global legal group

Contributing Editors
Neil Gerrard & David Kelley, Dechert LLP

Sales Director
Florjan Osmani

Account Director
Oliver Smith

Sales Support Manager
Toni Hayward

Sub Editor
Oliver Chang

Senior Editors
Rachel Williams
Caroline Collingwood

CEO
Dror Levy

Group Consulting Editor
Alan Falach

Publisher
Rory Smith

Published by
Global Legal Group Ltd.
59 Tanner Street
London SE1 3PL, UK
Tel: +44 20 7367 0720
Fax: +44 20 7407 5255
Email: info@glgroup.co.uk
URL: www.glgroup.co.uk

GLG Cover Design
F&F Studio Design

GLG Cover Image Source
iStockphoto

Printed by
Ashford Colour Press Ltd
January 2019

ISBN 978-1-912509-50-8
ISSN 2398-5623

Strategic Partners

MIX
Paper from responsible sources
FSC® C011748

General Chapters:

Country Question and Answer Chapters:

Switzerland

Andreas D. Länzlinger

Bär & Karrer Ltd.

Sarah Mahmud

1 The Decision to Conduct an Internal Investigation

1.1 What statutory or regulatory obligations should an entity consider when deciding whether to conduct an internal investigation in your jurisdiction? Are there any consequences for failing to comply with these statutory or regulatory regulations? Are there any regulatory or legal benefits for conducting an investigation?

Swiss law does not impose direct obligations on companies to conduct internal investigations. However, duties to cooperate with and provide regulatory authorities with accurate information can indirectly compel them to do so. The Swiss Financial Market Supervisory Authority ("**FINMA**"), for example, frequently orders regulated entities to explain incidents and produce documents relating to matters under its supervision, and the entities are also under an ongoing obligation to immediately and proactively notify material events. The stock exchange, SIX Swiss Exchange, imposes a similar *ad hoc* notification requirement, and financial intermediaries have duties to investigate and report suspicious activity to the Swiss Money Laundering Reporting Offices. Conducting an internal investigation is often the only way to gather information and comply with such duties, and sanctions for non-compliance can be serious. Providing FINMA incorrect information, even if only negligently, is a criminal offence attracting a fine of up to CHF 250,000, while intentional non-compliance bears a maximum sentence of three years' imprisonment. Sanctions against the entity can go as far as the regulatory authority revoking an entity's licence to engage in business, particularly if it fails to remediate the conduct in issue.

Regulators such as FINMA usually have the power, under their overarching authority to remediate unlawful conduct and restore compliance, to order internal investigations. If necessary, FINMA can appoint an independent investigator (usually a law firm or an audit firm) to investigate and implement remedial measures within a regulated entity. By taking a proactive and early decision to investigate, entities have the advantage of preserving a degree of control over their investigations, and give themselves time to prepare responses to any government or media enquiries before they arise.

Another incentive to investigate is that the Swiss Criminal Code ("**CC**") imposes corporate criminal liability for failure to take adequate measures to detect or prevent the commission of offences within an organisation. A legal entity may thus be convicted for failing to implement reasonable measures to prevent an exhaustive list of catalogue offences (known as primary corporate criminal liability); or, if the organisation does not have adequate corporate and compliance structures to identify the natural person responsible, it can be made (secondarily) liable for any felony or misdemeanour committed during the ordinary course of its business. The criminal prosecution authorities recently rewarded a company's proactive initiation of an internal investigation, cooperation with the authorities and its implementation of compliance measures by treating these as mitigating factors at sentencing (*cf.* question 2.1 below).

An entity's board of directors and its executive organs also have duties of care under company law, which can require them to set up compliance and control systems to detect, investigate and remediate misconduct. In addition, key employees, such as senior management or compliance officers, may be held criminally liable for failing to take action to prevent criminal conduct within the organisation.

A specific benefit to conducting an internal investigation in competition law is that a statutory leniency programme can grant companies complete or partial immunity from sanction if they report unlawful restraint of competition before others do.

