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Internal Investigations Update

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Corporate Internal Investigations under Swiss Law: Information Gathering and Employee Interviews

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I. INTRODUCTION

Corporate decision makers, shareholders, and Swiss and foreign investigative governmental agencies increasingly demand that Swiss corporations conduct internal investigations if there is a strong suspicion of fraud or other illegal activity in Swiss corporations. For example, the Swiss Financial

Market Supervisory Authority ("FINMA") has recently directed that the compliance function at banks includes the duty and responsibility of "reporting serious compliance breaches and matters with far-reaching implications in a timely manner to the executive board and the board of directors, as well as supporting the executive board in its choice of appropriate instructions and measures".[1] Compliance with this duty requires a thorough understanding of the relevant facts, which, particularly in complex cases, may often only be reached by conducting an internal investigation.[2]

The need to conduct internal investigations may also arise from the general duty of the employer and senior management to supervise and control employees and the internal processes within the organization.[3]

Properly executed, internal investigations help to determine (a) if the suspicion of fraud or other illegal activity has merit; (b) who is involved in the wrongdoing and to what degree; (c) what the appropriate internal and external responses should be (including the risks associated to inadequate responses); (d) how to minimize the civil, regulatory and criminal exposure of the corporation, including its decision makers; (e) what preventive measures apply to preclude repetition of the activity in question; and (f) how to minimize reputational risks. In contrast, improperly executed internal investigations increase the corporation's potential exposure and the corresponding risks to the management and board of directors.

This article examines common problems that arise in the gathering of information in Swiss corporate internal investigations. The article focuses particularly on interviews with current or former employees and how information gathering, specifically by way of interviews, should be conducted. In any event, the first stage of the information gathering process of an internal investigation is document collection and review.

II. DOCUMENT COLLECTION AND REVIEW

1. Background

Relevant documents are crucial to virtually any internal investigation and form the basis on which witness interviews can be conducted at a second stage of the information gathering process. With the high-volume use of electronic mail in the corporate world, complex investigations today often encompass the review of millions of documents. This creates significant administrative, logistical and legal challenges for the organization, as well as the investigative team. An information system expert is often brought in to assist in the retention, collection, imaging and organization of the electronic documents.

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1 FINMA Circular 2017/1 "Corporate governance – banks", section 81. This circular sets out the requirements to be met by the corporate governance, risk management, internal control system and internal audit at banks, securities dealers, financial groups (article 3c paragraph 1 Banking Act ("BA")) and financial conglomerates dominated by banking or securities trading (article 3c paragraph 2 BA).

2 *Othmar Strasser*, Zur Rechtsstellung des vom Whistleblower beschuldigten Arbeitnehmers, in: Von Kaenel Adrian (ed.), Whistleblowing – Multidisziplinäre Aspekte, Bern 2012, 55 et seq., at 62. Another example is the duty to report suspicion of money laundering pursuant to article 9 of the Anti-Money Laundering Act ("AMLA").

3 *Thomas Geiser*, Behördliche und interne Untersuchungen: Die arbeits- und datenschutzrechtlichen Rahmenbedingungen, in: Emenegger Susan (ed.): Banken zwischen Strafrecht und Aufsichtsrecht, Basel 2014, 165 et seq., at 168; *Strasser*, *supra* n. 2, at 61 et seq.

Document reviews regularly provide a detailed historical background, while providing independent evidence to the investigative team that it can use to assess the recollections and candor of witnesses. In addition, reviewing documents and electronic information frequently leads to identifying further individuals with knowledge of the allegations who should be interviewed.

2. Business Communication

One of the key principles for the entire information gathering process is the distinction under Swiss labor and data protection law between business-related and private communication. Business communication may be collected, analyzed and reviewed by the employer (and the investigative team) with no information to or consent from the employee.[4] Under the Swiss Code of Obligations ("CO"), the employee must hand over all work produced in the course of his employment to the employer.[5] This reflects the principle that the employer is the actual possessor of the business documents and the employee is only the employer's agent.[6] Business communication includes physical documents (for example, paper documents) and electronic communication (in particular, emails).[7] Business communication may be processed even though it regularly contains personal employee data (article 328b CO (first sentence)). The employer must, however, respect the provisions of the Federal Act on Data Protection ("FADP") (article 328b CO (second sentence)). In particular, the processing of personal data must be carried out in good faith and be proportionate (article 4 FADP). The employer must have the principle of proportionality in mind when defining the scope of the review (i.e., the universe of documents to be reviewed).[8] In practice, however, even large reviews with a scope of millions of documents may be proportionate.

