a financial institution under supervision of the Swiss Financial Market Supervisory Authority (FINMA), and if the suspected or actual misconduct may violate administrative law, but not criminal law, FINMA is the competent authority for conducting the investigations. Regarding money laundering, criminal investigations are conducted by the OAG or a cantonal public prosecutor, whereas FINMA or a financial sector self-regulatory organisation (SRO) are responsible for the supervision of the implementation of anti-money laundering legislation and effective risk and compliance management at financial institutions.

In cases of regulatory breaches, for instance in the financial sector, the majority of the investigations are carried out by independent examiners (specialised law firms and consulting and audit companies), who are selected and supervised by and report the facts to the competent regulator.

Competition law is enforced by the Federal Competition Commission (COMCO). COMCO has a standing executive secretariat (Secretariat) that conducts the investigations and prepares the materials for COMCO's decisions. The Secretariat has far-reaching investigative powers. It may conduct dawn raids, seize evidence and interview management and employees of undertakings in case of cartels, illicit vertical restraints, abuse of dominance and in case of violation of the merger control regime. In case of violation of Swiss competition law, COMCO may fine companies with a maximum of 10 per cent of the Swiss turnover during the past three years.

Switzerland's legislative framework reflects socio-economic and ethical considerations and views of the parliamentary majority (which, in most cases, is based on centre to centre-right positions). In the recent past, the prosecutorial functions have been granted increased power and resources, in particular with regard to the enforcement of financial market regulation, stricter anti-money laundering legislation and the fight against cartels. The evolution since the beginning of the financial crisis in 2007 reflects the will to protect Switzerland's reputation and integrity as a sound, stable and fair financial market.

Under statutory law, undertakings are not obliged to cooperate with investigating authorities. This is a consequence of due process principles, in particular in *dubio pro reo* and *nemo tenetur se ipsum accusare*. However, limited or non-cooperation with investigating authorities is not a viable option in most cases, simply because undertakings under investigation are interested in a swift investigation and a fair settlement or fine, which will provide legal certainty. And in the view of the public, undertakings are expected to behave as good corporate citizens.

II CONDUCT

i Self-reporting

As a rule, there is no obligation under Swiss law for undertakings to self-report suspected or actual misconduct. However, there are some exceptions where statutory law contains

reporting obligations, and there is a statutory leniency mechanism in the Cartel Act (CA).

Suspected or actual misconduct in the business domain of an undertaking requires the management to conduct an internal investigation. If the internal investigation results in evidence for likely or actual misconduct, the governing body of the undertaking must decide whether the undertaking self-reports the misconduct or not. As a rule, there is no statutory obligation to self-report offences. The reason is that the principle of *nemo tenetur se ipsum accusare* is an implicit fundamental right under Article 6 of the European Convention on Human Rights (ECHR). *Nemo tenetur* states that no person must be obliged or forced to self-incriminate himself, herself or itself. However, in some extraordinary cases (which have not yet been tested in court) there are duties to self-report legal risks (which may, in practice, be equal to an obligation to self-report misconduct). For instance, financial institutions are required by FINMA, based on the Financial Market Supervision Act (FINMASA), to disclose cross-border risks that may impact the institutions' reputation.³

If a company decides to self-report actual or likely misconduct and to disclose information in the absence of a legal obligation, specific legal aspects should be considered.

First, the undertaking must comply with the Data Protection Act (DPA), which obliges controllers of data files to keep personal data confidential (typically, undertakings qualify as controllers of employee and third party personal data). If the company wishes to disclose the results of its internal investigation, it may only do so in case a statutory exception applies or if the data subject provides a waiver. The undertaking may also balance its material interest in disclosure against the individual's interest in confidentiality. However, this process is cumbersome and entails a high risk of follow-on litigation.

Another aspect requiring consideration is the limited acceptance of internal investigations and their findings in public investigations. For example, employee interviews will typically not be regarded as equivalent to a formal witness or defendant interrogation by a prosecutor.