1.2 How should an entity assess the credibility of a whistleblower's complaint and determine whether an internal investigation is necessary? Are there any legal implications for dealing with whistleblowers?

A whistleblower's complaint should be investigated with the same care and diligence as any other report of impropriety. An entity's exact response – and whether it is necessary to appoint external consultants to investigate – will depend on the circumstances. Normally, an entity should take immediate measures to preserve relevant evidence, investigate the facts and document the steps in its investigation. If the complaint is substantiated, steps should be taken to sanction and remediate the wrongdoing.

Although legislative reforms in employment and criminal law are under parliamentary discussion, currently, Swiss law does not offer any statutory protection to whistleblowers. Whistleblowers who breach confidentiality and secrecy obligations (for example, by leaking protected information to the public) are subject to criminal sanction. From a compliance perspective, it is considered best practice for entities to establish reliable avenues for their employees to report suspected misconduct free from risk of reprisal. Terminating a whistleblower's employment solely because he has made a complaint can constitute unfair dismissal with potential consequences under civil law.

1.3 How does outside counsel determine who "the client" is for the purposes of conducting an internal investigation and reporting findings (e.g. the Legal Department, the Chief Compliance Officer, the Board of Directors, the Audit Committee, a special committee, etc.)? What steps must outside counsel take to ensure that the reporting relationship is free of any internal conflicts? When is it appropriate to exclude an in-house attorney, senior executive, or major shareholder who might have an interest in influencing the direction of the investigation?

The identity of the "client" will vary depending on the specific investigation and the terms of counsel's engagement. As the person who often leads the investigation internally, the client can influence whether an investigation is viewed as being independent and, as a result, whether its findings are reliable.

To ensure the reporting relationship is free of internal conflicts, employees or third parties who were involved in the matters under investigation or who are otherwise personally interested in its outcome should not lead or be part of the investigation team. This should apply regardless of whether the person is an in-house attorney, senior executive or major shareholder. Outside counsel should be granted full and free access to the entity's internal records and to its employees, so that it can make recommendations as to the composition of the investigative team.

Outside counsel should then report its findings to specific individuals or a steering committee who have been designated responsibility for the supervision, strategic direction and overall coordination of the investigation. Limiting and defining the number of persons involved in the investigation can help to focus the direction it takes, maximise confidentiality and legal privilege, and ultimately make it more cost-efficient.

2 Self-Disclosure to Enforcement Authorities

2.1 When considering whether to impose civil or criminal penalties, do law enforcement authorities in your jurisdiction consider an entity's willingness to voluntarily disclose the results of a properly conducted internal investigation? What factors do they consider?

Yes, they do. As mentioned above, competition law authorities can grant immunity to companies that (first) report unlawful infringements voluntarily. At sentencing in criminal proceedings, law enforcement authorities generally take into account mitigating factors, such as an offender's remorse and whether reasonable efforts have been made to remediate wrongdoing. The voluntary disclosure of the results of an internal investigation can qualify as a mitigating factor. In 2017, we saw the first reported instance in Switzerland of a company being rewarded for self-disclosing criminal conduct to the authorities. The company reported its liability for failing to take adequate measures to prevent the bribery of foreign public officials, and shared the investigative reports of its external lawyers. The company's admission of guilt, its full cooperation with the authorities and its investment in improving its compliance systems were rewarded by the authorities reportedly reducing the penalty imposed from CHF 3.5 million to the symbolic sum of CHF 1. As is usually always the case, the company was nonetheless separately ordered to disgorge its profits from the illegal activity.

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

In competition law, companies may need to disclose any impropriety early on in order to benefit from the statutory leniency programme. Otherwise – and save for any *ad hoc* obligations to notify the authorities of material events – a company is generally free to disclose whenever it feels appropriate. From a strategic point of view, it should only do so once satisfied that it has a clear understanding of the main aspects of the misconduct in issue, its implications and the actors involved, even if it has not yet uncovered all the details. Once the authorities are involved, the company will no longer have autonomy over the investigation and will be forced to react to external pressures and unknowns. The following considerations can influence the timing of a self-disclosure: any disruption that disclosure could cause to the fact-finding process; the desirability of state support in securing evidence, freezing assets or interrogating and apprehending suspects; and the likelihood of resulting court proceedings, requests for assistance from domestic or foreign authorities, media coverage or whistleblowers.