3. Private Communication

Private employee communication generally may not be collected, analyzed or reviewed by the employer (or the investigative team).[9] This also applies, in principle, if the employer implemented internal regulations that prohibit the private use of company resources.[10] The private use of company resources will generally make it difficult to distinguish private from business communication. For example, an employee may receive an email with private content

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4 *Stefan Rieder*, Whistleblowing als interne Risikokommunikation, Diss. Zürich/St. Gallen 2013, at 121.

5 Article 321b paragraph 2 CO.

6 *Ibid.*; *Wolfgang Portmann*, Article 321b, in: H. Honsell/N.P. Vogt/R. Watter (eds.), Basler Kommentar: OR I, Basel 2015, at n. 3.

7 *Claudia M. Fritsche*, Interne Untersuchungen in der Schweiz: Ein Handbuch für regulierte Finanzinstitute und andere Unternehmen, Zürich/St. Gallen 2013, at 162 et seq. Special provisions apply to sealed documents (article 179 SCC) and to telephone conversations (article 179bis SCC); see section IV below.

8 *Ibid*., at 163.

9 Federal Data Protection and Information Commissioner (EDÖB), Leitfaden über Internet- und E-Mailüberwachung am Arbeitsplatz, 2013, at 5 et seq.

10 The implementation of internal regulation about supervision of email traffic is strongly recommended. See *Thomas A. Frick/Adrian W. Kammerer*, Internal Investigations: Swiss Law Aspects, in: The European, Middle Eastern and African Investigations Review, 2015, at 9.

on his or her business email account. The employer may not process this communication if the private nature of the communication is apparent from, for example, the subject line of an email, the name of the sender or recipient of an email, or the title of a jpeg file. If the private nature of the communication is not apparent, the employer may in good faith assume that the communication is business related.[11] However, once the employer notices that the communication is of a private nature, he must refrain from processing the data. If he is in doubt, and if practicable, the employer should try to clarify its status with the employee.[12]

III. WITNESS INTERVIEWS

1. Background

Document collection and review provide the investigative team with documentary evidence and, more importantly, help to identify the yet unknown elements of the issue under investigation, i.e., when the facts remain unclear or when the document review results in contradictory information (so called “black spots”). Witness interviews serve the main purpose of supplementing the information gathered during the document review phase and clarifying any “black spots”. It is easier and more cost-effective to ask the employee to clarify such inconsistencies as an alternative to a time-consuming and expensive document review regarding those unclear or contradictory elements.[13] In addition, employee witnesses frequently identify other employees who in turn must be interviewed in order to establish accurate fact-finding.

Generally, employees often have no interest in participating in interviews. They do not want to become the focus of an internal investigation and do not want to get their colleagues into trouble. Employees generally just want to be left in peace and are not interested in spending additional hours at work answering questions about their past.[14] However, employees generally have a duty to participate in interviews, the refusal of which can result in disciplinary measures by the employer.[15]

2. Duty to Participate in the Interview

Employees must carry out the work assigned to them with due care and must loyally safeguard their employer’s legitimate interests (article 321a paragraph 1 CO). This implies a duty on the employee to account for all activities in the course of his employment and to share with the

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11 Federal Data Protection and Information Commissioner (EDÖB), Leitfaden über Internet- und E-Mailüberwachung am Arbeitsplatz, 2013, at 10.

12 *Fritsche*, *supra* n. 7, at 166.

13 *Sarah Reinhardt/Gerd Kaindl*, Mitarbeiterinterviews im Rahmen von Internal Investigations – ein schmaler Grat zwischen Befragung und Verhör, CB 2017, at 211. This is of course not possible if the document review is needed to establish the facts in order to perform the interviews.

