

Workplace Investigations

Contributing Editors

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01. What legislation, guidance and/or policies govern a workplace investigation?

Finland

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Mainly, the Occupational Safety and Health Act (738/2002). In addition, the following also have relevance in connection to a workplace investigation: the Employment Contracts Act (55/2001), the Criminal Code (39/1889), the Act on Occupational Safety and Health Enforcement and Cooperation on Occupational Safety and Health at Workplaces (44/2006), the Act on Equality between Women and Men (609/1986) and the Non-discrimination Act (1325/2014). In addition, the employer's own policies must be taken into consideration while conducting a workplace investigation.

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Greece

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In Greece, workplace investigations are not heavily regulated.

However, internal disciplinary procedures are governed by certain general principles, while there is also legislation regulating certain aspects of investigations opened in the context of whistleblowing procedures or concerning complaints for workplace violence or harassment. These include Law 4990/2022, which transposed EU Directive 2019/1937 into Greek Law; and Law 4808/2021, which ratified the ILO's Violence and Harassment Convention, 2019 (No190) and introduced relevant provisions.

As far as disciplinary procedures in private-sector companies are concerned, employers that must have internal labour regulations in place (ie, those with more than 70 employees) or opt to adopt them voluntarily, can regulate the procedures themselves.

In the public sector, internal investigations are governed by disciplinary provisions included in the civil servant code.

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Poland

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There is no legislation on this area in Poland. However, employers implement internal policies that provide for workplace investigation rules to fulfil certain legal obligations, including those arising directly from labour law.

Based on the currently binding provisions of labour law, an employer must counteract unwanted behaviour in the workplace (eg, bullying, discrimination and unequal treatment). To fulfil this obligation, employers implement internal policies that provide a framework for reporting misconduct and conducting internal investigations. They may freely design the rules of such investigations, within the constraints of their policy. Therefore, it is recommended they create the policy based on the following:

- it should be possible to effectively report the misconduct;
- there should be more than one way to report misconduct;
- anonymous reporting should be allowed;
- an investigation committee should be appointed and be objective;
- rules on excluding persons with a conflict of interest from conducting the investigation should be provided; and
- the report from the investigation should be prepared and signed by all persons participating in the process.

However, work on a bill on whistleblower protections is in progress (the Draft Law). The Draft Law will not determine the rules of workplace investigations but it will force employers to implement a whistleblowing procedure and follow-up on recommendations in the case of a report, including initiating an internal investigation where appropriate. Whether an internal investigation is initiated depends on the assessment of a reported irregularity by the employer.

In addition, employers (especially those that are part of an international group) often already implement internal policies on whistleblowing management and internal investigations. Employers often base their policies on guidelines issued by relevant (usually international) organisations.

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Switzerland

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There is no specific legal regulation for internal investigations in Switzerland. The legal framework is derived from general rules such as the employer's duty of care, the employee's duty of loyalty and the employee's data protection rights. Depending on the context of the investigation, additional legal provisions may apply; for instance, additional provisions of the Swiss Federal Act on Data Protection or the Swiss Criminal Code.

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02. How is a workplace investigation usually commenced?

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When the employer becomes aware of possible misconduct, the employer must commence an investigation immediately, in practice within about two weeks. The information may come to the employer's knowledge via, for example, the employer's own observations, from the complainant or their colleagues or an employee representative.

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Internal investigations can be initiated either upon a complaint or report by an employee, (or other persons providing services or seeking employment, etc) in the workplace or by the employer as part of their managerial right.

If from an employee, the complaint or report may fall within the scope of an internal disciplinary procedure, if any, or may concern an alleged workplace violence or harassment incident, or fall within the scope of L.4990/2022 on the protection of persons who report breaches of Union law.

Reports by whistleblowers are submitted to the manager with responsibility for receiving and monitoring reports, a person appointed for that purpose under L.4990/2022. Complaints for incidents and harassment in the workplace can also be submitted, according to L.4808/2022, to the person or internal body specifically assigned to receive such complaints. Both laws require the employer to define the persons competent for receiving and monitoring complaints or reports and notifying the employees *stricto sensu* and any other persons falling within the scope of the respective provisions.

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There are no legal requirements in this respect – it depends on the internal policies or practices at a given working establishment. Based on our experience – an internal investigation usually commences with a preliminary assessment of a reported irregularity. If the preliminary assessment leads to a conclusion that a reported situation may be an irregularity, an investigation is launched by appointing a commission or team that conducts the investigation or selecting an investigator. Then, a plan of investigation is established. Depending on the circumstances, the investigation plan may involve a collection of documents or files, their analysis, and interviews with a victim, witnesses or a subject (although the procedure depends on the type of case, internal rules and practice). At the end of the process, the report is prepared by the commission or team with facts established during the process, recommendations, and other suggestions as to the investigated issue.

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Internal investigations are usually initiated after reports about possible violations of the employer's code of conduct, applicable laws or regulations have been submitted by employees to their superiors, the human resources department or designated internal reporting systems such as hotlines (including whistleblowing hotlines).

For an internal investigation to be initiated, there must be a reasonable suspicion (grounds).^[1] If no such grounds exist, the employer must ask the informant for further or more specific information. If no grounds for reasonable suspicion exist, the case must be closed. If grounds for reasonable suspicion exist, the appropriate investigative steps can be initiated by a formal investigation request from the company management.^[2]

[1] Claudia Fritsche, *Interne Untersuchungen in der Schweiz: Ein Handbuch für regulierte Finanzinstitute und andere Unternehmen*, Zürich/St. Gallen 2013, p. 21.

[2] Klaus Moosmayer, *Compliance, Praxisleitfaden für Unternehmen*, 2. A. München 2015, N 314.

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03. Can an employee be suspended during a workplace investigation? Are there any conditions on suspension (eg, pay, duration)?

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There is no legislation on temporary suspension in the event of a workplace investigation or similar. In some situations, the employer may relieve the employee from their working obligation with pay for a short period.

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Internal labour regulations may allow for the suspension of an employee when there is reasonable suspicion that a disciplinary offence has been committed. Given that under Greek law employees have the right to receive wages and to be employed, suspension without a specific provision in the internal labour regulation may only be imposed in an extreme case where the offence and the risk of keeping the employee employed during an investigation is obvious.

Payment of remuneration during suspension should not be withheld, otherwise, the suspension could be considered a disciplinary penalty not provided in law and imposed without completion of the disciplinary procedure, thus illegally harming the employee.

In any case, suspension is one of the ultimate measures that may be taken, in contrast to, for example, a change of work position.

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Polish law does not provide for the suspension of an employee. Instead, an employer may agree with an employee that he or she will be released from the obligation to perform work during a relevant period of investigation (with the right to remuneration). The employer may not do this unilaterally, unless the employee is in a notice period. As an alternative, which is more common in practice, the employer may force the employee to use outstanding holiday leave (subject to limitations provided by law) or the parties may mutually agree on the use of holiday leave or unpaid leave (if the employee has already used his or her holiday entitlement in full).

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It is possible to suspend an employee during a workplace investigation.^[1] While there are no limits on duration, the employee will remain entitled to full pay during this time.

[1] David Rosenthal et al., *Praxishandbuch für interne Untersuchungen und eDiscovery*, Release 1.01, Zürich/Bern 2021, p. 181.

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04. Who should conduct a workplace investigation, are there minimum qualifications or criteria that need to be met?

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The employer must conduct the investigation, but the actual work can be done either by the employer's personnel or by an external investigator, for example, a law firm. Either way, there are no formal criteria for the persons executing the investigation; however, impartiality is required from the person conducting the investigation

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As far as the persons in charge of an internal investigation are concerned, L. 4990/2022 on the protection of persons who report breaches of Union law provides for certain conditions that should be met when exercising their duties (ie, being impartial and abstaining when there is a conflict of interest), which also apply as general principles in all disciplinary procedures. Whistleblowing legislation stipulates that persons appointed to receive and investigate a whistleblowing procedure should meet certain conditions, including no penal proceedings against them, no disciplinary proceedings or convictions for specific offences, and no workplace suspensions.

