GIR INSIGHT

EUROPE, THE MIDDLE EAST AND AFRICA INVESTIGATIONS REVIEW 2019

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Preface

Welcome to the *Europe, Middle East and Africa Investigations Review 2019*, a Global Investigations Review special report.

Global Investigations Review is the online home for all those who specialise in investigating and resolving suspected corporate wrongdoing, telling them all they need to know about everything that matters.

Throughout the year, the GIR editorial team delivers daily news, surveys and features; organises the liveliest events ('GIR Live'); and provides our readers with innovative tools and know-how products.

In addition, assisted by external contributors, we curate a range of comprehensive regional reviews – online and in print – that go deeper into developments than our journalistic output is able.

The *Europe, Middle East and Africa Investigations Review 2019*, which you are reading, is part of that series.

It contains insight and thought leadership from 28 pre-eminent practitioners from these regions.

Across 12 chapters, spanning around 120 pages, it provides an invaluable retrospective and primer. All contributors are vetted for their standing and knowledge before being invited to take part.

Together, these contributors capture and interpret the most substantial recent international investigations developments of the past year, with footnotes and relevant statistics. Other articles provide valuable background so that you can get up to speed quickly on the essentials of a particular topic.

This edition covers France, Germany, Nigeria, Switzerland and the UK from multiple angles; has overviews of money laundering, data transfer, the regulation of cryptocurrency and international cooperation between agencies; and discusses the value experienced forensic accountants will bring to most investigations.

Among the gems, it contains:

- A thorough review of data-protection provisions in all the regions covered by the book, including Africa and the Middle East.
- Similar tours d'horizons for anti-money laundering and the regulation of fintech.
- A chapter on Africa and the 'extra' stuff to bear in mind when investigating there, along with how to overcome challenges.
- A summary of a momentous year in France.
- A summary of a curious year in the UK, certainly for the Serious Fraud Office – and what to read into certain of its decisions and results.
- An analysis of the Financial Conduct Authority's year, and how it is using its investigatory powers in an inquisitorial fashion, plus how some target firms are now making strategic use of the partial settlement mechanism to hedge their bets.

Along the way, you will encounter a personal experiment in cryptocurrency by those authors; and learn how an accountant can be to an investigation what Jamie Martin, Sotheby's head of scientific research, is to detecting fake Rothkos.

Enjoy!

If you have any suggestions for future editions, or want to take part in this annual project, we would love to hear from you.

Please write to insight@globalarbitrationreview.com.

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London
May 2019

Switzerland

Thomas A Frick and Adrian W Kammerer
Niederer Kraft Frey Ltd

In our previous contributions to the 2015, 2016, 2017 and 2018 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). In the 2018 edition we rendered an updated overview of new developments. This year's chapter shall continue the discussion of our previous contributions. We will emphasise: (i) an internal investigation's key objectives, (ii) the limitations on gathering of information and (iii) the attorney–client privilege.

Continuing highly challenging disruptions: key objectives of internal investigations

The vast majority of the numerous internal investigations conducted within approximately 150 Swiss-domiciled banks as a result of the Department of Justice (DOJ) Swiss Bank Program have been completed, often resulting in payments of the affected banks to the US authorities. However, further international disruptions involving Swiss financial institutions and other industries have occurred, again resulting in internal investigations, some of which are ongoing.

One may consider (mostly global) disruptions such as: 1MDB; Petrobras; the LIBOR scandal; the Swiss Post scandal regarding PostAuto; the US-imposed sanctions on Venezuela's state-owned oil company, PDVSA; the German car emission fraud scandal referred to as 'Dieselgate' (that since September 2015 has expanded from just Volkswagen to almost all major German carmakers); the disruptions related to Uzbek first daughter Gulnara Karimova; various Western primary and secondary sanctions against Russian oligarchs; the Danske Bank and the Swedbank AML scandals (involving illicit assets in incredible amounts of hundreds of billions of dollars); as well as many other regional and international corruption, AML and fraud schemes. All of these were broadly reported in digital and print media, and a number of them also led to investigations in Switzerland.