14 *Steffen Bressler/Michael Kuhnke/Stephan Schulz/Roland Stein*, Inhalte und Grenzen von Amnestien bei Internal Investigations, NZG 2009, at 722; also *Reinhardt/Kaindl*, *supra* n. 13, at 210.

15 *Reinhardt/Kaindl*, *supra* n. 13, at 211; *Juerg Bloch*, Executive Share Ownership Guidelines, Kapitalbeteiligungsvorschriften für Verwaltungsrat und Geschäftsleitung börsenkotierter Aktiengesellschaften, Diss. Zürich 2014, at 121 et seq.

employer all work produced in the course of his contractual activities, including correspondence and other corporate documents such as contracts (article 321b CO). The employer decides by means of specific instructions (article 321d paragraph 1 CO) when and where the employee shall participate in witness interviews. The employee must comply in good faith and participate in witness interviews, whether in his capacity as a witness or as a suspect in the investigation (article 321d paragraph 2 CO). Noncompliance with the employer's instructions breaches the employee's obligations under the employment contract and his duty of loyalty towards the employer (article 321e CO). As a consequence, the employer may impose disciplinary measures on the employee, such as an oral or written warning, threat of termination or, ultimately, termination of the employment contract.[16]

Limitations on the employee's duty to participate in interviews may be derived from the employer's duty to safeguard the employee's personal rights.[17] For example, the employee may refuse to participate in interviews which are, for no specific reason, scheduled during after-work hours, weekends or public holidays.[18] The question of whether the employer can compel the employee to travel abroad in order to eliminate the risk of criminal exposure under article 271 Swiss Criminal Code ("SCC") is to be decided based on a balancing of interests in each individual case. Although it might be reasonable to ask a higher ranking employee (who travels frequently for his job) to travel abroad for an interview, the employee has the right to decline such travel to avoid the risk of criminal exposure.[19]

A suspended employee whose salary continues to be paid by the employer has an ongoing duty of loyalty towards the employer until the proper termination of the employment and, therefore, must participate in witness interviews.

By contrast, former employees have no obligation to participate in witness interviews. With certain exceptions (for example, the duties of confidentiality or accountability), the duty of loyalty ends with the termination of the employment.

3. Duty to Provide Complete and Truthful Information

The duty of loyalty (article 321a CO) includes the obligation of the employee to cooperate and to provide truthful and complete information in the interview.[20] The employee's duty to cooperate and provide information may also encompass questions outside of the employee's immediate working area,[21] including questions about events and occurrences in other working areas, the conduct of other employees and such employees' performances and work products.[22]

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16 *Bloch*, *supra* n. 15, at 121.

17 *Fritsche*, *supra* n. 7, at 170.

18 *Ibid*.

19 *Ibid*.

20 *Strasser*, *supra* n. 2, at 71.

21 This refers to any information that is directly related to the employee's area of responsibility.

22 *Rieder*, *supra* n. 4, at 119.

If an employee is interviewed as a suspect, certain limitations to the employee's duty of loyalty may be derived from (a) the privilege against self-incrimination (*nemo tenetur* principle), (b) privacy safeguards to protect the employee's private sphere and (c) the employer's duty of care and protection towards the employee (*arbeitsrechtliche Schutzpflichten*). Swiss labor law does not, however, give the employee the right to refuse to cooperate based on the privilege against self-incrimination.[23] According to the Swiss Supreme Court, this privilege only applies vis-à-vis the government and has no third-party effect among private law subjects.[24] In general, the employee may therefore not refuse to participate or answer specific questions based on the *nemo tenetur* principle.[25] To safeguard the employee's constitutional rights, self-incriminating statements by the employee made during internal investigations are generally not admissible evidence in a (subsequent) criminal governmental investigation.[26]

4. Providing Information and Warning at the Outset of the Interview

Although under Swiss law no explicit statutory obligation exists to inform the employee about his rights (and duties) at the outset of the interview, this obligation can be derived from the general duty of care of the employer (article 328 paragraph 1 CO).[27] In Swiss internal investigations it is *best practice* to inform the interviewee at the outset of the interview at a minimum about the following:

a. After introducing all participants of the interview, the interviewer should explain the **background and purpose** of the interview. Although the interviewer may not want to reveal the details of the investigation, the interviewee needs to be provided with a reason for wanting to talk to him.