Official disciplinary procedures are conducted by the competent bodies as described in the respective internal labour regulations.

Although not specifically regulated, support from external advisors (eg, lawyers) is allowed.

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There are no legal requirements in this regard but it is good practice if the team of investigators or individuals who deal with the case consists of:

- a person who has specific knowledge in a given field (concerning the violation);
- a member of the HR team; and
- a lawyer (it is recommended to engage an independent, external lawyer who can maintain the objectivity of the investigation, especially in complex matters or where a conflict of interest arises or may arise).

It is crucial that the investigators are independent (and they must be allowed to act independently).

Also, certain personal features are useful (eg, the ability to objectively assess a situation, empathy, and managing skills).

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The examinations can be carried out internally by designated internal employees, by external specialists, or by a combination thereof. The addition of external advisors is particularly recommended if the allegations are against an employee of a high hierarchical level^[1], if the allegations concerned are quite substantive and, in any case, where an increased degree of independence is sought.

^[1] David Rosenthal et al., *Praxishandbuch für interne Untersuchungen und eDiscovery*, Release 1.01, Zürich/Bern 2021, p. 18.

05. Can the employee under investigation bring legal action to stop the investigation?

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The employee does not have a legal right to stop the investigation. The employer must fulfil its obligation to investigate the alleged misconduct.

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Although there is no specific legal provision, access to legal action and judicial proceedings cannot be obstructed under any circumstances as this is a fundamental right under the Greek constitution. Thus, if an employee manages to bring legal action to stop the investigation (eg, a prolonged investigation for a frivolous complaint harms them), then the investigation may have to be temporarily paused or permanently terminated depending on the court decision.

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This is unlikely. Theoretically, an employee can file a claim against an employer concerning the infringement of personal rights in the course of an investigation and a motion to secure his or her claims, which would consist of an employer being forced to suspend the proceedings, but in practice we have not encountered such a situation.

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The accused could theoretically request a court to stop the investigation, for instance, by arguing that there is no reason for the investigation and that the investigation infringes the employee's personality rights. However, if the employer can prove that there were grounds for reasonable suspicion and is conducting the investigation properly, it is unlikely that such a request would be successful.

06. Can co-workers be compelled to act as witnesses? What legal protections do employees have when acting as witnesses in an investigation?

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There is no legislation on a witness's role in investigations. However, the legislation on occupational safety requires that employees must report any irregularities they observe. Depending on the situation, participating in the investigation may also be part of the person's work duties, role or position, in which case the employer may require the employee to contribute to clarifying the situation. However, there is no formal obligation to act as a witness, and there is no legislation regarding the protection of witnesses. If a witness wishes, they may have, for example, an employee representative as a support person during the hearing.

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Indirectly involved employees may be interviewed as witnesses in the context of the investigation, as the employee has a duty of loyalty towards the employer originating from the employment relationship. However, they cannot be forced to do so (in contrast with criminal procedures). Any harmful act that could be considered retaliation against witnesses in the context of violence or harassment or whistleblowing investigation is prohibited. In addition, the identity of any employees as witnesses is also covered by the principle of confidentiality.

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In general, an employee may not be forced to act as a witness, but based on the provisions of the Polish Labour Code, an employee must act for the benefit of a working establishment or employer and perform work in line with the instructions of an employer. A lack of cooperation from an employee (eg, refusing to attend a hearing, hiding facts or even false testimony) may constitute a basis for the loss of an employer's trust in the employee and, as a consequence, may constitute a valid reason for termination (in some specific situations, even without notice).

There is no formal protection for employees who act as witnesses. However, participation in an investigation cannot result in negative consequences (eg, no retaliation is allowed). Also, during an investigation, employees who are bound by professional secrecy are not required to provide information

that would imply a breach of such secrecy.

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Due to the employee's duty of loyalty towards the employer and the employer's right to give instructions to its employees, employees generally must take part in an ongoing investigation and comply with any summons for questioning if the employer demands this (article 321d, Swiss Code of Obligations). If the employees refuse to participate, they generally are in breach of their statutory duties, which may lead to measures such as a termination of employment.

The question of whether employees may refuse to testify if they would have to incriminate themselves is disputed in legal doctrine.^[1] However, according to legal doctrine, a right to refuse to testify exists if criminal conduct regarding the questioned employee or a relative (article 168 et seq, Swiss Criminal Procedure Code) is involved, and it cannot be ruled out that the investigation documentation may later end up with the prosecuting authorities (ie, where employees have a right to refuse to testify in criminal proceedings, they cannot be forced to incriminate themselves by answering questions in an internal investigation).^[2]

[1] Nicolas Facincani/Reto Sutter, *Interne Untersuchungen: Rechte und Pflichten von Arbeitgebern und Angestellten*, published on hrtoday.ch, last visited on 17 June 2022.

[2] Same opinion: Nicolas Facincani/Reto Sutter, *Interne Untersuchungen: Rechte und Pflichten von Arbeitgebern und Angestellten*, published on hrtoday.ch, last visited on 17 June 2022.

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07. What data protection or other regulations apply when gathering physical evidence?

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Generally, the basic principles set out by the GDPR and the Finnish Data Protection Act apply to data processing in connection with investigations, including evidence gathering: there must be a legal basis for processing, personal data may only be processed and stored when and for as long as necessary considering the purposes of processing, etc.

Additionally, if physical evidence concerns the electronic communications (such as emails and online chats) of an employee, gathering evidence is subject to certain restrictions based on Finnish ePrivacy and employee privacy laws. As a general rule, an employee's electronic communications accounts, including those provided by the employer for work purposes, may not be accessed and electronic communications may not be searched or reviewed by the employer. In practice, the employer may access such electronic correspondence only in limited situations stipulated in the Act on Protection of Privacy in Working Life (759/2004), or by obtaining case-specific consent from the employee, which is typically not possible in

internal investigations, particularly concerning the employee suspected of wrongdoing.

However, monitoring data flow strictly between the employee and the employer's information systems (eg, the employee saving data to USB sticks, using printers) is allowed under Finnish legislation, provided that employee emails, chats, etc, are not accessed and monitored. If documentation is unrelated to electronic communications, it also may be reviewed by the employer. Laptops, paper archives and other similar company documentation considered "physical evidence" may be investigated while gathering evidence on the condition that any private documentation, communications, pictures or other content of an employee are not accessed.

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GDPR and the provisions of L. 4624/2019 regulate the gathering of physical evidence from a data protection perspective, providing, among other things, that personal data should be processed with transparency and to the extent necessary for the investigation.

L.4990/2022 on the protection of persons who report breaches of Union law regulates data protection issues in the context of whistleblowing investigations, mainly to safeguard confidentiality throughout the investigations.

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If personal data is involved – the rules and principles of the GDPR will apply. If the physical evidence includes e-mail correspondence, files, or an employee's equipment and possessions, the Labour Code will apply (ie, as a general rule, to monitor it, a monitoring policy must be implemented at that working establishment). Such a policy must strictly determine the aim of the surveillance and an employer must only apply surveillance in situations that reflect this aim. Also, when it comes to monitoring correspondence, it must not infringe on the secrecy of the correspondence, which in practice means that the employer should not check employees' private correspondence when checking their business mailboxes.

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The Swiss Federal Act on Data Protection applies to the gathering of evidence, in particular such collection must be lawful, transparent, reasonable and in good faith, and data security must be preserved.^[1]

It can be derived from the duty to [disclose and hand over benefits received and work produced](#) (article 321b, Swiss Code of Obligations) as they belong to the employer.^[2] The employer is, therefore, generally entitled to collect and process data connected with the end product of any work completely by an

employee and associated with their business. However, it is prohibited by the Swiss Criminal Code to open a sealed document or consignment to gain knowledge of its contents without being authorised to do so (article 179 et seq, Swiss Criminal Code). Anyone who disseminates or makes use of information of which he or she has obtained knowledge by opening a sealed document or mailing not intended for him or her may become criminally liable (article 179 paragraph 1, Swiss Criminal Code).

