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Switzerland

Thomas A Frick and Adrian W Kammerer
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In our previous essays in the 2015, 2016 and 2017 editions of *The European, Middle Eastern and African Investigations Review*, we gave an overview of how to conduct an internal investigation in Switzerland or with a Swiss angle (2015), provided an overview of three of the key issues that need to be taken into account in a Swiss investigation at its very early stages (2016), and summarised most recent developments on the aforementioned topics (2017). Our outline below renders an updated overview on our discussions in the frame of our previous publications.

Certain important Swiss Law aspects of internal investigations

Over the past six years, the Swiss financial industry in particular has become acquainted with the instrument of internal investigations. By now, the vast majority of the numerous internal investigations conducted within approximately 50 Swiss domiciled banks as a result of the Department of Justice (DOJ) programme imposed on such banks have been completed and regularly resulted in payments of the affected banks to the US authorities. According to the media, the total amount of the payments made by in total 41 banks is around 4.1 billion Swiss francs. Some settlements are still outstanding.

Yet, further international disruptions also involving Swiss financial institutions occurred, again resulting in respective internal investigations that are partially ongoing, such as 1MDB, Petrobras and the political turmoil in Saudi Arabia launched by Saudi Crown Prince Mohammed bin Salman. Therefore, it appears worthwhile to reiterate certain key Swiss law aspects to be borne in mind when conducting internal investigations with cross-border aspects on Swiss territory.

An internal investigation should be initiated in case of a suspicion of criminal activities affecting or in connection with an entity's business. Yet, if criminal activities have an enterprise-internal impact only, the affected company often does not prosecute the criminals and is not under an obligation to do so. If the criminals are outside the company that suffers the damage, the company often does not involve public authorities as it feels threatened by reputational risks.

Under certain circumstances, an internal investigation may be imposed on a company by a Swiss regulator, in particular the Swiss Financial Market Supervisory Authority (FINMA) or the Federal Competition Commission, to establish control mechanisms. The regulator will in such cases usually impose an internal investigation in accordance with specific rules set forth by the regulator. In such event, the regulator would typically instruct an independent third party (normally a law or audit firm) to conduct the investigation and to prepare a report to be disclosed to the regulator. Notably, the costs of such internal investigation (which can be considerable) have to be borne by the investigated entity itself.

In case an internal investigation is about to be launched, it is highly recommendable to address a variety of questions before entering into such exercise in order to keep the investigation as efficient as possible. The success and the efficiency of an internal investigation to a large extent depend on the decisions taken at the very beginning of the investigation. The first decision to be taken is who shall be tasked with the investigation. Naturally, the initial questions to be resolved differ if an investigation is not made on a voluntary basis but imposed on the entity by a regulator. The following topics may arise when conducting a voluntary investigation while in the case of an investigation imposed by the regulator, the latter will dictate the details of the conduct.

The project structure needs to be determined at the very beginning of an internal investigation, ie, a project board should be established consisting of both internal and external personnel with adequate respective knowledge and expertise. The structure should be determined in writing and a project management suitably composed of experienced individuals should closely manage the project. Key to the success of a voluntary internal investigation is that at the top of the line, a steering committee composed of persons with the necessary influence in the company is supporting the project.

Before launching an internal investigation, the project team should be given a clear and unambiguous mandate and task. The mandate should be based on an initial analysis of the issue and should fix the topic and the goal of the investigation.

Also from the very beginning of the project, clear reporting lines need to be established and a comprehensive reporting rhythm should be implemented. The entity under investigation is well advised to fix in writing:

- who reports;
- what;
- to whom;
- at what point in time; and
- in which format.

Furthermore, the company under investigation must determine at what point in time and in what form the board of directors will be informed and assess any external information (media concept), including the competences therefor. The communication concept is a necessary part of the immediate measures to be taken after the trigger incident for an internal investigation.

Finally, it should be determined what the work product of the investigation shall be – usually a written report about the facts established and including proposals to improve, eg, control mechanisms and compliance in general.

Equal to various other jurisdictions, internal investigations in Switzerland are either conducted by external (independent) or internal investigators, the latter being employees of the investigated company. In our experience, the advantages of having the investigation conducted by external investigators (with substantial support by the investigated company's internal staff) are:

- the absence of conflicts of interest;
- expertise in the field of internal investigations;
- possibility of ancillary services by related service providers (forensic information technology services, redaction teams, etc); and

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- possible advantages towards third parties, such as foreign authorities, to render an 'independence stamp' and possibly add some credibility on the conduct and the results of the investigation.

Internal investigations in Switzerland must take into consideration Swiss secrecy and data protection regulations. The respective provisions are set forth in a variety of laws and regulations. They can have an impact or may hinder internal investigations in Switzerland and do not only apply to individuals but also to legal entities. Furthermore, the investigator must ascertain that the data established in the frame of a specific investigation can be used as evidence in court proceedings if necessary, and must avoid any breach of the prohibitions set forth in the Swiss Penal Code (PC) to gather evidence in Switzerland in connection with foreign proceedings (article 271 PC), unless previously authorised by the Swiss Finance Department (we addressed this possibility in our 2016 essay in more detail).