b. If **outside counsel** participates in an interview, outside counsel must clarify who they represent – typically the employer and not the interviewee.[28] If outside counsel attends the interview and it therefore is protected by the attorney-client privilege, it should be made clear to the interviewee that the employer may waive such privilege at its own discretion.[29] The interviewer should not promise confidentiality about the content of the interview (including the interview memorandum) to the interviewee but should nevertheless try to maintain confidentiality to the extent possible. The interviewer may

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23 *Flavio Romerio/Claudio Bazzani/Daphne Frei*, Informationen – Vermittlung, Verwertung und Verbreitung bei komplexen Verfahren, in: Interne und regulatorische Untersuchungen II, Zürich 2016, at 24.

24 Swiss Supreme Court, BGE 131 IV 36, at 3.3.1.

25 The authorities on this point are divided. Pro granting the privilege against self-incrimination and, consequently, being entitled to invoke the right to refuse to answer specific questions are, for example: *Rieder*, *supra* n. 4, at 119; *Gunhild Godenzi*, Private Beweisbeschaffung im Strafprozess, Zürich 2008, at 56; *Strasser*, *supra* n. 2, at 72 et seq. Against: *Christian Bettex*, Le cadre légal des enquêtes internes dans les banques et autres grandes entreprises en droit du travail, SJ 2013 II, at 172; *Romerio/Bazzani/Frei*, *supra* n. 23, at 119 f.; *Fritsche*, *supra* n. 7, at 149 et seq.

26 *Fritsche*, *supra* n. 7, at 181; *Romerio/Bazzani/Frei*, *supra* n. 23, at 24.

27 *Fritsche*, *supra* n. 7, at 195. Dissenting: *Strasser*, *supra* n. 2, at 71.

28 *Reinhardt/Kaindl*, *supra* n. 13, at 210.

29 *Fritsche*, *supra* n. 7, at 196.

explain to the interviewee that although the employer has not been requested so far and does not anticipate to be requested to share the content of the interview or the interview memorandum with a third party or a regulator, this cannot be excluded in the future.

c. If the employee is at risk of exposing himself to criminal prosecution, the interviewers should consider informing him about the possibility of retaining legal representation.

d. The interviewer must explain to the interviewee that notes will be taken during the interview and, if applicable, that the interview is recorded on audio or video tape (regarding the collection and review of audio and video material, see section IV below).

e. The interviewee will frequently be asked to keep the content of the interview (and, if applicable, the fact that the interview took place) **confidential** and, in particular, not to share any information or discuss the topic with his coworkers.

In U.S.-driven internal investigations, the interviewee must be apprised with a "corporate Miranda warning" aka "Upjohn warning" prior to initiating the interview.[30] This warning by an attorney (in-house or outside counsel) at a minimum provides the employee with notice that the attorney represents only the engaging entity and not the employee individually. The *Upjohn* warning makes it clear that attorney-client privilege over communications between the attorney and the employee belongs only to, and is controlled by, the company and that the company may choose to waive that privilege and disclose what the employee informs the attorney to a third party or a government agency.[31]

5. Best Practices for the Information Gathering Phase of the Interview

a. Establishing Rapport

After completing the information and warning phase, the interviewer may begin a dialogue with the interviewee.

The information gathering phase should begin with introductory questions that are aimed at establishing *rapport* between interviewer and interviewee.[32] Developing a relationship with the

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30 The term originated with Upjohn Company v. United States, 449 U.S. 383 (1981), in which the U.S. Supreme Court held that the attorney-client privilege is preserved between the company and its attorney when its attorney communicates with the company's employees, despite the rule that communications with third parties constitute a waiver of the attorney-client privilege. *William Michael, Jr*., 27-63 Rocky Mt. Min. L. Fdn. 2017, § 27.03, at 4i.

31 This is crucial so that the interviewee cannot later claim that he holds the privilege and therefore can block the company's disclosure of the communications which occurred during the course of the interview. See *Dan K. Webb/Robert W. Tarun/Steven F. Molo*, Corporate Internal Investigations (LJP), 2017, at § 6.08.