It is advisable to state in internal regulations that the workplace might be searched as part of an internal investigation and in compliance with all applicable data protection rules if this is necessary as part of the investigation.

[1] Simona Wantz/Sara Licci, Arbeitsvertragliche Rechte und Pflichten bei internen Untersuchungen, in: Jusletter 18 February 2019, N 52.

[2] Claudia Fritsche, Interne Untersuchungen in der Schweiz, Ein Handbuch für Unternehmen mit besonderem Fokus auf Finanzinstitute, p. 148.

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08. Can the employer search employees' possessions or files as part of an investigation?

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Only the police can search employees' possessions (assuming that the prerequisites outlined in the legislation are met).

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As a first step, the employer should ask for the employee's permission to access their possessions and files. Employment contracts and internal labour regulations may include provisions regarding an employer's access to employees' documents created and kept for business purposes or related to business activity.

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It depends on whether the employer implemented rules of personal control at the workplace. If yes, such rules are applicable. If not, in our opinion if there is suspicion of a serious violation, it is possible to carry out an ad hoc inspection but its scope should be limited only to necessary activities and should not concern

an employee's private files or correspondence, so as not to infringe on personal rights. If there is an ad hoc inspection, an employee should be informed in advance, and it should take place in the presence of the employee or employee's representative, observing the rules of fairness and equity.

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The basic rule is that the employer may not search private data during internal investigations.

If there is a strong suspicion of criminal conduct on the part of the employee and a sufficiently strong justification exists, a search of private data may be justified.^[1] The factual connection with the employment relationship is given, for example, in the case of a criminal act committed during working hours or using workplace infrastructure.^[2]

^[1] Claudia Fritsche, *Interne Untersuchungen in der Schweiz: Ein Handbuch für regulierte Finanzinstitute und andere Unternehmen*, Zürich/St. Gallen 2013, p. 168.

^[2] Claudia Fritsche, *Interne Untersuchungen in der Schweiz: Ein Handbuch für regulierte Finanzinstitute und andere Unternehmen*, Zürich/St. Gallen 2013, p. 168 et seq.

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09. What additional considerations apply when the investigation involves whistleblowing?

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In respect of data protection, the processing of personal data in whistleblowing systems is considered by the Finnish Data Protection Ombudsman (DPO) as requiring a data protection impact assessment (DPIA).

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L. 4990/2022 includes specific requirements regarding, among other things, the procedure of receiving and investigating respective reports, confidentiality issues (especially regarding the identity of the whistleblower), data protection issues (including restrictions to the right of access) and the employer's right to keep a record of the relevant complaint and investigation. Such provisions are expected to be further detailed by Ministerial Decisions in future.

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In principle, an internal investigation should be conducted in the same way, regardless of whether it is initiated following a whistleblowing report, an audit, or a monitoring result. This includes anything related to confidentiality, fairness, data privacy protection, etc.

If an internal investigation is initiated following a whistleblower report, the main characteristic that is imposed by the EU Directive on the protection of persons who report breaches of EU Law (Whistleblowers Directive) and that will also be available under the Draft Law is for the organisation (employer) to communicate (if practicable) the report to the whistleblower. Furthermore, the whistleblower should receive feedback as to whether follow-up actions were undertaken following the report and, if yes – what actions were taken – and if not – why the follow-up actions were not taken.

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If an employee complains to his or her superiors about grievances or misconduct in the workplace and is subsequently dismissed, this may constitute an unlawful termination (article 336, Swiss Code of Obligations). However, the prerequisite for this is that the employee behaves in good faith, which is not the case if he or she is (partly) responsible for the grievance.

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10. What confidentiality obligations apply during an investigation?

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Concerning a workplace investigation, there is no specific legislation in force at the moment regarding confidentiality obligations. All normal legal confidentiality obligations (eg, obligations outlined in the Trade Secrets Act (595/2018)), and if using an external investigator, the confidentiality obligations outlined in the agreement between the employer and the external investigator, apply. Attorneys-at-law always have strict confidentiality obligations as per the Advocates Act (496/1958).

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Confidentiality applies as a general principle in disciplinary investigations.

Moreover, L. 4990/2022, which transposed EU Directive 2019/1937 into Greek Law, regulates the issue of confidentiality during investigations that start based on an internal report. The managers conducting the investigation must respect and abide by the rules of confidentiality regarding the information they have become aware of when exercising their duties[1]. They must also protect the complainant's and any third party's (referred to in the report) confidentiality by preventing unauthorised persons from accessing the report[2].

Finally, L. 4808/2021 provides that employers must create a procedure that should be communicated to employees regarding all the necessary steps of an investigation following a complaint. Throughout the whole process, the employer, managers and the employer's representatives responsible for the investigation must respect and abide by the rules of confidentiality in a manner that safeguards the dignity and personal data of the complainant and the person under investigation[3].

[1] Law 4990/2022, art. 9 par.8(b)

[2] Law 4990/2022, art. 10 par. 2(e)

[3] Law 4808/2021 art. 5 par.1(a) and 10 par.2(b)

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The law does not cover this issue, apart from whistleblower regulations, as it should be regulated by the employer in their internal rules. The employer should ensure all participants of the investigation keep information related to it secret, as long as is necessary for the investigation (or even longer, if required by law concerning personal data or other specially protected information). Reputation, personal data and the personal rights of other people cannot be breached during the proceedings and this should be protected.

Moreover, according to the Draft Law – a whistleblower's personal data should be kept confidential. It can only be disclosed if law enforcement authorities require it. Also, confidentiality should be guaranteed for the subject and other interested persons.

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Besides the employee's duty of performance (article 319, Swiss Code of Obligations), the employment relationship is defined by the employer's duty of care (article 328, Swiss Code of Obligations) and the employee's duty of loyalty (article 321a, Swiss Code of Obligations). Ancillary duties can be derived from the two duties, which are of importance for the confidentiality of an internal investigation.[1]

In principle, the employer must respect and protect the personality (including confidentiality and privacy) and integrity of the employee (article 328 paragraph 1, Swiss Code of Obligations) and take appropriate measures to protect the employee. Because of the danger of pre-judgment or damage to reputation as well as other adverse consequences, the employer must conduct an internal investigation discreetly and objectively. The limits of the duty of care are found in the legitimate self-interest of the employer.[2]

In return for the employer's duty of care, employees must comply with their duty of loyalty and safeguard the employer's legitimate interests. In connection with an internal investigation, employees must therefore keep the conduct of an investigation confidential. Additionally, employees must keep confidential and not disclose to any third party any facts that they have acquired in the course of the employment relationship, and which are neither obvious nor publicly accessible.[3]

[1] Wolfgang Portmann/Roger Rudolph, BSK OR, Art. 328 N 1 et seq.

[2] Claudia Fritsche, Interne Untersuchungen in der Schweiz, Ein Handbuch für Unternehmen mit besonderem Fokus auf Finanzinstitute, p. 202.

[3] David Rosenthal et al., Praxishandbuch für interne Untersuchungen und eDiscovery, Release 1.01, Zürich/Bern 2021, p. 133.

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11. What information must the employee under investigation be given about the allegations against them?

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The process must be transparent and impartial, and therefore all the information that may influence the conclusions made during the investigation should be shared with the employee.

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As a matter of general principle, employees under investigation must have access to the necessary information to be able to defend themselves, in the context of their fundamental right to a fair trial and hearing.

Moreover, from a data protection perspective, they may be entitled to access their personal data in the respective files.

The above rights must be balanced with confidentiality and the need to safeguard the completion of the investigation and to protect the complainant from retaliation.

