The International Investigations Review

Sixth Edition

Editor
Nicolas Bourtin

Law Business Research

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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, the US Department of Justice recently has increasingly sought and obtained guilty pleas from corporate defendants.

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 sixth edition, this volume covers 21 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 2016

Chapter 19

SWITZERLAND

Daniel Lucien Bühr and Marc Henzelin[1]

I INTRODUCTION

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

Various federal and cantonal agencies are competent to investigate corporate offences as well as offences committed by corporate employees and company 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 in charge of investigations of corporate offences.

At the federal level, the Office of the Attorney General (OAG) is the competent investigative and enforcement agency for Switzerland's national security matters. In particular, the OAG investigates suspected or actual violations of Switzerland's sovereignty and neutrality, its economy, or violations representing 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 (1) it involves Swiss federal authorities, or (2) if – to a substantial degree – it has been committed abroad (bribery of foreign officials). Insider trading and market price manipulation as well as money laundering also fall within the competence of the OAG. The OAG has all investigative powers a public prosecutor commonly has (i.e., the power to search, seize and arrest).

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1 Daniel Lucien Bühr and Marc Henzelin are partners at LALIVE SA. The authors would like to thank Matthias Weger and Stefano Lappe, trainees at LALIVE in Zurich, for their assistance with the chapter.

In cases where the offences of insider trading, market price manipulation and money laundering are committed by a financial institution, which is under the supervision of the Swiss Financial Market Supervisory Authority (FINMA), and if the suspected or actual misconduct violates administrative law, but not criminal law, FINMA is the competent authority for conducting the investigations. In cases of suspected money laundering, criminal investigations are conducted by the OAG or a cantonal 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.

Suspected regulatory breaches, in the financial sector for instance, are typically investigated by independent examiners (specialised law firms and consulting and audit companies), which are selected and supervised by and report their factual findings to the competent regulator.

Competition law is enforced by the Federal Competition Commission (COMCO). COMCO has a standing executive secretariat (the Secretariat) which 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 where there have been violations of the merger control regime. COMCO may fine undertakings with a maximum of 10 per cent of their turnover in Switzerland over the past three years.

Switzerland's legislative framework reflects socio-economic and ethical considerations and the view of the particular parliamentary majority. In the recent past, the prosecutorial functions have been granted increased power and resources, in particular with regard to the enforcement of financial market regulations, 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 promote market and business integrity.

Under Swiss statutory law, undertakings are, as a rule, not obliged to cooperate with investigative authorities. This is a consequence of due process principles, in particular *in dubio pro reo* and *nemo tenetur se ipsum accusare*. However, limited cooperation or refusal to cooperate with investigative authorities is, in most cases, not a viable option because undertakings under investigation are interested in a swift investigation and resolution of the matter to gain legal certainty. Once an investigation becomes 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 misconduct and no statutory framework for self-reporting. However, there are some exceptions where statutory law contains reporting obligations or a leniency mechanism is outlined.

Suspected or actual misconduct in the business domain of an undertaking requires management to conduct an internal investigation. If the internal investigation results in evidence of potential 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*

impsum accusare (no duty to self-incriminate) is an implicit fundamental right under Article 6 of the European Human Rights Convention (EHRC). *Nemo tenetur* states that individuals and undertakings must not be obliged or forced to self-incriminate. In some extraordinary cases (which have not yet been tested in court) though, there are statutory duties to self-report legal risks (which may, in practice, be equal to an obligation to self-report misconduct). For instance, based on the Financial Market Supervision Act (FINMASA), financial institutions are required to disclose cross-border risks which may have an impact on the institution's reputation.[2]

If an undertaking decides to self-report 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). All data relating to a natural or legal person qualifies as 'personal data'. If the company wishes to disclose personal data resulting from its internal investigation, it may only do so in the event a statutory exception applies or if the data subject provides a waiver. Data protection and data transfer compliance are of particular relevance in cross-border internal investigations. The undertaking may also balance its legally protected interests against the individual's interest in confidentiality. However, this process is cumbersome and entails a high risk of subsequent litigation.