32 *Ames Davis/Jennifer L. Weaver*, A litigator's approach to interviewing witnesses in internal investigations, 17 Health Lawyer 8, March 2005, at 9. The concept of rapport is traditionally referenced in clinical settings, where therapists cite the importance of creating a "therapeutic alliance". See *Robinder P. Bedi/Michael D. Davis/Merris Williams*, Critical incidents in the formation of the therapeutic alliance from the client's perspective, Psychotherapy: Theory, Research, Practice, Training, 42, at 311 et seq.; *Jonathan P. Vallano/Nadja Schreiber Compo*, A Comfortable Witness Is a Good Witness: Rapport-Building and Susceptibility to Misinformation in an Investigative Mock-Crime Interview, Applied Cognitive Psychology, 2011, at 960 et seq.

interviewee is a tactic to ease anxiety, improve a witness's cooperation and increase the likelihood of open and truthful responses. Building rapport includes asking simple and non-threatening questions in a conversational tone.[33]

An additional goal of rapport-focused questioning is establishing a "baseline" for the behavioral characteristics an interviewee may exhibit when answering questions. For example, introductory questions regarding job description or typical duties will likely elicit truthful responses and allow the interviewer to assess the witness's demeanor or responses. These responses can later be compared to more sensitive investigative questions to assist the interviewer gauge a witness's candor.[34]

b. Questioning

The interviewer should have a strategy ready and an outline covering the most important information at hand that reflects his strategy.

In general, it is almost always preferable for the purpose of gathering unbiased factual information to ask non-confrontational and non-threatening questions that allow the employee to elaborate and tell his story. It is critical to let the interviewee answer the questions and to carefully listen and gain information from the answers.

The interviewer should be prepared to respond to an employee who does not fully cooperate and refuses to answer interview questions. As described above, the employer may compel an employee to participate in an investigation and may discipline (for example, by warning or termination) an employee if he does not cooperate properly.[35] The interviewer should, however, make himself familiar with all possible considerations before threatening such consequences to the employee. The employee might be willing to accept disciplinary employment law consequences rather than expose himself to criminal or regulatory prosecution.[36] If an employee refuses to speak even after discussing potential disciplinary employment law measures, the interviewer should accept that and document the situation accordingly. The interviewer should not threaten, coerce or intimidate the interviewee during questioning.[37]

c. Leave the Door Open at Conclusion

When concluding the interview the interviewer should "leave the door open" for later contact with the interviewee. The interviewee should be provided with the interviewer's contact information and should be asked how he can be contacted for potential follow-up questions and

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33 *Christopher Haney/Andrea Roller*, Investigative Interview Techniques, 2012, at 4.

34 *Ibid.*

35 Disciplinary measures also apply if the employee knowingly provides wrong or incomplete information. *Ullin Streiff/Adrian von Kaenel/Roger Rudolph*, Arbeitsvertrag, Praxiskommentar zu Art. 319-362 OR, Article 321a OR n. 4 and 7.

36 *Reinhardt/Kaindl*, *supra* n. 13, at 213.

37 *Webb/Tarun/Molo*, *supra* n. 31, at § 9.06; *Fritsche*, *supra* n. 7, at 145.

clarifications. The rapport established between the interviewer and interviewee may ultimately lead the interviewee to provide further information in the weeks after the interview.

d. Employee Representation at Interview

In general, employee witnesses have no right to counsel at an interview. Under certain circumstances however, legal representation can be encouraged in order to facilitate the conduct of the interview and for the employee to feel more protected and thus more likely to cooperate. To allow an attorney to attend the interview can also have the opposite effect as it may prove disruptive to the interview flow and may create a more adversarial atmosphere than is desirable. If the employee is at risk of criminal prosecution the employee should be allowed to have his attorney attend the interview.[38] If the employee retains independent counsel, he or she will have to pay for counsel, in particular if the employee did not properly execute the employment contract, breached his or her contractual duties, or committed an unlawful act such as a criminal offense.[39] In practice, companies regularly pay these fees as a result of D&O insurance coverage.

e. Interview Memorandum

Each interview should be conducted by (at least) two individuals to ensure an accurate record of what is discussed.[40] Typically, one individual should be designated as the main interviewer while the other will be mainly in charge of taking notes.