According to L.4990/2022, all data and information as well as the identity of the complainant are

confidential, and any disclosure is only permitted where required by the EU or national legislation or during court proceedings, and only if it is necessary for the protection of the defence rights of the employee under investigation. The section of L.4808/2021 for the elimination of workplace violence and harassment does not regulate this specifically but provides a general obligation for confidentiality.

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There is no specific mandatory information that should be given to an employee who is the subject of an internal investigation. However, it is common practice that he or she must know what the allegations against them are, on what grounds these allegations are formulated and be given a right to discuss these allegations and the evidence or grounds for these allegations.

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Switzerland

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As a result of the employer's duty of care (article 328, Swiss Code of Obligations), employees under investigation have certain procedural rights. These include, in principle, the right of the accused to be heard. In this context, the accused has the right to be informed at the beginning of the questioning about the subject of the investigation and at least the main allegations and they must be allowed to share their view and provide exculpatory evidence.^[1] The employer, on the other hand, is not obliged to provide the employee with existing evidence, documents, etc, before the start of the questioning.^[2]

Covert investigations in which employees are involved in informal or even private conversations to induce them to provide statements are not compatible with the data-processing principles of good faith and the requirement of recognisability, according to article 4 of the Swiss Federal Act on Data Protection.^[3]

Also, rights to information arise from the Swiss Federal Act on Data Protection. In principle, the right to information (article 8, Swiss Federal Act on Data Protection) is linked to a corresponding request for information by the concerned person and the existence of data collection within the meaning of article 3 (lit. g), Swiss Federal Act on Data Protection. Insofar as the documents from the internal investigation recognisably relate to a specific person, there is in principle a right to information concerning these documents. Subject to certain conditions, the right to information may be denied, restricted or postponed by law (article 9 paragraph 1, Swiss Federal Act on Data Protection). For example, such documents and reports may also affect the confidentiality and protection interests of third parties, such as other employees. Based on the employer's duty of care (article 328, Swiss Code of Obligations), the employer is required to protect them by taking appropriate measures (eg, by making appropriate redactions before handing out copies of the respective documents (article 9 paragraph 1 (lit. b), Swiss Federal Act on Data Protection)).^[4] Furthermore, the employer may refuse, restrict or defer the provision of information where the company's interests override the employee's, and not disclose personal data to third parties (article 9 paragraph 4, Swiss Federal Act on Data Protection). The right to information is also not subject to the statute of limitations, and individuals may waive their right to information in advance (article 8 paragraph 6, Swiss Federal Act on Data Protection). If there are corresponding requests, the employer must generally grant access, or provide a substantiated decision on the restriction of the right of access, within 30 days (article 8 paragraph 5, Swiss Federal Act on Data Protection and article 1 paragraph 4, Ordinance to the Federal Act on Data Protection).

[1] Roger Rudolph, *Interne Untersuchungen: Spannungsfelder aus arbeitsrechtlicher Sicht*, SJZ 114/2018, p. 390.

[2] Roger Rudolph, *Interne Untersuchungen: Spannungsfelder aus arbeitsrechtlicher Sicht*, SJZ 114/2018, p. 390.

[3] Roger Rudolph, *Interne Untersuchungen: Spannungsfelder aus arbeitsrechtlicher Sicht*, SJZ 114/2018, p. 390.

[4] Claudia Götz Staehelin, *Unternehmensinterne Untersuchungen*, 2019, p. 37.

Last updated on 15/09/2022

12. Can the identity of the complainant, witnesses or sources of information for the investigation be kept confidential?

Finland

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See question 11, there is no protection of anonymity as the process must be transparent to the parties involved.

Last updated on 15/09/2022

Greece

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According to express provisions of L.4990/2020, in principle personal data and any other information that may lead directly or indirectly to the identification of the complainant must not be disclosed to anyone other than the investigating individuals unless the complainant gives consent^[4] and that is why pseudonyms should be used. The witnesses and third persons that aid the complainant are deemed as “mediators” by the Law and their contribution to the procedure should be confidential^[5].

L.4808/2021 does not indicate when such disclosures are permitted; however, it is obvious that this is a matter of cost-benefit analysis where the public interest and the fundamental rights of the involved persons should be considered in a balanced way to ensure the best results. From a data protection perspective, it could be argued that the person under investigation’s right to know the identity of the complainant, witnesses or sources of information should be limited to protect the rights of these persons.

[4] Law 4990/2022 art.14 par.1

[5] Law 4990/2022, art.3 par. 7 and art.10 par.2(e)

Last updated on 03/04/2023

Poland

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Yes.

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As mentioned under Question 10, the employer's duty of care (article 328, Swiss Code of Obligations) also entails the employer's duty to respect and protect the personality (including confidentiality and privacy) and integrity of employees (article 328 paragraph 1, Swiss Code of Obligations) and to take appropriate measures to protect them.

However, in combination with the right to be heard and the right to be informed regarding an investigation, the accused also has the right that incriminating evidence is presented to them throughout the investigation and that they can comment on it. For instance, this right includes disclosure of the persons accusing them and their concrete statements. Anonymisation or redaction of such statements is permissible if the interests of the persons incriminating the accused or the interests of the employer override the accused' interests to be presented with the relevant documents or statements (see question 11; see also article 9 paragraphs 1 and 4, Swiss Federal Act on Data Protection). However, a careful assessment of interests is required, and these must be limited to what is necessary. In principle, a person accusing another person must take responsibility for their information and accept criticism from the person implicated by the information provided.^[1]

[1] Roger Rudolph, *Interne Untersuchungen: Spannungsfelder aus arbeitsrechtlicher Sicht*, SJZ 114/2018, p. 390.

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13. Can non-disclosure agreements (NDAs) be used to keep the fact and substance of an investigation confidential?

Finland

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Yes, however, the need for an NDA is assessed always on a case-by-case basis.

Last updated on 15/09/2022

Greece

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NDAs are an option, especially to outline in detail the obligations of the persons conducting the investigation, which is also provided for in law. On the other hand, NDAs will not prevent persons involved from providing information to the competent authorities in the context of criminal or other similar procedures, where they must do so by law. Moreover, they may not protect confidentiality if persons who report breaches of Union law decide to make an external or public report, according to the provisions of L. 4990/2022.

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Poland

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Yes, but it may not stop the disclosure of information at the request of relevant law enforcement authorities.

Last updated on 20/04/2023

Switzerland

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In addition to the above-mentioned statutory confidentiality obligations, separate non-disclosure agreements can be signed. In an internal investigation, the employee should be expressly instructed to maintain confidentiality.

Last updated on 15/09/2022

14. When does privilege attach to investigation materials?

Finland

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The privilege of investigation materials concerns a rather limited amount of cases. In practice, materials may be considered privileged in connection with the litigation process under the Procedural Code (4/1734). For example, communications between a client and an attorney may attract protection against forcible public disclosure.

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Greece

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Regarding L.4990/2022 for whistleblowers' procedures, many categories of privilege may occur during an investigation, such as: attorney-client privilege; doctor-patient privilege; and court or other proceedings' privilege deemed as classified. L.4990/2022 provides that its provisions do not affect any of these privileges and these privileges supersede^[6].

Privilege may also be attached to investigation materials in investigations relating to workplace harassment and violence incidents; however, since L.4808/2021 does not offer a specific provision and criminal proceedings may also commence, the matter of privilege must be examined ad hoc.

^[6] Law 4990/2022 art.5 par.2(b) and par.2(c)

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In general, findings made and documents established during an internal investigation, including the report thereof, are not covered by privilege per se. It can be claimed that they are covered by the employer's commercial secrecy, but this secrecy is not very well protected from requests of law enforcement authorities. Hence, if prosecuting authorities find a report of an internal investigation or other documents established during an investigation relevant for criminal proceedings, they can ask for them. If they are not produced voluntarily, a search can be performed.

Legal privilege will, on the other hand, cover an internal investigation if it is entrusted to an independent lawyer. Specifically, client-attorney privilege will cover all documents that are established during the investigation by a lawyer.