One of the consequences of such scandals is that, on an ever-increasing basis, not only Swiss and foreign governmental bodies, but also shareholders of Swiss corporates and their executive management, request the conduct of internal investigations in cases of suspicion of AML misconduct, fraud, tax offences or other misconduct within or by Swiss-domiciled entities. It is, therefore, in our view fair to say that public awareness in relation to internal investigations has increased even more in the past year or so, given the various scandals addressed in the media on an almost daily basis. Against this background, it should not only be re-emphasised what the important Swiss law aspects of an internal investigation are, as we have tried to explain in our previous contributions, but it should also be borne in mind what the most important objectives of an internal investigation shall be, how the respective information should be gathered and how complex the question of the applicability of the attorney–client privilege is under Swiss law today. We will focus on these three important topics.

When an internal investigation is about to be launched, it is highly recommendable to address a variety of questions to keep the investigation as efficient as possible. While the concept of an internal investigation is ultimately stemming from the United States and is, as such, not defined in Swiss law, over the past five or more years, a variety of best practice standards, soft law regulation and also some case law has addressed the topic in Switzerland. Before deciding, among other things, who shall be tasked with the investigation and, in the continuance of the investigation, determining the project structure (establishment of a steering committee or project board), the investigated entity is well advised to make clear the primary and key objectives of an internal investigation. These are (unless an internal investigation is imposed on a company by a regulator) usually dependent on whether a misconduct occurred or whether there is a suspicion of a misconduct (such as the determination of an AML scheme or the identification of fraud-related issues), or whether information needs to be gathered for litigation or claims (eg, against an insurance company). As a rule, the following first steps prove to be useful:

- the gathering of information of the background of an occurrence (subject matter, jurisdictions involved, individuals or entities involved);
- an urgent, yet thorough and comprehensive, assessment of the next steps following an occurrence;
- document and evidence preservation measures and data protection instruments;
- assessment of potential IA or other technical tools (which have seen a tremendous development over the past (approximately) three years) in support of the forthcoming investigation;
- a written schedule on the foregoing and further action (mandate and task, reporting lines, information of other stakeholders (board of directors), media and communication concept, work product); and
- determination of measures for the future avoidance of similar occurrences (business continuation) and minimisation of reputational exposure.

Data protection regulation and gathering of evidence

Internal investigations in Switzerland must take into consideration Swiss (business) secrecy and data protection regulations. Since May 2018, the European GDPR regulation has been a further major impact. The relevant data protection provisions are set forth in a variety of laws

and regulations, and sometimes also foreign laws that may apply (such as the GDPR). They must be strictly observed when conducting an internal investigation, which regularly entails very complex legal questions, in particular in cross-border matters, so as not to render the investigation entity and its management subject to considerable risks and perhaps even rendering the findings non-admissible in court.

The gathering of evidence in the frame of an internal investigation is, as a rule, twofold: (i) document preservation, collection and review in the first instance, followed by (ii) the conduct of employee interviews. While, in particular, document preservation, collection and reviews are increasingly and heavily supported, if not almost entirely conducted, by technical means such as AI-supported specialised document analysis and review software, employee interviews should be held by specialised experts that, in Switzerland, as a rule will be external lawyers familiar with the conduct of such interviews (and their respective pitfalls).

Document preservation, collection and review

The documents possibly relevant for fact-finding in the frame of an internal investigation are myriad. For example, the Email Statistics Report 2018–2022 of the Radicati Group Inc states that, despite social media and instant messaging, email 'remains the most pervasive form of communication'. According to the report's executive summary,[1] in 2018, the total of business and consumer emails sent and received per day was expected to exceed 281 billion (and forecast to grow to over 333 billion by 2022). It is therefore likely that in mid-size to major internal investigations, millions of documents are to be retained, collected, clustered and reviewed. While the number documents to be assessed is ever-increasing, the evolution of the capabilities of supportive IT solutions to bear with the load of data over the past years is evenly impressive. It is therefore highly recommended to bring in IT experts familiar with current IT capabilities at an early stage of every complex internal investigation.

Employee interviews

Following the conduct of the document preservation, collection, clustering and review, the information gathered from such undertaking may be used for the conduct of witness interviews, be it to remedy inconsistencies resulting from the review, further investigate crucial findings or confront employees with potential wrongdoing. In our experience, very often such witnesses will be employees and former employees of the entity performing the internal investigation. According to the Report to the Nations 2018 of the Association of Fraud Examiners, ACFE,[2] occupational fraud (ie, fraud committed by company-internal resources, 'is likely the largest and most prevalent threat' among the various kinds of fraud that organisations might be faced with. Consequently, it seems likely that employees will not only be the most important witnesses to approach when conducting interviews, but also likely suspects. This seems to be even more true

1 www.radicati.com/wp/wp-content/uploads/2017/12/Email-Statistics-Report-2018-2022-Executive-Summary.pdf.