Detailed notes should be taken in order to accurately reflect what was said during the interview. The notes should be used to produce a well-written, concise work product in a timely fashion to ensure that the information learned in the interview is fully and accurately reflected in the interview memorandum. An internal investigation memorandum provides a written record of a witness interview in the form of a summary, protocol or verbatim minutes. Whatever the work product is, the interview memorandum should accurately reflect the interviewee's statements and not selectively omit any relevant information, such as facts that might be unfavorable to the interviewee or client. The work product should at a minimum include the names of all persons who attended the interview, and the dates, time and place of the interview. On occasion, witnesses will be requested to review and sign their memorandum to confirm its accuracy.[41]

If the work product is a summary of the interview, as in U.S.-driven investigations, the memorandum should not be a verbatim recitation of the interview and should not constitute a chronological description of the questions asked and answers provided.[42] Rather, the summary

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38 Dissenting: *Rieder*, *supra* n. 4, at 120, arguing that as part of the employer's duty to protect the employee's personal rights (article 328 CO), the employee may have an interest in having his attorney be present even if the employee is not accused of criminal behavior. See also *Strasser*, *supra* n. 2, at 76.

39 *Wolfgang Portmann/Roger Rudolph*, Article 327a, in: H. Honsell/N.P. Vogt/R. Watter (eds.), Basler Kommentar: OR I, Basel 2015, at n. 5; *Thomas Geiser*, Rechte und Pflichten von Banken und Bankmitgliedern in Verfahren vor Behörden und Gerichten (Datenherausgabe, Unterstützungspflichen, Schadenersatz), ZBJV 04/2016, at 254 et seq.

40 *Reinhardt/Kaindl*, *supra* n. 13, at 213.

41 *Ibid*.

42 Practical Law Litigation, Internal Investigations: Witness Interview Memorandum, 2018, at 7.

should group the information by topic, regardless of the order of questions, and use headings and subheadings liberally.[43] In U.S.-related investigations, the primary note taker should indicate within the notes and also within the final memorandum of the interview that the witness was apprised of the *Upjohn* warning. In general, if the work product is a summary of the interview, the summary should include an introductory section outlining at a minimum the purpose and context of the interview and making clear that the memorandum contains only a summary of the interview statements.

IV. Telephone Conversations / Video Surveillance

In some cases the employer might be in possession of audio or video recordings (for example, client phone orders or security videos). The question of interest here is whether such recorded phone conversations and videos can be legally reviewed and used for the internal investigation. The collection and review of audio and video material is restricted by the personal rights of the employee[44] as well as Swiss criminal,[45] labor,[46] and data protection law,[47] and must therefore carefully be evaluated in an internal investigation.[48] This section focuses on constraints set by Swiss criminal law:

1. Collection of Audio and Video Material

First, it must be determined whether the audio or video material that is collected has been legally recorded.

Under article 179bis paragraph 1 SCC, the recording of private conversations is only legal if all participants have given their permission. Similarly, video recordings of "information from the secret domain of another person or information which is not automatically accessible from the private domain of another" require consent of that person to be admissible under Swiss criminal law (article 179^{quater} paragraph 1 SCC).

Under article 179^{quinquies} SCC, certain types of private phone conversations may, however, be recorded without prior permission of the participants. The so called "safe harbor" provision (subsection b)[49] has been introduced to simplify certain business transaction processes,

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43 *Ibid*.

44 See in particular articles 28 et seq. Swiss Civil Code.

45 In particular articles 179bis, 179ter, 179^{quater} and 179^{quinquies} SCC.

46 See in particular articles 328 and 328b CO as well as article 26 Federal Employment Act, Ordinance 3 ("ArGV3").

47 See in particular article 4 FADP.

48 See further references in *Thomas Geiser*, Interne Untersuchungen des Arbeitgebers: Konsequenzen und Schranken, AJP 2011, at 1047 et seq.; *Streiff/Von Kaenel/Rudolph*, *supra* n. 35, at article 328b CO n. 8; *Stefan Maeder*, Verwertbarkeit privater Dashcam-Aufzeichnungen im Strafprozess, AJP 2018 155 et seq., at 162 et seq.