2.3 How, and in what format, should the findings of an internal investigation be reported? Must the findings of an internal investigation be reported in writing? What risks, if any, arise from providing reports in writing?

In cases where an investigation has been ordered by the authorities, the findings are usually required to be in writing. If a company's intention is to fully cooperate with the authorities, it should also report the findings of a voluntary internal investigation in writing. While there is no formal requirement to do so, as a matter of common sense, a written compilation of the most relevant facts would demonstrate the greatest degree of transparency, cooperation and contrition on the part of the company.

Even though reports prepared by external lawyers may be fully or partially privileged from disclosure, the risks associated with written reports are that the findings may nonetheless be used against the company in domestic or foreign legal or regulatory proceedings or that the report is leaked to the press. As is set out in response to question 5.5, the authorities may be subject to duties to cooperate with one another such that the report, or its findings, may be distributed further than its intended audience. This risk is less pronounced with oral reporting. A report may also contain information belonging to or affecting the rights of employees and third parties. Any unauthorised disclosure of the report and resulting breach of employee and third-party rights could have legal consequences for the company. Companies are advised to engage with the authorities on the format, scope and use of their reports prior to disclosure.

3 Cooperation with Law Enforcement Authorities

3.1 If an entity is aware that it is the subject or target of a government investigation, is it required to liaise with local authorities before starting an internal investigation? Should it liaise with local authorities even if it is not required to do so?

Save for in relation to certain regulated financial markets, entities

subject to ongoing or pending government investigations are not required to liaise with the authorities. It is, nonetheless, advisable to do so. Being in contact and maintaining good relations with the authorities can generate goodwill and potential credit at sentencing. The authorities can also be a valuable source of information regarding developments such as planned coercive measures, involvement and collaboration with foreign authorities, etc. In a best-case scenario, an entity may, for example, be able to minimise the disruption caused by a dawn raid by agreeing mutually beneficial terms for producing evidence in advance. If entities investigate in parallel to the authorities, they risk frustrating the government's fact-finding and, at worst, expose themselves to allegations of tampering with or destroying evidence.

3.2 If regulatory or law enforcement authorities are investigating an entity's conduct, does the entity have the ability to help define or limit the scope of a government investigation? If so, how is it best achieved?

In criminal proceedings, the prosecuting authorities will define the scope of their investigations independently and without input from the concerned parties. There may be more flexibility and opportunity to informally influence an investigation if it is ordered or conducted by regulators such as FINMA that usually have the power to order internal investigations. Regulators will usually define the scope of an investigation but it may be possible to discuss with them and agree on a reasonable scope, the most efficient methodology in reviews and realistic reporting deadlines. While law enforcement entities will usually not involve themselves much or at all in an entity's own internal investigations, we have noticed a trend following the US model for investigations, such that Swiss authorities may also expect to be more involved in purely internal investigations in the future.

3.3 Do law enforcement authorities in your jurisdiction tend to coordinate with authorities in other jurisdictions? What strategies can entities adopt if they face investigations in multiple jurisdictions?

There are a multitude of treaties and legal provisions covering the Swiss enforcement authorities' capacity to cooperate with their international counterparts. Particularly in recent times, we have observed an increase in cases involving international cooperation and coordination (e.g. numerous tax evasion matters involving Swiss banks, the FIFA scandal in which officials were arrested in Zurich, or the multi-jurisdiction investigations in the Petrobas/Odebrecht affair, etc.).

Where an entity is investigated by several authorities in multiple jurisdictions, it is almost always in its best interests for the various proceedings to be coordinated and, if possible, resolved comprehensively. Parallel investigations bring with them: the risk of delays; repeated and increased business disruption; overlapping sanctions; and sustained reputational damage. Although an entity cannot control the authorities' willingness to coordinate, it can attempt to influence them by making appropriate disclosures. The best course of action will vary depending on the circumstances of the case and will almost inevitably require an entity to seek legal advice in all the jurisdictions concerned.