Overall, undertakings should keep in mind that prosecutors and regulators have different priorities than they have, and before self-reporting suspected or actual misconduct it typically makes sense to assess (on a no-names basis) whether a common understanding regarding the framework of the investigation can be outlined.

The benefits of self-reporting and full cooperation with the regulator or prosecutor are that both facts are considered as mitigating factors when fines are calculated. Under the CA, the leniency applicant may receive full reduction of the fine. In criminal proceedings, the defendant may benefit from the abbreviated procedure and its fine may be reduced as a result of the admission of guilt and its cooperation.

In cartel investigations, leniency applications have become the standard, and when dawn raids are conducted, the first leniency applications are typically filed within the first hours of the investigation.

³ Article 29, paragraph 2, FINMSA and, for instance, Section 4.5 of the FINMA Position paper of 22 October 2010 on legal and reputational risks in cross-border financial services.

ii Internal investigations

The governing body and top management of an undertaking are required to conduct an internal investigation in case of suspected or actual (serious) misconduct. As a rule, there is no statutory obligation to share the result of the internal investigation with regulators or prosecutors.

If the undertaking decides to share the report or to self-report possible misconduct, it must consider limitations to the disclosure of personal data under the DPA and under employment law. In Switzerland, an internal investigation does not require consultation or preapproval by the Works Council (i.e., the employee representative body).

Internal investigations will typically focus on the review of electronic communication and documents. Employee interviews may also be conducted. However, if the employees themselves become defendants in regulatory or criminal proceedings, they should be invited to appoint independent legal counsel before interviews are conducted.

Employee business communication may, as a rule, be reviewed without information or consent of the employee if there is a prevailing interest of the undertaking in conducting the review. However, disclosure of personal data to third parties is subject to restrictions under the DPA and employment law (which demands that the employer protect employee privacy and apply due process principles in case of internal investigations).

According to Swiss employment law, employees are required to act in good faith and in the interest of the employer. Often, employees are asked to cooperate with internal investigations, based on the general duty to act in the interest of the employer. In consideration of the employers' duty to apply due process principles when investigating employees who may become defendants, employers should inform employees that they may retain independent counsel before conducting interviews. If the employee decides to retain counsel, he or she will have to pay counsel fees. In practice, undertakings often fully or partially pay these fees as a result of directors and officers (D&O) insurance cover.

If a law firm conducts the internal investigation, attorney-client privilege applies to the communication between the law firm and the undertaking, to the communication between the law firm and its agents (e.g., accountant and forensic firms) and to all attorney work product.

Switzerland does not grant legal privilege to in-house counsel or compliance officers. In fact, professional secrecy and the advantages of a person who is independent from the undertaking conducting an investigation are the main reasons for engaging law firms as external investigators.

iii Whistle-blowers

Switzerland does not yet have whistle-blower protection laws. In practice, many undertakings have established mechanisms for employees, and partially also for external stakeholders, to report suspected or actual misconduct to an independent person (the compliance officer or an external ombudsperson or lawyer). For a while now, multinationals have been following the guidance provided by the US Department of Justice and the Securities and Exchange Commission in their FCPA Resources Guide,

and international standards (in particular ISO 19600 – Compliance Management Systems and the OECD Guidelines for Multinational Enterprises).⁴

On 5 May 2015, the Swiss National Council debated a new whistle-blower protection law. It decided to ask the Federal Council to revise the proposal because of its overly complex mechanism. This proposal was criticised by non-governmental organisations (NGOs) as being a setback rather than progress because of the lack of the right to report anonymously and the absence of a non-retaliation guarantee for employees who report in good faith.

III ENFORCEMENT

i Corporate liability

The Swiss Penal Code (SPC) covers corporate criminal offences.⁵ According to the SPC, an undertaking is liable for organisational weakness if it fails to implement all adequate and necessary safeguards to avoid money laundering, terrorism financing, participation in a criminal organisation and corruption, committed by its employees in the course of the undertaking's business.