To the extent gathered data is transferred abroad, the rules prohibiting economic espionage as per article 273 PC need to be complied with. Documents affecting third parties may only be transmitted in redacted form; documents may be transmitted in unredacted form if the third party has agreed to the disclosure of his or her details and if no state interests are involved.

The Federal Data Protection Act furthermore prohibits any transfer if there is, in the country of the recipient, no data protection comparable to Swiss data protection. As Swiss data protection extends to legal entities in the same way it does to natural persons, this is often not the case. For example, US data protection regulation is deemed insufficient from a Swiss data protection law point of view and EU data protection is deemed equivalent for persons only (but not for legal entities). In case a cross-border transfer is a problem, the storage and analysis of the data is typically done in Switzerland and the results are only transmitted abroad in an anonymous manner. As a consequence, the servers used in the investigation should be located on Swiss territory. In particular if data on persons resident in the EU are affected, European Union data protection law may need to be observed even if the investigation is conducted in Switzerland.

In case of foreign proceedings, article 271 PC needs to be observed. Acts undertaken in Switzerland for and on behalf of a foreign state, which (according to Swiss understanding) are typically done by a public authority, are prohibited unless expressly authorised by the federal government. It must be noted in that regard that the collection of evidence, even in civil law court proceedings, is considered as being an activity done by state officials under Swiss law (as Switzerland has no institute such as the US pretrial discoveries). If this becomes an issue, Swiss companies sometimes conduct the interviews with their employees abroad, just across the border of Switzerland. Notably, even consent by the involved persons does not prevent the actions taken in Switzerland from being illegal. Even acts prior to the initiation of court proceedings may sometimes be considered illegal. As a rule, a party in foreign court proceedings may voluntarily submit its own documents to support its position in the foreign proceedings. However, it may not file documents compelled by a court order (similar rules apply to third parties being called as witnesses). A third party may only respond to general enquiries. The foreign court needs to obtain the evidence through judicial assistance proceedings. Therefore, whether an internal investigation infringes article 271 PC may depend on the background of the investigation, eg, on whether a foreign regulator has initiated the investigation.

Key issues that need to be observed when initiating an investigation

Gathering of evidence

The possibility of using the findings of an investigation in court or other official proceedings may depend on the type of a given proceeding. As a general rule, the 'fruit of the poisonous tree' doctrine is not applicable under Swiss law.

In court proceedings governed by Swiss law, not all evidence gathered by prosecutors or civil law claimants is eligible to be heard by the court. The Federal Supreme Court stated the principle that illegally taken evidence, as a rule, cannot be used in court proceedings. However, this rule has been partly revised by considerable exceptions granted in the various legal fields (ie, criminal proceedings, civil proceedings and administrative proceedings). Also, the legal concept of attorney–client privilege was put into perspective by a 2016 judgment of the Federal Supreme Court as discussed further below. Finally, in cases where internal investigations are led by a regulator, the latter may be obliged to report certain findings of (severe) misconduct to prosecution authorities and, therewith, disclose sensitive data to such authorities.

Criminal proceedings

In criminal proceedings, the Federal Supreme Court puts considerable emphasis on the circumstances of a specific case when assessing whether evidence possibly not gathered in a fully legal way may be heard by it or not. As a consequence of various uncertainties entailed by the Federal Supreme Court's case law, internal investigations in Switzerland should, among other things, focus on the observation of the rights of the individuals involved and the fairness of the performance of the investigation. Therefore, the investigation should by all means observe the principle of proportionality and, where possible, the mildest investigatory instrument available should be applied.

Civil proceedings

In civil proceedings, as a rule, evidence obtained by illegal means will only be taken into consideration if the interest in finding the truth is clearly prevailing. Article 152 paragraph 2 of the Swiss Civil Procedure Code states that '[i]llegally obtained evidence shall be considered only if there is an overriding interest in finding the truth'.

According to the Federal Supreme Court, evidence is considered as having been unlawfully obtained if it was gathered 'in breach of material law'. In internal investigations, the following illegal evidence-collecting actions in connection with a violation of an individual's personality pursuant to article 28 of the Swiss Civil Code (CO) should be avoided in particular:

- criminal conduct (eg, breach of postal secrecy, illegal recordation of conversations, illegal gathering of personal data);
- breach of data protection provisions protecting employees (as set forth in the Swiss data protection regulation currently being revised and certain employment law provisions); and
- breach of the principle of good faith according to article 2 paragraph 1 CO (eg, by breaching provisions of employment agreements).

In connection with internal investigations in Switzerland it should be noted that the revised Swiss data protection regulation (scheduled to enter into force in 2019), among other things, is likely to render cross-border disclosure of data more cumbersome and complicated and will impose certain approval requirements on the data processor.

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Administrative proceedings

Swiss administrative law does not contain provisions regulating illegally gathered evidence. Internal investigations that are not performed by the order of state authorities are not subject to administrative law. In summary, the rules outlined above for criminal proceedings are usually applied in the event of administrative proceedings. A different aspect concerns the risk of documents prepared for regulatory reviews being disclosed. A recent, widely discussed Federal Supreme Court decision held that in case of a criminal investigation, reports prepared by a bank in the framework of a regulatory review by FINMA must be disclosed to the state attorney upon request. Hence, any such reports need to be drafted in a way that takes into account the risk of their appearance in other proceedings.