Under Polish law there is no distinction between legal advice privilege and litigation privilege. Hence, legal privilege will cover the documentation of the internal investigation led by a lawyer regardless of whether the lawyer's involvement is for the purpose of obtaining legal advice or because of ongoing or contemplated litigation.

Last updated on 20/04/2023

Switzerland

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As outlined above, all employees generally have the right to know whether and what personal data is being or has been processed about them (article 8 paragraph 1, Swiss Federal Act on Data Protection; article 328b, Swiss Code of Obligations).

The employer may refuse, restrict or postpone the disclosure or inspection of internal investigation documents if a legal statute so provides, if such action is necessary because of overriding third-party interests (article 9 paragraph 1, Swiss Federal Act on Data Protection) or if the request for information is

manifestly unfounded or malicious. Furthermore, a restriction is possible if overriding the self-interests of the responsible company requires such a measure and it also does not disclose the personal data to third parties. The employer or responsible party must justify its decision (article 9 paragraph 5, Swiss Federal Act on Data Protection).[1]

The scope of the disclosure of information must, therefore, be determined by carefully weighing the interests of all parties involved in the internal investigation.

[1] Claudia M. Fritsche, *Interne Untersuchungen in der Schweiz, Ein Handbuch für Unternehmen mit besonderem Fokus auf Finanzinstitute*, p. 284 et seq.

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15. Does the employee under investigation have a right to be accompanied or have legal representation during the investigation?

Finland

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The employee under investigation has a right to have a support person present (eg, a lawyer or an employee representative) during the hearings and a right to assistance in preparing written statements.

Last updated on 15/09/2022

Greece

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Greek law does not specifically regulate the right to be accompanied or have legal representation during internal investigations for private-sector employees.

However, the right to legal representation established in article 6 of the European Convention on Human Rights could be interpreted to cover cases such as internal investigations in the workplace. In addition, according to article 136 of Civil Servant Code, the employee under investigation has the right to be represented by an attorney at law. There is an additional argument regarding private-sector employees and their right to legal representation, by applying this provision by analogy.

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Poland

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This is not regulated by law and it depends on internal procedures or practice at a given working

establishment. As a rule, the participation of third parties or proxies is neither a recognised practice nor recommended (according to the principle that the fewer people participate in the investigation, the easier it is to determine the circumstances of the case, the so-called need-to-know rule). However, in certain situations it should be permissible for a proxy (eg, a lawyer) to participate in a meeting with a subject.

Last updated on 20/04/2023

Switzerland

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In the case of an employee involved in an internal investigation, a distinction must be made as to whether the employee is acting purely as an informant or whether there are conflicting interests between the company and the employee involved. If the employee is acting purely as an informant, the employee has, in principle, no right to be accompanied by their own legal representative.^[1]

However, if there are conflicting interests between the company and the employee involved, when the employee is accused of any misconduct, the employee must be able to be accompanied by their own legal representative. For example, if the employee's conduct might potentially constitute a criminal offence, the involvement of a legal representative must be permitted.^[2] Failure to allow an accused person to be accompanied by a legal representative during an internal investigation, even though the facts in question are relevant to criminal law, raises the question of the admissibility of statements made in a subsequent criminal proceeding. The principles of the Swiss Criminal Procedure Code cannot be undermined by alternatively collecting evidence in civil proceedings and thus circumventing the stricter rules applicable in criminal proceedings.^[3]

In general, it is advisable to allow the involvement of a legal representative to increase the willingness of the employee involved to cooperate.

^[1] Claudia Götz Staehelin, *Unternehmensinterne Untersuchungen*, 2019, p. 37.

^[2] Simona Wantz/Sara Licci, *Arbeitsvertragliche Rechte und Pflichten bei internen Untersuchungen*, in: *Jusletter* 18 February 2019, N 59.

^[3] Roger Rudolph, *Interne Untersuchungen: Spannungsfelder aus arbeitsrechtlicher Sicht*, SJZ 114/2018, p. 392; Niklaus Ruckstuhl, *BSK-StPO, Art. 158 StPO* N 36.

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16. If there is a works council or trade union, does it have any right to be informed or involved in the investigation?

Finland

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A works council or a trade union does not have a role in the investigation.

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Greece

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L.4990/2022 explicitly states that the exercise of employee rights that refer to consulting from representatives or trade unions and protection against any detrimental measure that results from those consultations does not affect the implementation of any legal provisions. The autonomy of social partners and their right to enter into collective agreements regardless of the level of protection provided by L.4990/2022[7] is also unaffected.

Under L.4808/2021, legal persons and associations of persons, including trade unions, that have a legitimate interest in doing so may, with the consent of the complainant, bring an action in the complainant's name before the competent administrative or judicial authorities. They may also intervene in their defence[8].

[7] Law 4990/2022 art.5 par.2 (e)

[8] Law 4808/2021 art.14

Last updated on 03/04/2023

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There is no such obligation, unless it is provided for in an internal procedure or, for example, in the applicable collective bargaining agreement. It is neither a recognised practice nor recommended that such persons participate in the investigation.

However, in the event of violations that justify the termination of an employment contract with the employee, the employer should consult with that employee's union about their intention to immediately terminate any employment contract concluded with that person or to terminate, with notice, the employment contract agreed with him or her for an indefinite term, or apply for consent to terminate the employment contract with an employee who is protected by a union.

Last updated on 20/04/2023

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In general, works councils and trade unions are not very common in Switzerland and there are no statutory rules that would provide a works council or trade union a right to be informed or involved in an ongoing internal investigation. However, respective obligations might be foreseen in an applicable collective bargaining agreement, internal regulations or similar.

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17. What other support can employees involved in the investigation be given?

Finland

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They can request assistance, for example, from an occupational health and safety representative, a shop steward or the occupational healthcare provider.

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Greece

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According to L.4990/2022, any form of retaliation against complainants is prohibited, including threats of retaliation[9]. The complainants have the right to cost-free legal advice about possible acts of retaliation as well as cost-free provision of psychological support (to be defined by Ministerial Decisions)[10]. In terms of other types of support, the complainants are not in principle liable for the acquisition of information or releasing the information they reported under specific conditions (eg, the acquisition or access does not independently constitute a criminal offence, if they had reasonable grounds for believing that a report was necessary to reveal the violation)[11].

L. 4808/2021 states that the dismissal or termination of the legal relationship of employment and any other discrimination that constitutes an act of revenge or retaliation is prohibited and invalid[12].

[9] Law 4990/2022 art.17

[10] Law 4990/2022 art.19

[11] Law 4990/2022 art.18 par.1(a)

[12] Law 4808/2021 art.13

Last updated on 03/04/2023

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They may be supported by, for example, allowing an alternative work environment (eg, remote work to avoid direct contact with people involved in the case). Depending on circumstances of the case, this solution will be offered to the subject or the victim. However, it is important that such actions do not infringe the rights of other people (eg, the subject itself).

Employees may also be sent on leave (by a unilateral decision of the employer – if possible under currently

binding law provisions) or the parties to an employment contract may mutually agree to use such leave. Moreover, if the employer thinks it is necessary, they may assign the employee to another job for a period not exceeding three months (only if it does not result in a reduction in the employee's remuneration and corresponds to the employee's qualifications).

Also, depending on the employer's decision – psychological or even legal assistance can be provided by the employer to a whistleblower or a victim.

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Switzerland

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The employer does not generally need to provide specific support for employees that are subject to an internal investigation. The employer may, however, allow concerned employees to be accompanied by a trusted third party such as family members or friends.^[1] These third parties will need to sign separate non-disclosure agreements before being involved in the internal investigation.

In addition, a company may appoint a so-called lawyer of confidence who has been approved by the employer and is thus subject to professional secrecy. This lawyer will not be involved in the internal investigation but may look after the concerned employees and give them confidential advice as well as inform them about their rights and obligations arising from the employment relationship.^[2]

[1] Roger Rudolph, *Interne Untersuchungen: Spannungsfelder aus arbeitsrechtlicher Sicht*, SJZ 114/2018, p. 390.