In practice, the organisational weakness has to be understood as being an ineffective compliance system. Therefore, an undertaking with an ineffective, under-organised, understaffed, under-resourced compliance organisation will be subject to criminal sanctions, including disgorgement of illicit profits in case of money laundering, corruption, etc.

Furthermore, an undertaking is also liable if a crime has been committed in the process of a business activity and it is not possible, due to the company's organisational weakness, to identify the responsible employee.⁶

ii Penalties

Under the SPC, undertakings may be fined up to 5 million Swiss francs, and illicit profits are confiscated.

iii Compliance programmes

The diligent management of any undertaking requires best practice risk and compliance management. This is reflected in the SPC Undertakings, which have implemented and maintain adequate and necessary organisational measures to prevent corporate misconduct and are not subject to sanctions regarding corporate criminal offences. When assessing corporate compliance management, the OAG relies on international

4 See for instance the OECD CleanGovBiz Initiative: Whistle-blower protection: encouraging reporting, July 2012.

5 Article 102, paragraph 2, Swiss Penal Code in connection with Articles 322 *ter et seqq.*, 305 *bis*, 260 *ter*, and 260 *quinquies* Swiss Penal Code, as well as with Articles 4a and 23 Swiss Act on Unfair Competition.

6 Article 102, paragraph 1, SPC.

standards and generally accepted best practice. Equally, COMCO considers compliance management system standards and international guidelines when calculating and mitigating cartel fines. In the financial sector, FINMA requires regulated institutions to establish independent risk and compliance functions based on risk and compliance policies which must be formally approved by the Board of Directors or the Executive Committee. FINMA demands that financial institutions apply best practice efforts to manage and control risk, including compliance risks.

Best management practices are typically described in international standards or generally accepted guidelines. Best practice risk management is described in ISO⁷ Standard 31000 – Risk Management⁸ and, alternatively, in the COSO Enterprise Risk Management Framework.⁹ Best practice compliance management systems (programmes) are described in ISO 19600 – Compliance Management Systems and in international guidelines, such as the OECD Guidelines for Multinational Enterprises.

iv Prosecution of individuals

Where employees are personally prosecuted for misconduct in business matters, the undertaking should coordinate employment related decisions with the regulator, and also with the enforcement agency. Under no circumstances should employees under investigation be unilaterally terminated by the undertaking. This can be construed as a lack of cooperation by the undertaking because the regulator, or the enforcement agency, may face difficulties in interviewing or interrogating the witness.

Ideally, an employee under investigation will appoint independent counsel and the undertaking's counsel will communicate with the employee's counsel. Once the investigation is closed, the undertaking can take employment related decisions and implement them. However, under Swiss employment law, the undertaking must apply due process principles in its dealings with employees, in particular granting them the right to be heard.

The undertaking is free to decide whether it wants to pay for legal fees of the employee. When the undertaking has D&O insurance cover, it should do so. Also, the employer's duty of care may demand that the employer cover the employee's legal fees in cases where it is questionable whether the employee committed misconduct or acted culpably (i.e., acted wilfully, was wilfully blind or acted negligently).

IV INTERNATIONAL

i Extraterritorial jurisdiction

In some instances, Swiss law has extraterritorial reach. Under the SPC, bribery of foreign officials is a criminal offence. Undertakings, including foreign parent companies of Swiss subsidiaries, can be sanctioned under the corporate offence of the SPC if they have not

7 International Organization for Standardization; www.iso.org.

8 According to the OECD, ISO 31000 is *de facto* the world standard for risk management. See: Risk Management and Corporate Governance, OECD, 2014, p. 16.