4 The Investigation Process

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

An investigation plan should clearly set out the scope of the investigation (e.g. jurisdiction, subject matter, business area, time-frame, etc.), its purpose and the legal issues that should be addressed by outside counsel during the investigation.

It should typically address the following: (i) identification of an investigative team; (ii) reporting milestones (including the structure and format for reporting); (iii) interim or immediate measures (e.g. to secure evidence); (iv) identification, preservation and collection of relevant evidence; (v) scoping interviews; (vi) (physical and electronic) document reviews and analysis; (vii) engagement of external counsel and experts; (viii) substantive interviews; (ix) preparation of investigation reports; and (x) communications with the authorities and the media.

4.2 When should companies elicit the assistance of outside counsel or outside resources such as forensic consultants? If outside counsel is used, what criteria or credentials should one seek in retaining outside counsel?

If companies decide to engage outside counsel, they should do so early on in an investigation to maximise the procedural protection over the communications and work product generated during the investigation. The nature, scope and budget of an investigation will determine whether additional external consultants should be engaged. The main reasons for using outside counsel are: to maximise the chances of the investigation results being privileged; to ensure the investigation is independent and free from conflicts of interests; to obtain an independent perspective on the issues; to lend the factual findings and legal conclusions neutrality and credibility; and to engage with the authorities. For cross-border investigations, it is also worth noting that Swiss in-house counsel do not enjoy legal professional privilege (*cf.* question 5.3 below). The criteria for selection should reflect those reasons. Outside counsel should be selected based on: their know-how and experience in conducting investigations; their reputation for being independent; their history of engaging with the authorities; the resources they have to deal with investigations; and, in cross-border investigations, their track record for collaborating with foreign counsel and dealing with cross-border issues.

5 Confidentiality and Attorney-Client Privileges

5.1 Does your jurisdiction recognise the attorney-client, attorney work product, or any other legal privileges in the context of internal investigations? What best practices should be followed to preserve these privileges?

Yes, in principle, Swiss law recognises the confidentiality of documents and material relating to the attorney-client relationship. The scope of the privilege can vary depending on the type of

proceedings involved but, typically, it only applies to lawyers registered to practise law in Switzerland and, under certain circumstances, in EU and EFTA countries. Provided the documents and material relate to an engagement for the provision of typical legal services, privilege can extend to: confidential information that a client shares with his lawyer; information from other sources; the lawyer's own work product; and even work product of the client or third parties; but it does not cover pre-existing evidence created outside the scope of a lawyer's engagement.

Although the conduct of internal investigations can potentially qualify as the provision of typical legal services, caution is required in investigations involving statutory anti-money laundering ("**AML**") obligations and general regulatory banking compliance obligations. Recent case-law of the highest Swiss court, the Federal Supreme Court ("**FSC**"), has held that work product created in such investigations will not necessarily enjoy blanket legal professional privilege if the client was under a statutory or regulatory obligation to take the investigative steps in any event. It remains to be seen whether this reasoning is applied beyond AML and banking compliance to investigations involving general controlling and auditing activities.

In criminal proceedings, both legal entities and natural persons are also entitled to claim privilege against self-incrimination. The principle is usually interpreted restrictively for legal entities and cannot be used to circumvent statutory obligations to keep records, such as under AML legislation.

Best practices to maximise the prospects of preserving legal privilege include defining the scope of a lawyer's engagement and the legal issues to be addressed at the outset of an investigation, and keeping particularly sensitive documents in an external lawyer's custody.

5.2 Do any privileges or rules of confidentiality apply to interactions between the client and third parties engaged by outside counsel during the investigation (e.g. an accounting firm engaged to perform transaction testing or a document collection vendor)?