[2] David Rosenthal et al., *Praxishandbuch für interne Untersuchungen und eDiscovery*, Release 1.01, Zürich/Bern, 2021, p. 133.

Last updated on 15/09/2022

18. What if unrelated matters are revealed as a result of the investigation?

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If they are related to the work or workplace, the employer will handle the emerging matters separately. In internal investigations, the employer is allowed to use any material legally available.

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Greece

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If any unrelated matters are revealed as a result of an investigation and are of legal importance, the applicable legal provisions must be implemented and any relevant policies or agreements between the involved parties should be taken into account. For example, if the reporting procedure sheds light on other criminal acts, criminal law procedure may be followed if the matter is reported to the competent authorities.

If these unrelated matters fall under the ambit of another company's policies, the relevant procedures may also be followed separately. However, the employee under investigation must be allowed to defend him or herself, otherwise he or she may raise complaints relating to the procedural guarantees of the investigation.

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It depends on the circumstances of the revealed issue and the employer's compliance culture. Normally, if a new issue is revealed during the investigation, it should be analysed and investigated if appropriate.

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Switzerland

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There are no regulations in this regard in the Swiss employment law framework. However, in criminal proceedings, the rules regarding accidental findings apply (eg, article 243, Swiss Criminal Procedure Code for searches and examinations or article 278, Swiss Criminal Procedure Code for surveillance of post and telecommunications). In principle, accidental findings are usable, with the caveat of general prohibitions on the use of evidence.

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19. What if the employee under investigation raises a grievance during the investigation?

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If the nature of the grievance relates to the employer's obligations to handle such matters in general, the grievance will be investigated either separately or as a part of the ongoing investigation.

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Greece

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Employees under investigation frequently raise grievances during investigation procedures that are dealt with on a case-by-case basis. The grievances raised by the employee under investigation are examined by the employees responsible for the investigation. They may either pause the relevant proceedings and review the grievance, especially if the claims of the employee under investigation are linked to a breach of his or her data or hearing rights, or they may continue the investigation.

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Poland

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It depends on the internal policies in force in the organisation. Most often, it constitutes the basis for separate proceedings.

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In the context of private internal investigations, grievances initially raised by the employee do not usually have an impact on the investigation.

However, if the employer terminates the employment contract due to a justified legal complaint raised by an employee, a court might consider the termination to be abusive and award the employee compensation in an amount to be determined by the court but not exceeding six months' pay for the employee (article 336 paragraph 1 (lit. b) and article 337c paragraph 3, Swiss Code of Obligations). Furthermore, a termination by the employer may be challenged if it takes place without good cause following a complaint of discrimination by the employee to a superior or the initiation of proceedings before a conciliation board or a court by the employee (article 10, Federal Act on Gender Equality).

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20. What if the employee under investigation goes off sick during the investigation?

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As a general rule, sick leave does not prevent an investigation from progressing. Depending on the nature

of the sickness, the employee can attend hearings and take part in the procedure. If the sickness prevents the employee from participating, the employer can put the process on hold temporarily.

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In principle, the health of an ordinary employee would not prevent the investigation procedure from taking place (eg, interviews with witnesses or the collection of evidence would not be postponed or suspended). However, if the employee under investigation is unwell and they can't participate in the procedure, the investigation may be suspended or postponed until the employee can take part. Bearing in mind the majority of company internal policies and regulations governing workplace investigations provide for a specific framework and timetable for the whole procedure to be completed, the long-term sickness of an employee under investigation may impede the completion of the procedure in the prescribed time. As a result, the person conducting the investigation may seek alternative measures to facilitate participation (eg, teleconferencing).

On a related note, if sickness occurs after the investigation is completed and the employer decides upon the imposition of disciplinary measures against the said employee and the initiation of a relevant procedure, the decision should be duly and timely communicated to the employee, irrespective of whether his or her presence in the workplace is not possible because of the illness.

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This may prolong the investigation, as the employee may be unable to participate for a time (if the employee is not able to work, in many cases he or she will not be able to participate in proceedings that requires some level of engagement and psychophysical ability). Also, an employee is protected against termination of an employment contract with notice during sick leave. During such a period, the employer may only terminate his or her employment contract without notice (with immediate effect).

Last updated on 20/04/2023

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The time spent on the internal investigation by the employee should be counted as working time^[1]. The general statutory and internal company principles on sick leave apply. Sick leave for which the respective employee is not responsible must generally be compensated (article 324a paragraph 1 and article 324b, Swiss Code of Obligations). During certain periods of sick leave (blocking period), the employer may not ordinarily terminate the employment contract; however, immediate termination for cause remains possible.

The duration of the blocking period depends on the employee's seniority, amounting to 30 days in the employee's first year of service, 90 days in the employee's second to ninth year of service and 180 days thereafter (article 336c paragraph 1 (lit. c), Swiss Code of Obligations).

[1] Ullin Streiff/Adrian von Kaenel/Roger Rudolph, Arbeitsvertrag, Praxiskommentar zu Art. 319–362 OR, 7. A. 2012, Art. 328b N 8 OR.

Last updated on 15/09/2022

21. How do you handle a parallel criminal and/or regulatory investigation?

Finland

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Regardless of a possible criminal investigation, the employer must run its internal workplace investigation without unnecessary delay. A workplace investigation and a criminal investigation are two separate processes and can be ongoing simultaneously, so the criminal process does not require the workplace investigation to be stayed. Thus, parallel investigations are to be considered as two separate matters. The police may only obtain evidence or material from the company or employer if strict requirements for equipment searches are met after a request for investigation has been submitted to the police.

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Incidents of violence and harassment may be dealt with by certain independent authorities, such as the Labour Inspectorate Body and the Greek Ombudsman. The former is competent to impose sanctions on the employer if there is a breach of the general prohibition of violence and harassment at the workplace and the obligation of employers regarding the prevention of such incidents and the obligation to adopt policies within the business. The Greek Ombudsman is competent to deal with disputes when there is violence or harassment in the workplace coupled with discrimination due to, for example, gender, age, disability, sexual orientation, religious beliefs, or gender identity. Moreover, the applicable legal framework [13] stipulates that victims of violence and harassment are entitled to lodge a report before the Labour Inspectorate Body and the Greek Ombudsman. This is in addition to the judicial protection he or she may seek and the internal investigation procedure to which he or she may have recourse, without specifying whether internal proceedings may be suspended before the regulatory bodies decide on the matter.

On the other hand, the National Transparency Authority and in certain cases the Hellenic Competition Commission are external reporting channels for employees reporting breaches of Union law. In such cases, L.4990/2022 (article 11 paragraph 5) stipulates that the investigation before the National Transparency Authority is not suspended if reporting procedures before other regulatory authorities have been initiated.

Moreover, criminal investigations can run in parallel with internal probes.

[13] Law 4808/2018 art.10

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They can be run in parallel. It is up to the company whether it informs the authority about the ongoing internal investigation.

Based on our experience in criminal matters, a report from an internal investigation may not necessarily be treated as evidence per se, but as a source of information about the evidence.

According to procedural rules stemming from, for example, the Criminal Procedure Code, the authorities can demand to see evidence and documents in the employer's possession that they consider relevant to the conducted proceedings and their subject matter.

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The actions of the employer may carry through to a subsequent state proceeding. First and foremost, any prohibitions on the use of evidence must be considered. Whereas in civil proceedings the interest in establishing the truth must merely prevail for exploitation (article 152 paragraph 2, Swiss Civil Procedure Code), in criminal proceedings, depending on the nature of the unlawful act, there is a risk that the evidence may not be used (see question 27 and article 140 et seq, Swiss Civil Procedure Code).

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22. What must the employee under investigation be told about the outcome of an investigation?

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The employer's conclusions from the investigation.

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The employer has an obligation, towards the alleged victim but also the alleged perpetrator, to carefully investigate the report and any existing evidence before making decisions. The employee under investigation must be informed about the outcome of the procedure and any measures adopted in this regard. The respective decision must have due justification.