2 https://s3-us-west-2.amazonaws.com/acfepublic/2018-report-to-the-nations.pdf.

when taking into consideration that, according to the aforementioned report, tips are 'by far the most common initial detection method' and that employees 'provide over half of the tips'.

When conducting employee interviews, in a nutshell, the following should be considered:

- the general reluctance of employees to attend interviews because of the threat of disciplinary sanctions;
- the employee's duty to participate in interviews and provide truthful and complete information, however limited, to employment-related matters, the employer's duty to safeguard the employee's personal rights, and the *nemo tenetur* concept (however, the latter exception is disputed among scholars);
- in cross-border internal investigations, the observance of article 271 of the Swiss Criminal Code;
- although this is mostly soft law and best practice, the application of common interview standards (introduction, description of background and representation, *nemo tenetur* rule, etc); and
- drafting a report on interview findings as work product and deciding whether the interview should be minuted or not.

Attorney–client privilege

It should be established at the very beginning of an investigation whether the company wishes the investigation results to be subject to Swiss attorney–client privilege. Such protection has been somewhat confined by recent decisions of the Federal Supreme Court of September 2016 and of March 2018; however, if an investigation is set up properly, a company can still benefit from the attorney–client privilege being applicable.

Attorney–client privilege is governed by article 13 of the Swiss Federal Act on Attorneys (an attorney licensed to practise in Switzerland must keep confidential all information entrusted to him or her by a client; breaches lead to professional sanctions), by the contractual obligations of the attorney and by article 321 of the Swiss Criminal Code (breach of professional secrecy renders the attorney subject to a monetary penalty or a custodial sentence of up to three years). Furthermore, according to Swiss procedural laws governing civil, criminal and administrative proceedings, a party to proceedings has the right to refuse to produce attorney–client correspondence, provided the correspondence relates to the attorney's typical professional activity (ie, legal advice and legal representation). Please note that in-house counsels cannot claim professional secrecy rights and the said procedural privileges do not apply to correspondence of the management with its in-house counsel.

Therefore, for the results and findings of an internal investigation to be protected by attorney–client privilege, the investigation should first be headed by 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.

Such protection has been somewhat confined by the 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 an assignment of extensive fact-finding exercises to external counsel that the entity itself or service providers not being attorneys would have been capable of collecting. In short, the court held that the findings were not 'the attorney's typical professional activity, i.e. legal advice and legal representation'. However, the final investigation report (containing not only a legal assessment of the facts but also the facts established by the investigation) will continue to be subject to Swiss legal privilege, and both the Appeals Chamber of the Swiss Federal Criminal Court (in 2017) and the Swiss Federal Supreme Court in further decisions rendered in 2016 and 2017 clarified the criteria to determine when the privilege applies. In particular, the courts stressed that a waiver should not be granted lightly.

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), we would recommend 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 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 lecturer in the LLM programme of Zurich University on banking and financial markets law and at 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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For approximately 20 years, Adrian Kammerer has been advising clients in the prevention of money laundering and financial crime matters. He also advises on fraud detection and prevention, compliance and good corporate governance matters. Furthermore, Adrian is a highly recognised expert in the organisation and conduct of major internal investigations and has significant experience advising institutional clients in contractual and commercial law-related matters. Adrian also advises domestic and international financiers in aviation finance. Adrian represents banks and their management and internal legal departments in investigations and enforcement proceedings brought by the Swiss supervisory authorities FINMA and CDB Supervisory Board and assisted foreign financial services providers in enforcement proceedings imposed on them by FINMA.

Highlights include:

- Support of financial institutions in connection with large-scale internal investigations and assistance in monitorship-driven inquiries.
- Negotiations with FINMA, the Swiss Financial Market Supervisory Authority regarding compliance of non-Swiss financial service providers with the Swiss regulatory regime.
- Drafting of AML and know-your-customer (KYC) policies and procedures.
- Defence of financial institution before the CDB Supervisory Board.
- Swiss law-related advice to international financiers, owners and lessors on aircraft sale and lease back transactions and pertaining registration matters in relation to the Federal Office of Civil Aviation (FOCA).

Adrian Kammerer is a board member of a Zurich-based mid-size group of companies engaged in the IT and electronic supplies industry. Furthermore, he was elected to the board of the Zurich Bar Association (ZBA) in late 2016 and as vice chairman of the board of the ZBA in January 2019.

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