Third parties who are engaged to support outside counsel can fall under their instructing legal counsel's privilege if they qualify in law as a person assisting them. Anyone from administrative staff, forensic experts, accounting firms or private detectives can qualify as a "person assisting" a lawyer, provided the lawyer exercises the requisite degree of direction and supervision over them. If so, the third party would be bound by the same professional rules of confidentiality as the lawyer. Best practices for engaging third parties include: defining the scope of the collaboration in writing; regular reporting to the outside counsel; copying counsel in all communications with the third party; and ensuring the third party agrees to adequate confidentiality undertakings.

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

No, they do not. The current position under Swiss law is that legal professional privilege and professional duties of confidentiality do not extend to in-house counsel. Although legislative reforms have been proposed to change the law, two such proposals have recently failed. A third proposal to extend privilege to dealings with in-house counsel in civil proceedings is currently under parliamentary deliberation. Note, however, that communications with patent attorneys may be privileged regardless of whether they are in-house or not.

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

As stated above, legal privilege is best ensured by engaging independent counsel early on in an investigation and clearly defining the legal services they must provide. As a general rule, all communications and work products should be shared on a confidential basis and with a pre-defined circle of persons, on a "need-to-know" basis only. As a matter of practicality, privileged material should be marked accordingly and stored separately to make it easier to identify.

5.5 Do enforcement agencies in your jurisdictions keep the results of an internal investigation confidential if such results were voluntarily provided by the entity?

Enforcement agency employees are usually bound by official secrecy and must keep information they become aware of during the exercise of their duties confidential. At the same time, however, they are often bound to notify other authorities, including criminal prosecutors, of any unlawful conduct that comes to their attention, be it in the context of information provided voluntarily or otherwise. While this can discourage companies from volunteering the results of their investigations, the Swiss authorities have shown that they can be sympathetic to companies torn between regulatory disclosure and criminal self-incrimination. FINMA, for example, has at times refused requests by criminal prosecutors to share internal investigation reports that have been provided voluntarily, on the basis that this would discourage cooperation in the long term and thus compromise its ability to supervise. We recommend carefully reviewing the applicable regulatory rules prior to any disclosure and, if necessary, addressing concerns directly with the relevant enforcement agency.

6 Data Collection and Data Privacy Issues

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

The collection and use of personal data is generally governed by the Federal Data Protection Act of 19 June 1992 ("**DPA**") and the Data Protection Ordinance. These provisions are currently subject to comprehensive statutory revision. Proposed legislative changes would exclude legal entities from the existing scope of data protection provisions, increase sanctions for non-compliance and introduce a duty to notify data breaches. The revised DPA is not expected to enter into force before 2020.

Provisions of the newly introduced General Data Protection Regulation ("**GDPR**") of the European Union may apply to Swiss companies to the extent that they process personal data in connection with the offering goods or services to data subjects in the EU or monitor their conduct within the EU.

Employment law provisions in the Code of Obligations also impose duties of care on employers, which may restrict the handling of employee data.

Swiss "blocking provisions" intended to protect Swiss sovereignty can also affect the collection and transfer of data from Switzerland. Article 271 CC, for example, prohibits foreign states from, either directly or indirectly, performing any act which falls within the exclusive competence of the Swiss public authorities, including taking evidence in Switzerland. As a result, collecting documentary or oral evidence in Switzerland can require government authorisation.

6.2 Is it a common practice or a legal requirement in your jurisdiction to prepare and issue a document preservation notice to individuals who may have documents related to the issues under investigation? Who should receive such a notice? What types of documents or data should be preserved? How should the investigation be described? How should compliance with the preservation notice be recorded?

Specific legal provisions impose general document retention obligations, such as in corporate and federal tax law (10 years); however, unless an authority has specifically ordered evidence to be preserved, there is no legal requirement to preserve documents in connection with litigation and/or regulatory proceedings. Nonetheless, it is common practice for companies to issue data preservation notices when litigation and/or regulatory proceedings become reasonably foreseeable, particularly as it ensures compliance with obligations in other jurisdictions. It follows that there are no Swiss formal requirements on how such notices are issued, although data protection rules continue to apply. Data preservation notices should accordingly only be issued to employees who are likely to have business-related information that is relevant to the investigation. Unless there are reasonable grounds to believe that doing so would risk data destruction and/or compromise the confidentiality of an investigation, the notice should inform the recipient of the background to the investigation, the purpose of preservation and the anticipated use of the preserved data. A common-sense approach should be taken to recording compliance with the notices to ensure that the data is admissible in legal, regulatory or other proceedings in Switzerland and abroad.