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He or she must be given feedback about follow-up actions that were undertaken, or reasons why the follow-up actions were not undertaken.

In any case – the feedback must be adapted to the circumstances of each case so as not to reveal too many details or infringe the other interested parties' rights.

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Workplace investigations often result in an investigation report that is intended to serve as the basis for any measures to be taken by the company's decisionmakers.

The employee's right to information based on article 8, Swiss Federal Act on Data Protection also covers the investigation report, provided that the report and the data contained therein relate to the employee.^[1] In principle, the employee concerned is entitled to receive a written copy of the entire investigation report free of charge (article 8 paragraph 5, Swiss Federal Act on Data Protection and article 1 et seq, Ordinance to the Federal Act on Data Protection). Redactions may be made where the interests of the company or third parties so require, but they are the exception and must be kept to a minimum.^[2]

[1] Arbeitsgericht Zürich, Entscheide 2013 No. 16; Roger Rudolph, *Interne Untersuchungen: Spannungsfelder aus arbeitsrechtlicher Sicht*, SJZ 114/2018, p. 393 et seq.

[2] Roger Rudolph, *Interne Untersuchungen: Spannungsfelder aus arbeitsrechtlicher Sicht*, SJZ 114/2018, p. 394.

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23. Should the investigation report be shared in full, or just the findings?

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The employee under investigation may only be informed of the conclusions.

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Greece

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There is no explicit legal provision stating the whole report must be communicated with the employee under investigation. The legal framework (L.4990/2022 and L.4808/2021) is governed by strict confidentiality obligations and obligations to protect the complainant's data. From a data protection regulation perspective, it could be argued that the right of the person under investigation to know the identity of the complainant, witnesses or sources of information should be limited to protect the rights of such persons.

However, if the outcome of the investigation leads to the imposition of disciplinary measures, the right of the employee under investigation to request the whole investigation report, to aid in their defence is enhanced. Moreover, if a complaint is made in bad faith or is unfounded, it may be supported that the employee under investigation is entitled to receive full documentation so he or she can seek adequate legal protection or file an action before the courts.

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It does not need to be shared with the employees at all. It may be shared only to the extent such a disclosure will not violate any law, including personal data protection law or personal rights.

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Switzerland

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In principle, there is no obligation to disclose the final investigation report. Disclosure obligations may arise based on data protection law vis-à-vis the persons concerned (eg, the accused). Likewise, there is no obligation to disclose other documents, such as the records of interviews. The employee should be fully informed of the final investigation report, if necessary, with certain redactions (see question 22). The right of the employee concerned to information is comprehensive (ie, all investigation files must be disclosed to him).[1] Regarding publication to other bodies outside of criminal proceedings, the employer is bound by its duty of care (article 328, Swiss Code of Obligations) and must protect the employee as far as is possible and reasonable.[2]

[1] Nicolas Facincani/Reto Sutter, *Interne Untersuchungen: Rechte und Pflichten von Arbeitgebern und*

Angestellten, in: HR Today, to be found on: <Interne Untersuchungen: Rechte und Pflichten von Arbeitgebern und Angestellten | hrtoday.ch> (last visited on 27 June 2022).

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24. What next steps are available to the employer?

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The employer decides whether misconduct has taken place or not. Depending on the case, the employer may recommend a workplace conciliation in which the parties try to find a solution that can be accepted by both sides. The employer may choose to give an oral reprimand or a written warning. If the legal conditions are met, the employer may also terminate the employment agreement.

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For workplace violence and harassment investigations, depending on the outcome of the internal investigation, the employer may adopt certain measures including, for example, recommendations to the employee under investigation, changes to the employee's working hours and transfer to another department.

If the employer decides to terminate the employment relationship, without having previously followed existing corporate policies regarding reporting procedures or without having provided the alleged perpetrator with the right to be heard, the dismissal could be deemed invalid. In any case, the measures adopted should be appropriate and proportional to the act committed.

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Poland

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It depends on the outcome of the investigation: imposing penalties; reporting to a regulator; notifying a suspected offence or civil claim; termination of an employment contract with or without notice; and changes to the work organisation. Following the investigation, the employer must make some legal, business or HR corrective actions.

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If the investigation uncovers misconduct, the question arises as to what steps should be taken. Of course, the severity of the misconduct and the damage caused play a significant role. Furthermore, it must be noted that the cooperation of the employee concerned may be of decisive importance for the outcome of the investigation. The possibilities are numerous, ranging, for example, from preventive measures to criminal complaints.^[1]

If individual disciplinary actions are necessary, these may range from warnings to ordinary or immediate termination of employment.

[1] David Rosenthal et al., *Praxishandbuch für interne Untersuchungen und eDiscovery*, Release 1.01, Zürich/Bern 2021, p. 180 et seq.

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25. Who can (or must) the investigation findings be disclosed to? Does that include regulators/police? Can the interview records be kept private, or are they at risk of disclosure?

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In general, investigation materials, including findings, that includes personal data should only be processed by the personnel of the organisation who are responsible for internal investigations. However, it may in some situations be required by applicable legislation that findings are disclosed to competent authorities for the performance of their duties, such as conducting investigations in connection with malpractice and violations of the law.

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In principle, there is no specific obligation for investigating persons to disclose their findings. For proceedings before a court that have been initiated or investigated by the police or competent regulatory bodies, the relevant findings may be communicated under strict conditions and provided that the personal data of the parties involved are not publicly disclosed.

More specifically, under L. 4490/2022, in the context of whistleblowing procedures, personal data and any information that leads, directly or indirectly, to the identification of the complainant are not disclosed to anyone other than employees involved in the investigation, unless the complainant consents. The identity of the complainant and any other information may only be disclosed in the context of investigations by

competent authorities or judicial proceedings, to the extent necessary for the protection of the employee under investigation's rights of defence. Confidentiality obligations govern the procedure for revealing trade secrets to police and regulatory bodies, especially in the framework of L.4990/2022.

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It depends on the matter. In general, there is no obligation to disclose the report. In some instances, there is an obligation to notify a suspected offence (for example, a terrorist attack or a political assassination). This, however, does not mean there is an obligation to file a report from the internal investigation, but to provide the law enforcement authority with the facts and evidence at the notifier's disposal. In other instances of criminal offences, for example corruption, there is no obligation to notify law enforcement authorities. Therefore, it is up to the organisation to decide whether it will file a notification for a suspected offence.

At the same time, presenting a report from an internal investigation can constitute an element of defence for an organisation if a regulatory authority initiates proceedings regarding a failure by the organisation to comply with regulatory obligations.

Records of interviews do not need to be produced for the case file provided the law enforcement authority does not ask for them.

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The employer is generally not required to disclose the final report, or the data obtained in connection with the investigation. In particular, the employer is not obliged to file a criminal complaint with the police or the public prosecutor's office.

Exceptions may arise, for example, from data protection law (see question 22) or a duty to release records may arise in a subsequent state proceeding.

Data voluntarily submitted in a proceeding in connection with the internal investigation shall be considered private opinion or party assertion.^[1] If the company refuses to hand over the documents upon request, coercive measures may be used under certain circumstances.^[2]

[1] Oliver Thormann, Sicht der Strafverfolger – Chancen und Risiken, in: Flavio Romerio/Claudio Bazzani (Hrsg.), *Interne und regulatorische Untersuchungen*, Zürich/Basel/Genf 2016, p. 123.

[2] Oliver Thormann, Sicht der Strafverfolger – Chancen und Risiken, in: Flavio Romerio/Claudio Bazzani (Hrsg.), *Interne und regulatorische Untersuchungen*, Zürich/Basel/Genf 2016, p. 102 et seq.

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26. How long should the outcome of the investigation remain on the employee's record?