49 This provision provides that recording calls "in the course of business that have orders, assignments, reservations and similar transactions as their subject matter" does not fall under article 179bis paragraph 1 SCC.

especially in business sectors with a high frequency of transactions, for example, in the banking sector.[50]

Specifically, phone conversations regarding the purchase or sale of standardized financial products and, to a certain extent, regarding asset transfers are covered by the "safe harbor" provision. Moreover, in the private banking sector, confirmations of orders by phone can be recorded without prior authorization by the client.[51]

This is in line with the duty to record "external and internal phone calls of all employees working in the security trading, including those made by mobile phones" under FINMA Circular 2013/8 on Market Conduct Rules. The recordings must be kept for at least two years and made available to FINMA without alterations as required.[52]

2. Review of Audio and Video Material

Under article 179bis paragraph 2 SCC, "making use of information" (for example, audio recordings) that a person knows or must assume has come to his knowledge as the result of an offense under article 179bis paragraph 1 SCC results in criminal liability (see similar wording in article 179^{quater} paragraph 2 SCC). The term "making use of information" is interpreted broadly and includes cases where a person uses such information for his/her benefit (for example, using the information for a criminal proceeding).[53] Reviewing and using audio recordings in an internal investigation could be interpreted as "making use of information" in the sense of paragraph 2 of the above-mentioned provisions.

As long as the audio or video material has been legally recorded under articles 179bis paragraph 1 and 179^{quater} paragraph 1 SCC, "making use" of such information does not fulfill the elements of the offense and may, in general, be legally reviewed under Swiss criminal law in an internal investigation.[54] By contrast, each individual case must be evaluated to determine whether conversations which have been recorded unlawfully may be reviewed with the prior consent of the relevant person.[55]

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50 *Stefan Trechsler/Viktor Lieber*, Article 179^{quinquies}, in: St. Trechsler/M. Pieth (eds.), Schweizerisches Strafgesetzbuch, Praxiskommentar, 3. Auflage, Zürich/St. Gallen 2018, at n. 5 et seq.; *Peter von Ins/Peter-René Wyder*, Article 179^{quinquies}, in: M.A. Niggli/H. Wiprächtiger (eds.), Basler Kommentar: Strafrecht II, Basel 2013, at n. 16 et seq.; *Andrea Grimm/Michael Vlcek*, Liberalisierung für das Aufnehmen von Telefongesprächen im Geschäfts- und Bankenverkehr Revision Art. 179^{quinquies} StGB, AJP 2004 p. 534 et seq., at 539.

51 *Grimm/Vlcek*, *supra* n. 50, at 540.

52 FINMA Circular 2013/8 Market conduct rules: Supervisory rules on market conduct in securities trading, section 60.

53 *Günter Stratenwerth/Wolfgang Wohlers*, Schweizerisches Strafgesetzbuch Handkommentar, Bern 2013, at article 179bis n. 4 and article 179^{quater} n. 3; *Peter von Ins/Peter-René Wyder*, Article 179bis, in: M.A. Niggli/H. Wiprächtiger (eds.), Basler Kommentar: Strafrecht II, Basel 2013, at n. 31.

54 Even if audio recordings have been legally collected under the "safe harbor" provision, note that there is legal literature holding that they can only be legally reviewed for the very reasons they were collected, see *Trechsler/Lieber*, *supra* n. 50, at n. 9; *Von Ins/Wyder*, *supra* n. 50, Article 179^{quinquies} at n. 31 et seq.

55 *Von Ins/Wyder*, *supra* n. 50, Article 179bis, at n. 34.

V. Searching the Workplace

The internal investigation may under certain circumstances also include searching the employee's workplace. The workplace generally consists of the employer's property and sphere of influence.[56] Based on the employee's duty of care and disclosure obligation, the employer has an inspection right concerning business-related data (that is, concerning the employee's suitability for his job or the performance of the employment contract) provided the inspection is conducted in accordance with the principles of good faith and proportionality (articles 321b and 328b CO; article 4 paragraph 2 FADP).[57] However, even if the employee has to tolerate the inspection of the workplace based on aforementioned principles, private documents cannot be included in the review based on restrictions set by the personal rights of the employee, data protection and criminal law. Specifically, the search of locked cupboards or drawers without the consent of the employee or an overriding interest of the employer may interfere with the employee's personal rights.[58] In order to facilitate the distinction between private and business-related documents it may be advisable to conduct a search of the workplace in the presence of the relevant employee.