9 Committee of Sponsoring Organizations of the Treadway Commission: www.coso.org.

taken all adequate and necessary measures to prevent employee misconduct, in particular bribery of foreign officials, in their Swiss subsidiary.¹⁰

ii International cooperation

In general, Swiss authorities are interested in and willing to cooperate with their foreign counterparts, both in formal statutory processes and in an informal way. These forms of cooperation include international administrative assistance (for foreign administrative proceedings) and international legal assistance (for foreign court proceedings). Switzerland is a member of Interpol and – although not a member of the European Union – fully associated to the European Union's Schengen framework. Also, Switzerland and the EU have signed and implemented the first second-generation cooperation agreement in competition matters.¹¹

In terms of formal international legal assistance in criminal matters, Switzerland is a signatory to the European Convention on Extradition of 1957, including its Second Additional Protocol of 1978. Besides that, Switzerland has also signed numerous bilateral treaties in order to improve mutual legal assistance with other countries.¹²

Assistance may be granted to countries that are not party to any applicable treaty based on the Federal Act on International Mutual Assistance in Criminal Matters of 1981 (IMAC). According to this federal law, legal assistance is granted under the condition of reciprocity.

While Switzerland does not extradite Swiss nationals against their will, Swiss authorities are usually ready to extradite foreigners. According to the IMAC, the grounds for refusal are lack of criminal liability in Switzerland, fallacious charges, application of a statute of limitations, politically motivated proceedings and violations of the right to a fair trial, as well as the prohibition of inhumane treatment in compliance with Articles 3 and 6 of the ECHR in the foreign proceedings. All objections are procedural in nature; the merits of the case and the defendant's guilt's are not taken into consideration.

In practice, extradition has only been rejected in a few cases, mainly because the requests were inconsistent or because it was found that the motive for prosecution was political. The likelihood of a violation of fundamental human rights in the target country is usually not an obstacle for extradition if the target country is a signatory to the ECHR. For those countries that are condemned relatively often by the European Court on Human Rights (for instance Russia and Turkey), Switzerland relies on a (criticised) practice of accepting diplomatic 'warranties', by which the requesting state guarantees to Switzerland that it will uphold the standards of the ECHR in the specific case.

10 See OAG Criminal Order of 22 November 2011 against Alstom Network Schweiz AG, acting on behalf of the Alstom Group.

11 Agreement between the European Union and the Swiss Confederation concerning cooperation on the application of their competition laws (2014).

12 A public database with extensive information on applicable sources of law relevant for Switzerland's legal assistance in criminal matters can be found here: www.rhf.admin.ch/rhf/de/home/rhf/index/laenderindex.html, (in German, French and Italian), last visited 13 May 2015.

iii Local law considerations

If multiple jurisdictions are involved in an investigation, Swiss undertakings must pay special attention to compliance with the DPA, Swiss employment law and banking secrecy, as well as laws protecting business secrets. Also, undertakings, when cooperating with foreign public agencies, must avoid violation of Articles 271 (prohibited acts on behalf of a foreign state) and 273 (prohibited economic intelligence in favour of a foreign state or organisation). For some investigations (such as the US Department of Justice (DOJ) and the US Internal Revenue Service investigations of Swiss banks regarding tax offences), the Federal Council has granted special permissions for undertakings to cooperate with foreign states and their agencies.

V YEAR IN REVIEW

2014 has been marked by the US Department of Justice Program of 29 August 2013 for non-prosecution agreements or non-target letters for Swiss banks (US Program),¹³ *de facto* a voluntary self-disclosure programme for Swiss banks regarding tax offences.

Starting on 29 August 2013, roughly 100 Swiss banks (one third of all banks in Switzerland) initiated internal investigations to establish whether they may have reason to believe that they violated US tax laws in the past. The Federal Council granted permissions to the banks under Article 271 SPC to cooperate with US agencies under the US Program. These permissions are subject to strict compliance with Swiss banking secrecy, the DPA and Swiss employment law.

One of the US Program's side effects is that a number of Swiss lawyers and auditors, in particular those who acted as independent examiners and conducted independent internal investigations at Category-3 banks (i.e., banks that have no reason to believe that they may have violated US tax laws), have gained significant experience in conducting internal investigations (including employee interviews) in compliance with DOJ standards. Also, almost all major Swiss banks are now familiar with the conduct of an international internal investigation in accordance with US standards.