Attorney–client privilege

In any investigation relating to Switzerland, it must be established at the very beginning of the investigation whether the company wishes the investigation results to be subject to Swiss legal privilege. This can be achieved if the head of the investigation is a Swiss attorney organising and supervising the investigation and supporting it by providing legal advice. If that is the case, that attorney may, for example, employ as support an auditing firm or other support staff and the work products of that support staff will also fall under the attorney–client privilege. In tis context, however, such protection has been somewhat confined by a recent decision of the Federal Supreme Court of September 2016 relating to a case of insufficient observance of AML duties by the sanctioned financial institution. In summary, the Federal Supreme Court upheld the unsealing of attorney work products stemming from an outside legal counsel led internal investigation upon request by the Federal Prosecutor with the reasoning that certain aspects of outside counsel's work went far beyond regular legal advice, that is, it was deemed a delegation of extensive fact finding, etc, that the entity itself or service providers not being attorneys would have been capable of collecting. As indicated, the final investigation report (containing not only a legal assessment of the facts but also the facts established by the investigation) will be subject to Swiss legal privilege. However, if the internal legal department of a company is charged with rendering the report, the findings of the internal investigation will not be subject to attorney–client privilege, regardless of whether the legal department employs fully qualified attorneys or not. Thus, in cases where confidentiality is a key issue for the investigated entity, in order to establish privilege (and to make sure the investigation is made free of any conflicts of interest), it is recommended in our view to have outside legal counsel lead the internal investigation. Finally, any correspondence between a Swiss company and attorneys only licensed to practise in a country outside the EFTA or the European Union is not considered to be privileged by the Swiss Competition Commission. As US courts tend to grant legal privilege to correspondence and documents held with foreign companies only when such documents enjoy legal privilege in the country where they are located, this may also lead to the loss of legal privilege of such documents in US proceedings and the US court will ask the company to deliver those documents.

Therefore, any Swiss internal investigation or international internal investigation with a Swiss angle needs to carefully assess at the outset the requirement for confidentiality and the scope of the legal privilege under available Swiss law and to structure the investigation accordingly.

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Thomas Frick specialises in counselling Swiss and foreign banks and other financial institutions in all kinds of legal and regulatory issues, with a particular focus on fintech, regulatory and compliance issues, customer contracts, interbank contracts and syndicated finance. He devotes a substantial amount of time to advising banks, securities traders, asset managers, investment advisers, investment funds and other participants in the financial markets both in Switzerland and abroad involving business activities related to the Swiss market. Recent instructions from clients include the acquisition of Swiss banks, the founding and setting up of Swiss banks, negotiations with the Financial Market Supervisory Authority and with other authorities relevant to market participants in Switzerland and various internal investigation mandates, concerning regulatory, employment and cybercrime issues.

Mr Frick is a member of the board of directors of several Swiss banks and of other prudentially supervised financial market participants. He is a lector in the LLM programme of Zurich University on banking and financial markets law, in the Swiss Finance Institute and has published various articles on financial law, in particular fintech, banking secrecy, securities law and investment fund law and internal investigations.

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Adrian Kammerer frequently advises institutional clients in the areas of contract, company, employment and commercial law. He also renders advice and support for international and domestic clients in litigation strategies and regulatory proceedings of Swiss regulators against his clients. Adrian is much appreciated for his expertise in the prevention of money laundering, fraud detection and prevention as well as compliance and good corporate governance matters. Furthermore, he is frequently advising (mostly foreign) financiers in aviation finance. Also, Adrian Kammerer has extensive expertise in the organisation and the conduct of major and large-scale internal investigations going back several years and involving various domestic and foreign law firms, auditors and other third-party service providers.

Recent instructions received from clients include the founding and setting up of a Swiss legal entity engaged in compliance consulting services, negotiations with the Financial Market Supervisory Authority regarding compliance of (foreign) financial service providers with the relevant Swiss regulation, the drafting of account opening documentation and of asset management and advisory agreements, support of financial institutions in connection with large-scale internal investigations, monitorship-driven inquiries, litigation before the Swiss Bankers' Association, customer handling, drafting of AML and Know Your Customer (KYC) policies and procedures as well as assistance of corporates in various employment law-related disputes. Furthermore, Adrian Kammerer recently provided Swiss law-related advice in connection with a number of aircraft sale and lease back transactions involving foreign financiers and lessors.

Adrian Kammerer is a board member of a Zurich-based mid-size group of companies engaged in the IT and electronic supplies industry that was awarded winner of the Prix SCV 2018 in January 2018, which is granted annually by the Swiss Venture Club, an independent, non-for-profit association with the purpose of promotion and support of small and medium-sized companies in Switzerland. Furthermore, Adrian Kammerer was elected to the board of the Zurich Bar Association (ZBA) in late 2016 and has acted as a board member of the ZBA since January 2017.

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