Another aspect requiring consideration is the limited acceptance of the results of internal investigations and their findings in the frame of public investigations. Employee interviews, for instance, will typically not be regarded as equivalent to a formal witness interview by a prosecutor.

Undertakings should consider the legal role and priorities of prosecutors and regulators before they self-report suspected or actual misconduct. In most cases, lawyers will seek clarification on a no-names basis from the public agency on what the framework would be in the event of self-reporting.

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 Cartel Act, the leniency applicant may receive full immunity from the fine. In criminal proceedings, defendants may benefit from the expedited procedure and their fine may be reduced as a result of the admission of guilt and their cooperation.

In cartel investigations, leniency applications have become the standard (in particular if dawn raids are conducted) and are typically filed within the first hours of an investigation.

ii Internal investigations

The governing body and senior management of an undertaking are required to conduct an internal investigation in case of suspected or actual (serious) misconduct. Swiss law imposes a duty of care and loyalty to the interests of the undertaking on the members of the board of directors and of the executive committee. They must perform their duties with increased diligence.

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

Furthermore, the board of directors has the non-transferable and inalienable duty of overall supervision of the persons entrusted with managing the company, in particular with regard to compliance with the law and internal directions.

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 pre-approval by a works council (i.e., a statutory employee representation body).

Internal investigations will typically focus on the review of electronic communication and documents and employee interviews.

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 oblige the employer to protect the employee's privacy, respectively to apply due process principles in the event of internal investigations.

Under 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, the related costs may need to be covered by the undertaking if the employee acted in accordance with instructions.

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 (for instance accounting and forensic firms, etc.) and to all attorney work product.

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

iii Whistle-blowers

Switzerland does not 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, an external ombudsperson or an external lawyer). Multinationals often follow the guidance provided by the US Department of Justice and the Securities and Exchange Commission in their FCPA Resources Guide and guidance provided in international standards (in particular ISO 19600 – Compliance Management Systems and the OECD Guidelines for Multinational Enterprises).[3]

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 legislative proposal because of its

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

overly complex mechanism. This proposal was criticised by 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.[4] 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 context of the undertaking's business.

In practice, the criminal organisational weakness under the SPC is an ineffective compliance management system. Therefore, an undertaking with poor compliance governance (independence, access to the board, adequate resources of the compliance function) and poor organisation and processes may, in the event of actual misconduct by employees, be subject to criminal sanctions, including – in the event of money laundering, corruption, etc. – disgorgement of illicit profits.

Furthermore, an undertaking is also liable if a crime has been committed in the process of a business activity and it is not possible, owing to the company's organisational weakness, to identify the responsible employee.[5]

ii Penalties

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

iii Compliance programmes

Diligent management of any undertaking requires best practice risk and compliance management. This is reflected in the SPC: undertakings that have implemented and are maintaining all adequate and necessary organisational measures to prevent corporate misconduct are not subject to sanctions under the corporate criminal offence. The OAG, when assessing corporate compliance management, relies on international 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.

4 Article 102 Paragraph 2 Swiss Penal Code in connection with Article 322-ter et seq., 305-bis, 260-ter, and 260-quiniquies Swiss Penal Code.

5 Article 102 Paragraph 1 SPC.

Best management practices are typically described in international standards or generally accepted guidelines. Best practice risk management is outlined in ISO[6] Standard 31000 – Risk Management[7] and, alternatively, in the COSO Enterprise Risk Management Framework.[8] Best practice compliance management systems (respectively, in the former wording: compliance programmes) are described in ISO Standard 19600 – Compliance management systems and in international guidelines, such as the OECD Guidelines for Multinational Enterprises.

iv Prosecution of individuals

In the event employees are prosecuted for misconduct in business matters, the undertaking should coordinate employment-related decisions with the regulator or the enforcement agency. Employees under investigation should under no circumstances be terminated unilaterally by the undertaking. This can be construed as a lack of cooperation by the undertaking because the regulator or 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 (to the extent permitted by law). 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 should pay for the employee's legal fees if the employee acted in accordance with internal regulations and instructions.