VI. Private Investigators

Swiss law does not generally prohibit the use of private investigators (that is, there is no state monopoly on gathering evidence).[59] However, undercover data collection by private investigators has to be carefully evaluated from a data protection and personal rights perspective, as well as a criminal law perspective.[60] From a civil law perspective, if investigations by private investigators interfere with the personal rights of the investigated employee, such investigations have to be justified by the consent of the person whose rights are infringed, by an overriding private or public interest, or by law (article 28 paragraph 2 Swiss Civil Code). The Swiss Supreme Court has previously considered the legality of an investigation by private investigators in the insurance sector and found that an overriding private interest may be justified in the interest of preventing insurance fraud.[61] It is, however, questionable whether

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56 *Fritsche*, *supra* n. 7, at 148.

57 *Fritsche*, *supra* n. 7, at 145 and 148; see also *Wolfgang Portmann/Roger Rudolph*, Article 321c CO, in: H. Honsell/N. P. Vogt/W. Wiegand (eds.), Basler Kommentar: Obligationenrecht I, Basel 2015, at n. 3 et seq.; regarding personal smartphones see also *Nicolas Birkhäuser/Marcel Hadorn*, BYOD – Bring Your Own Device, SJZ 109/2013, at 203 et seq.

58 *Fritsche*, *supra* n. 7, at 145; article 28 paragraph 2 Swiss Civil Code.

59 *Maeder*, *supra* n. 48, at 156-157.

60 *Ibid.*; *Fritsche*, *supra* n. 7, at 155; see in particular article 4 paragraph 4 FADP; article 28 Swiss Civil Code; articles 179bis et seq. SCC.

61 Swiss Supreme Court, BGE 136 III 410 at 2-6 (in particular 4.4 and 4.5) and decision of the Swiss Supreme Court of 3 November 2017, C-8034/2015 at 4.2.5 et seq.; see also BGE 137 I 327 at 5.3 regarding an overriding public interest and BGE 137 I 327 at 5.2 regarding the requirement of a sufficient legal basis for an observation by private investigators which has been overruled by the Supreme Court in its decision BGE 143 I 377 at 4 (the Supreme Court held that the observation by a private detective violated article 8 European Convention on Human Rights ("EMRK") and article 13 Federal Constitution ("BV"); see also decision of the Swiss Supreme Court of 26 July 2017, 8C_45/2017 at 4.3.1); further references in *Catherine Marianne Waldenmeyer*, Observation durch Haftpflichtversicherer: rechtmässig oder nicht?, HAVE 2017 – Haftung und Versicherung, 284-293.

such an overriding interest would apply to private corporate investigations. From a strategic point of view, the use of private investigators may collide with the principles of cooperation and transparency and may, in turn, prevent future cooperation by other employees. In addition, the question may be raised of whether cases where the necessity for undercover investigations arises go beyond the responsibilities of the employer and should be handed over to state authorities.

VII. Conclusion

The information gathering and review phase is fundamental to every corporate internal investigation. It forms the factual basis for the final report and legal considerations at a later stage of the investigation and provides evidence which might become relevant in a later civil, regulatory or criminal proceeding.

It is therefore crucial that the data collection and interview phase is conducted in a structured way in order to create a robust foundation for the internal investigation and the final report. As this article shows, it is important to perform a document review prior to the interview phase in order to establish the relevant facts and determine black spots (that is, factual areas that are unclear which should be targeted in the interviews). During the document review, the investigators must keep in mind that the employer generally has a right to look into the business-related documents of the employee, but must exercise caution with regard to documents or other data concerning the private sphere of the employee, as they are protected under Swiss law. In the interview phase, employees generally have the duty to cooperate and answer questions to the best of their knowledge. For the investigators, it is crucial to keep the questions open and unpretentious in order to maximize the cooperation of the employee and the fact-gathering process. The principles of cooperation and transparency should be the guiding principles for the fact gathering and interview phase of the internal investigation.

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