6.3 What factors must an entity consider when documents are located in multiple jurisdictions (e.g. bank secrecy laws, data privacy, procedural requirements, etc.)?

With each jurisdiction, a separate set of rules on data privacy, employment law, legal professional privilege, confidentiality and, potentially, blocking statutes must be considered. A time-consuming process in cross-border investigations is ensuring that the collection, transfer and use of documents complies with the requirements in each applicable legal system. Cross-border data transfers can require: consents or waivers to be obtained from data subjects; notification of or authorisation from the authorities; the agreement of a data transfer framework; and/or document redaction.

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

There are no specific guidelines governing document collection in internal investigations. The types of documents that could be important depend on the nature of the investigation. In their own investigations, the criminal authorities must consider all relevant evidence that has been obtained lawfully and in accordance with current scientific technology and practices. Admissible evidence can include anything from GPS data, to internet scripts, to any type of electronically stored information. Companies are therefore advised to collect any and all the evidence that is necessary to investigate the issues, including: hard copy data (e.g. archives, files, minutes of meetings, policies, HR files, etc.); electronically stored information (e.g. email records, databases, online servers, locally stored data repositories, journals/logbooks, back-up and legacy systems); lawfully obtained telephone and audio-visual recordings; oral evidence (e.g. from current and former employees and third-party witnesses); and any expert or specialised data (e.g. analyses on price movements, payments transactions, etc.).

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

The resources used to collect documents during an investigation vary greatly depending on its scope and funding. In larger investigations, it is commonplace for the latest scientific technology to be used to collect and process data (e.g. electronic imaging, e-discovery solutions and specialist IT or forensic accounting methods). It is usually considered most efficient to use comprehensive e-discovery programmes, which enable multiple data processing functionalities, such as searching, threading, tagging, redaction and production.

6.6 When reviewing documents, do judicial or enforcement authorities in your jurisdiction permit the use of predictive coding techniques? What are best practices for reviewing a voluminous document collection in internal investigations?

There are no specific restrictions on using technology-assisted review or predictive coding techniques to assist and simplify investigations. The usual e-discovery solutions and software used on the international market are also widely used by larger organisations and law firms here. The golden rule is to plan carefully and make contemporaneous records of important decisions made during the review process and why they were made. Once data for review is collected on a processing platform, the search criteria should be defined based on the investigation's objectives. The review process should be guided and supervised by qualified lawyers to ensure compliance with the applicable law and to ensure the legal issues in the investigation are addressed.

7 Witness Interviews

7.1 What local laws or regulations apply to interviews of employees, former employees, or third parties? What authorities, if any, do entities need to consult before initiating witness interviews?

Swiss employment law does not impose specific rules on how to conduct employee interviews. Pursuant to its general obligations and duties of care, an employer must respect its employees' personal rights. The ground rules for conducting an interview should always be fairness, objectivity and respect for the interviewee. General data protection provisions apply to interviews with third parties such as former employees. Using the evidence from Swiss interviews in foreign proceedings may breach the blocking provision in article 271 CC unless prior government authorisation is obtained. If the authorities are investigating the same matter, they may need to be consulted prior to the interview so as not to frustrate their fact-finding.

7.2 Are employees required to cooperate with their employer's internal investigation? When and under what circumstances may they decline to participate in a witness interview?

Employees are under a general duty of loyalty to their employer, which requires them to comply with their employer's instructions,

and under a duty to account for all their activities during employment by sharing all the products of their work (such as correspondence, analyses, contracts, etc.). These two obligations are widely recognised as entailing a duty to cooperate with the employer's internal investigations and to participate in witness interviews. In return, the employer must safeguard the employee's personal rights during the investigation, just as it is obliged to do during the ordinary course of employment. If an employee is targeted by an investigation and at risk of criminal prosecution, he arguably has the right to refuse participation or to answer specific questions pursuant to the privilege against self-incrimination. The authorities on this point are divided.