IV INTERNATIONAL

i Extraterritorial jurisdiction

In some instances, Swiss law has an extraterritorial reach: under the SPC, bribery of foreign officials and employees 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 taken all adequate and necessary measures to prevent employee misconduct, in particular bribery of foreign officials, in their Swiss subsidiary.[9]

ii International cooperation

Swiss authorities are in general interested in and willing to cooperate with their foreign counterparts, both in formal statutory processes and in an informal way. These ways of cooperation include international administrative assistance (for foreign administrative proceedings) and international legal assistance (for foreign court proceedings). Switzerland is

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

7 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.

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

9 See OAG criminal order of 22 November 2011 against Alstom Network Schweiz AG, acting on behalf of Alstom Group.

a member of Interpol and – although not a member of the European Union – fully associated with the European Union's Schengen framework. Also, Switzerland and the EU signed and implemented the first second-generation cooperation agreement in competition matters.[10]

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 dated 1978. In addition, Switzerland has signed numerous bilateral treaties in order to improve mutual legal assistance with other countries.[11]

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 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 reason for prosecution was political. A likelihood of a violation of fundamental human rights in the requesting country is usually not an obstacle for extradition if the requesting country is a signatory to the ECHR. For those countries that are convicted by the European Court on Human Rights (for instance Russia and Turkey) relatively often, 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.

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 the 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 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.

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

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

V YEAR IN REVIEW

2015 was coined by the US Department of Justice Program of 29 August 2013 for non-prosecution agreements or non-target letters for Swiss banks (the US Program),[12] *de facto* a voluntary self-disclosure programme for Swiss banks regarding tax offences, and the OAG investigations of suspected fraud, corruption and money laundering by FIFA officials and in the context of the Petrobras and Operation Car Wash cases.

Since 29 August 2013, roughly 100 Swiss banks (one-third of all banks in Switzerland) have 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 the US agencies under the US Program. These permissions are subject to strict compliance with Swiss banking secrecy, the DPA and Swiss employment law. Meanwhile, 79 Swiss banks settled with the Department of Justice and have been granted non-prosecution agreements. A smaller group of banks that have no reason to believe they violated US law are awaiting the decision of the Department of Justice to be granted non-target letters.

Another ongoing development concerns the New York State Department of Financial Services' appointment of 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 is investigating and supervising a Swiss undertaking.

The major new development in 2015 was the OAG's increased enforcement regarding suspected bribery of foreign officials. The OAG arrested and extradited nine FIFA officials to the US in relation to the Department of Justice's FIFA FCPA probe. Furthermore, the OAG continued to investigate financial flows through Swiss banks of suspected corrupt payments in the context of the Petrobras and the 1MDB investigations. Swiss banks initiated internal investigations, in order to clarify the facts regarding bank accounts which may have been used in the context of corrupt payments.

VI CONCLUSIONS AND OUTLOOK

The science and art of conducting international internal and external investigations is a young legal and managerial expert field globally and in Switzerland. Best practices are still being developed and although an increasing number are tested and adopted by Swiss undertakings, there are still no clear-cut answers to many questions. However, this field of law and management is developing quickly and there are a growing number of cases which will provide guidance and establish best practices. For undertakings, it is key to understand the complexity and challenges of international investigations and the need to retain experienced independent experts to successfully navigate the tricky waters of cross-border internal and government investigations.

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

Appendix 1

ABOUT THE AUTHORS

DANIEL LUCIEN BÜHR

LALIVE SA

Daniel Lucien Bühr's main areas and practice are regulatory and banking law and white-collar crime and compliance, mainly focusing on international 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.

Daniel L Bühr is a member of the International Bar Association, Swiss Management (SMG), the Swiss Association of Competition Law and Studienvereinigung Kartellrecht (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, Daniel L Bühr was regional counsel for a Swiss multinational, responsible for all legal matters in Europe, Russia, the Near East and Africa.

Daniel L 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 SA

Marc Henzelin joined LALIVE in 2001 and 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.

Marc Henzelin has been a judge at the Court of Cassation of Geneva since 2009 and was prior to that 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).

Marc Henzelin is ranked among the world's 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, *Journal of European Criminal Law*, *NJECL*) and of the *Global Investigations Review* (*GIR*) 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 adviser and 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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