Another development is that the New York State Department of Financial Services appointed a monitor for Credit Suisse AG in the framework of its consent order of 18 May 2014 regarding illegal tax evasion. It is the first time that a US agency appointed monitor will investigate and supervise a Swiss undertaking.

VI CONCLUSIONS AND OUTLOOK

The art of conducting international internal investigations is a rather young legal and managerial expert field in Switzerland. Only recently have best practices been developed and adopted by Swiss undertakings and their counsel in internal investigations. However, this field of law and management is developing quickly and there are more cases to come, in particular regarding international competition investigations (which are even more

13 See: www.justice.gov/opa/pr/united-states-and-switzerland-issue-joint-statement-regarding-tax-evasion-investigations.

likely now under the EU-Swiss cooperation agreement) and regarding undertakings willing to self-report suspected or actual misconduct, in particular regarding bribery of foreign officials.

Appendix 1

ABOUT THE AUTHORS

DANIEL LUCIEN BÜHR

Lalive

Daniel L Bühr is a partner at Lalive. His main areas and practice are regulatory and banking law and white collar crime and compliance, mainly focusing on investigations and best practice risk and compliance management. He also manages complex cross-border legal and compliance projects and advises clients in competition law matters.

Mr Bühr is a member of the International Bar Association, Swiss Management (SMG), the Swiss Association of Competition Law and *Studienvereinigung Kartellrecht* (an association of German, Austrian and Swiss antitrust lawyers). He is also a member of the Swiss Association for Standardization (SNV) and was the Swiss Head of Delegation in the Technical Committee on Compliance Management Systems of the International Organization for Standardization (ISO). He is a co-founder and vice-chair of Ethics and Compliance Switzerland (ECS), an independent NGO for organisational ethics and compliance.

Before joining Lalive, Mr Bühr was regional counsel for a Swiss multinational, responsible for all legal matters in Europe, Russia, the Near East and Africa.

Mr Bühr holds a PhD, *summa cum laude*, from the University of Berne Institute for Swiss and Foreign Civil Procedure Law and MBA degrees from Columbia University, New York, and London Business School (EMBA Global Programme). He graduated from the University of Berne in 1991 (*magna cum laude*).

MARC HENZELIN

Lalive

Marc Henzelin is a partner of the firm. He has vast experience in transnational and domestic litigation, and in particular in international and economic criminal law, regularly leading private investigations, focusing on asset search, recovery and compliance issues. He also has broad experience in commercial and banking litigation, mutual legal assistance in criminal matters and extradition, as well as public international law.

Mr Henzelin has been a judge at the Court of Cassation of Geneva since 2009, and prior to that was an acting judge in the criminal and commercial sections of the Geneva Court of Appeals (2002–2009). He is a member of numerous professional associations, including the business crime section of the International Bar Association (co-chair 2010–2012); the Advisory Board of the European Criminal Bar Association (ECBA) since 2007; and the Anti-corruption Commission of the International Chamber of Commerce (ICC).

Mr Henzelin is ranked among the best investigations and business crime defence lawyers by the leading legal directories.

He is on the editorial board of the *New Journal of European Criminal Law* (previously, the *Journal of European Criminal Law*) and of the *Global Investigations Review* and has published and lectured extensively in international and economic criminal law, mutual legal assistance in criminal matters, litigation and public international law. Since 1995, he has held various academic positions at universities in Switzerland (including Geneva) and abroad (Torino, Hong Kong, Paris, etc.).

Before joining Lalive, Marc Henzelin practised law in Lausanne and Geneva and, before then, acted as a legal advisor/deputy head of mission for the International Committee of the Red Cross in Mozambique (1987–1988), in Israel, Lebanon, occupied territories and South Africa (1987–1992).

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