7.3 Is an entity required to provide legal representation to witnesses prior to interviews? If so, under what circumstances must an entity provide legal representation for witnesses?

The question of whether an employee has a right to legal representation at an interview during an internal investigation is disputed in academic literature. The usual practice is to not provide representation unless the employee's conduct is in issue and he is at risk of criminal prosecution. In such cases, as a matter of good practice, the employee should be allowed the opportunity to seek advice, although there is no obligation on the entity to provide or finance it.

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

Best practices include giving the interviewee sufficient information about: the background to the investigation; the purpose of the interview; any allegations made against him; the intended use of information he provides; and giving an "Upjohn Warning" to disclose that the company's lawyers do not act for him. Witnesses should also be directed to keep the contents of the interview, and the fact that is being conducted, strictly confidential. The contents of the interview should be recorded in a memorandum, protocol or even *verbatim* minutes. If it is likely that an interviewee may expose himself to criminal prosecution, entities should carefully consider whether to grant the interviewee access to legal advice and representation.

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

Professional interactions in Switzerland tend to be formal and conservative. Employment relationships can to be hierarchical but they are also stable, with employees often having worked at the same company for many years. This, together with the fact that internal investigations are still a relatively new phenomenon, may necessitate increased sensitivity and respect when handling witnesses during interviews.

Although most Swiss employees tend to speak English to a relatively high standard, out of fairness, interviewees should always be offered the option of responding to questions in their native language. Four official languages are spoken in Switzerland, so care should be taken to engage translators for the correct language.

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

Whistleblowers should generally not be treated differently from any other interviewee, particularly if they are company employees. Pursuant to its general duty of care to employees, an employer may be obliged to take measures to protect a whistleblower's identity if there are reasonable grounds to fear an adverse reaction against the whistleblower.

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

Under data protection law, an interviewee should be granted the right to review and amend the minutes of an interview. In the interests of accurate fact-finding, minutes should be shown to the interviewee immediately or soon after the interview so as to avoid any misunderstandings or later disputes as to their contents. To reduce the risk of dissemination and protect the integrity and confidentiality of the investigation, the minutes should not necessarily be given to the employee.

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

No, there is no requirement that enforcement authorities be present at witness interviews. Such attendance would be unusual, if not detrimental to the purpose of an investigation, because it is likely to inhibit the free communication of information. There is also no requirement that a witness be legally represented. However, if there is a likelihood that a witness risks criminal sanction and/or incriminating himself during the interview, it is recommended that, as a matter of good practice, the interviewee either be advised that he can refuse to answer questions that would tend to incriminate himself and/or be given the chance to seek legal advice or representation. This is particularly so if the witness is an employee.

8 Investigation Report

8.1 How should the investigation report be structured and what topics should it address?

There are no strict rules on how to structure an investigation report. Investigations pursuant to statutory AML and regulatory banking compliance obligations may benefit from separating the findings of fact from legal assessment in order to maximise the prospects. As a matter of best practice, a report should include the following: (i) an executive summary; (ii) the background to the investigation, its triggers, scope, purpose and the legal issues it addresses; (iii) a description of the document preservation, collection and review processes; (iv) a chronology of relevant facts; (v) the investigative findings from document reviews and interviews; (vi) an overview of the applicable legal and regulatory framework; (vii) legal analysis; (viii) conclusions as to responsibilities and liability; and (ix) recommendations for the next steps and remediation. As far as practically possible, the report should attach any evidence referred to in the body of the report in an appendix.