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Please see question 7. The outcome of the investigation involving personal data may be retained only for as long as is necessary considering the purposes of the processing. In general, the retention of investigation-related data may be necessary while the investigation is still ongoing and even then the requirements of data minimization and accuracy should be considered. The data concerning the outcome of an investigation should be registered to the employee's record merely to the extent necessary in light of the employment relationship or potential disciplinary measures. In this respect, the applicable retention time depends on labour law-related rights and limitations, considering eg, the applicable periods for filing a suit.

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Under the General Data Protection Regulation, employees' personal details and information must be kept in the business records for as long as is necessary for the purposes of the employment relationship. Otherwise, stored data must be deleted. However, under L.4990/2022^[14], reports remain in the relevant record for a reasonable and necessary time, and in any case until the completion of investigations or proceedings before the courts that have been initiated as a consequence of a complaint against the employee under investigation, the complainant or any third parties.

^[14] L.4990/2022 art.16 par.1

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Neither Polish law nor the Draft Law specifically provide for a mandatory period during which the outcome of the investigation should be kept on the employee's record.

At the same time, the Draft Law indicates that the register of whistleblowing reports, which should also contain information about follow-up actions undertaken as a result of the report, should be kept for 15 months starting from the end of the calendar year in which the follow-up actions have been completed, or the proceedings initiated by those actions have been terminated.

Also, while determining how long the outcome of an internal investigation should be kept, additional legal considerations can be taken into account, especially data privacy.

The GDPR does not specify precise storage time for personal data. The employer must assess what will be an appropriate time for storage of the data, taking into consideration the necessity of keeping personal

data concerning the purpose of the processing in question. Employees' personal data should be kept for the period necessary for the performance of the employment relationship and may be kept for a period appropriate for the statute of limitations for claims and criminal deeds. A longer retention period may result from applicable laws. Following the Regulation of the Minister of Family, Labour and Social Policy on employee documentation, the employer may keep a copy of the notice of punishment and other documents related to the employee's incurring of disciplinary responsibility in the employee record.

There are different retention periods for the data contained in employee files:

- 10 years if the employee was hired on or after 1 January 2019;
- if the employment relationship began between 1 January 1999 and 1 January 2019, the retention period is 50 years, but may be reduced to 10 years if the employer provides the Polish Social Insurance Institution with certain mandatory information; and
- for 50 years if the employee was hired before 1 January 1999. It does not matter whether the person is still working or not.

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From an employment law point of view, there is no statute of limitations on the employee's violations. Based on the specific circumstances (eg, damage incurred, type of violation, basis of trust or the position of the employee), a decision must be made as to the extent to which the outcome should remain on the record.

From a data protection point of view, only data that is in the interest of the employee (eg, to issue a reference letter) may be retained during the employment relationship. In principle, stored data must be deleted after the termination of the employment relationship. Longer retention may be justified if rights are still to be safeguarded or obligations are to be fulfilled in the future (eg, data needed regarding foreseeable legal proceedings, data required to issue a reference letter or data in relation to a non-competition clause).^[1]

[1] Wolfgang Portmann/Isabelle Wildhaber, *Schweizerisches Arbeitsrecht*, 4. Edition, Zurich/St. Gallen 2020, N 473.

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27. What legal exposure could the employer face for errors during the investigation?

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There are no regulations regarding the actual investigation process. Therefore, the employer cannot be accused of procedural errors as such. However, once the matter has been adequately investigated, the employer must decide whether or not misconduct has taken place. If the employer considers that

misconduct has taken place, the employer must take adequate measures for remedying the situation. Failure to adequately conduct the investigation could result in criminal sanctions being imposed on the employer as an organisation or the employer's representative, or damages.

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The employee can contest the decisions of disciplinary councils before the courts and request their annulment.

Moreover, in the framework of L.4990/2022, a monetary penalty and prison sentence (to be defined by an implementing Ministerial Decision) may be imposed on any person violating confidentiality obligations concerning the identity and personal data of employees or third parties included in the investigation procedure, while monetary penalties are also provided for legal entities^[15].

Moreover, administrative fines may also be imposed if the employer does not comply with the legal requirements concerning the prevention of violence and harassment in the workplace.

Furthermore, the employee under investigation may initiate proceedings before the courts under tort law, by claiming compensation for moral damages suffered if the company did not comply with its confidentiality obligations after the incident (eg, due to the spread of rumours in the workplace). This may also be linked with criminal law proceedings against the persons responsible for dealing with the investigation (and not against the legal person, since under Greek law there is no criminal liability for legal persons).

On the other hand, the employer may also be exposed to liability vis-à-vis the complainant, witnesses or facilitators, for breach of confidentiality or other obligations prescribed in the respective legal provisions, or if there are retaliation measures.

^[15] L.4990/2022 art.23 par.1

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If any untrue allegations were made by an employer against an employee without checking them beforehand, there is a risk that such an employee would claim damages eg, for infringement of personal rights or even filing a private indictment for defamation or outrage.

Certainly, an employer must be aware that one must never behave in a way that, for example, in the employee's opinion, could constitute a form of blackmailing or deprivation of liberty. A problem may also arise when accessing the employee's correspondence, especially when access is made to documents or private correspondence. The Draft Law provides for several criminal offences related to, for example, preventing reporting, using retaliatory measures against a whistleblower or disclosing personal data of a whistleblower).

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As there are no specific regulations for internal investigations, the usual legal framework within which the employer must act towards the employee derives from general rules such as the employer's duty of care, the employee's duty of loyalty and the employee's data protection rights.

But, for example, unwarranted surveillance could conceivably result in criminal liability (article 179 et seq, Swiss Criminal Code) for violations of the employee's privacy. Furthermore, errors made by the employer could have an impact on any later criminal proceedings (eg, in the form of prohibitions on the use of evidence).[1]

Evidence obtained unlawfully may only be used in civil proceedings if there is an overriding interest in establishing the truth (article 152 paragraph 2, Swiss Civil Procedure Code). Consequently, in each case, a balance must be struck between the individual's interest in not using the evidence and in establishing the truth.[2] The question of the admissibility of evidence based on an unlawful invasion of privacy is a sensitive one – admissibility in this case is likely to be accepted only with restraint.[3] Since the parties in civil proceedings do not have any means of coercion at their disposal, it is not necessary, in contrast to criminal proceedings, to examine whether the evidence could also have been obtained by legal means.[4]

Unlawful action by the employer may also have consequences on future criminal proceedings: The prohibitions on exploitation (article 140 et seq, Swiss Criminal Procedure Code) apply a priori only to evidence obtained directly from public authorities. Evidence obtained unlawfully by private persons (ie, the employer) may also be used if it could have been lawfully obtained by the authority and if the interest in establishing the truth outweighs the interest of the individual in not using the evidence.[5] Art. 140 paragraph 1 Swiss Criminal Procure Code remains reserved: Evidence obtained in violation of Art. 140 paragraph 1 Swiss Criminal Procure Code is subject to an absolute ban on the use of evidence (e.g. evidence obtained under the use of torture[6]).[7]

[1] Cf. ATF 139 II 7.

[2] ATF 140 III 6 E. 3

[3] Pascal Grolimund in: Adrian Staehelin/Daniel Staehelin/Pascal Grolimund (editors), *Zivilprozessrecht*, Zurich/Basel/Geneva 2019, 3rd Edition, §18 N 24a.

[4] Pascal Grolimund in: Adrian Staehelin/Daniel Staehelin/Pascal Grolimund (editors), *Zivilprozessrecht*, Zurich/Basel/Geneva 2019, 3rd Edition, §18 N 24a.

[5] Decision of the Swiss Federal Court 6B_1241/2016 dated 17. July 2017 consid. 1.2.2; Decision of the Swiss Federal Court 1B_22/2012 dated 11 May 2012 consid. 2.4.4.

[6] Jérôme Benedict/Jean Treccani, CR-CPP Art. 140 N. 5 and Art. 141 N. 3.

[7] Yvan Jeanneret/André Kuhn, *Précis de procédure pénale*, 2nd Edition, Berne 2018, N 9011.

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