Andreas D. Länzlinger
Bär & Karrer Ltd.
Brandschenkestrasse 90
CH-8027 Zurich
Switzerland

Tel: *+41 58 261 50 00*
Email: *andreas.laenzlinger@baerkarrer.ch*
URL: *www.baerkarrer.ch*

Andreas D. Länzlinger heads Bär & Karrer's Internal Investigations Practice Group and is one of the leading partners of the firm's Litigation/Arbitration Practice Group. He has extensive experience in handling complex banking/financing, commercial, corporate, contract and insurance litigations, both before Swiss courts and in cross-border proceedings. He and his team have conducted many large-scale internal investigations at global enterprises in the financial, pharmaceutical and construction business. He has represented a number of Swiss clients in mass tort litigation cases before US courts. During the last years, he has regularly advised and represented Swiss corporate clients regarding compliance questions and in investigations, including proceedings before US authorities (Department of Justice, SEC and FED), especially in matters under the US Foreign Corrupt Practices Act.

Sarah Mahmud
Bär & Karrer Ltd.
Brandschenkestrasse 90
CH-8027 Zurich
Switzerland

Tel: *+41 58 261 50 00*
Email: *sarah.mahmud@baerkarrer.ch*
URL: *www.baerkarrer.ch*

Sarah Mahmud is a part of the litigation, arbitration, internal investigation and cross-border proceedings teams. Her practice currently focuses on internal investigations and cross-border proceedings. Sarah has also practised in common law jurisdictions and is experienced in common law commercial litigation.

BÄR
& KARRER

Bär & Karrer is a renowned Swiss law firm with more than 150 lawyers in Zurich, Geneva, Lugano and Zug.

Our core business is advising our clients on innovative and complex transactions and representing them in litigation, arbitration and regulatory proceedings. Our clients range from multinational corporations to private individuals in Switzerland and around the world.

Most of our work has an international component. We have broad experience handling cross-border proceedings and transactions. Our extensive network consists of correspondent law firms which are all market leaders in their jurisdictions.

Bär & Karrer was repeatedly awarded Switzerland Law Firm of the Year by the most important international legal ranking agencies in recent years.

- 2018 *IFLR* M&A Deal of the Year.
- 2018 Best in Trusts & Estates by Euromoney LMG.
- 2018, 2017 Trophées du Droit Silver.
- 2016 Trophées du Droit Gold.
- 2016, 2015 and 2014 Mergermarket European M&A Awards.
- 2016, 2013 and 2012 *Chambers* Awards.
- 2016, 2015 and 2014 *The Legal 500* ("most recommended law firm in Switzerland").
- 2015 and 2014 *IFLR* Awards.
- 2015, 2014, 2013, 2011, 2010 *The Lawyer* European Awards.
- 2015 Citywealth Magic Circle Law Firm of the Year – EMEA.
- 2014 Citywealth International Financial Centre Award.

Current titles in the ICLG series include:

- Alternative Investment Funds
- Anti-Money Laundering
- Aviation Law
- Business Crime
- Cartels & Leniency
- Class & Group Actions
- Competition Litigation
- Construction & Engineering Law
- Copyright
- Corporate Governance
- Corporate Immigration
- Corporate Investigations
- Corporate Recovery & Insolvency
- Corporate Tax
- Cybersecurity
- Data Protection
- Employment & Labour Law
- Enforcement of Foreign Judgments
- Environment & Climate Change Law
- Family Law
- Financial Services Disputes
- Fintech
- Franchise
- Gambling
- Insurance & Reinsurance
- International Arbitration
- Investor-State Arbitration
- Lending & Secured Finance
- Litigation & Dispute Resolution
- Merger Control
- Mergers & Acquisitions
- Mining Law
- Oil & Gas Regulation
- Outsourcing
- Patents
- Pharmaceutical Advertising
- Private Client
- Private Equity
- Product Liability
- Project Finance
- Public Investment Funds
- Public Procurement
- Real Estate
- Securitisation
- Shipping Law
- Telecoms, Media & Internet
- Trade Marks
- Vertical Agreements and Dominant Firms

glg global legal group

59 Tanner Street, London SE1 3PL, United Kingdom
Tel: +44 20 7367 0720 / Fax: +44 20 7407 5255
Email: info@glgroup.co.uk

www.iclg.com