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SWISS LEGAL STATUS ON THE PROTECTION OF WHISTLE-BLOWERS[1]

Taking into account the EU Directive on the protection of persons who report breaches of Union law.

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ABSTRACT

The EU Whistleblower Protection Directive came into force on 16 December 2019. Switzerland continues to struggle with this topic: the Swiss National Council (Nationalrat) dismissed a draft law on its introduction on 3 June 2019 and, after the Swiss Council of States (Ständerat) approved the draft law without changes on 16 December 2019, dismissed it again on 5 March 2020.

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I. INTRODUCTION

Whistleblowing and the protection of whistleblowers matters in the fight against national and international economic crime. According to an ACFE study, 40% of all cases of occupational fraud are identified by reports from whistleblowers, 53% of which are employees.[2] A survey of companies in Switzerland also showed that a whistle-blowing system allowed half of them to uncover between 21% to 60% of their total financial losses.[3] The European Parliament passed the EU Directive on the protection of persons who report breaches of Union law (EU Whistleblower Protection Directive) on 16 April 2019. The directive came into force on 16 December 2019.[4] The EU Member States are obliged to incorporate these regulations within two years of publication of the directive into their respective national laws.

To date, the explicit protection of whistleblowers has not yet been regulated in Switzerland, with the exception of Art. 22a of the Swiss Federal Personnel Act (*Bundespersonalgesetz*), and respective cantonal regulations on personnel. Accordingly, there is a lack of legal certainty for employers as well as employees in particular, as the principles for the protection of whistleblowers developed by court rulings are not sufficient. For this reason, Switzerland is evaluated by the OECD as *insufficient* in respect of the legal protection of whistleblowers.[5] Apart from the lack of a fundamental protection of whistleblowers, among others, the OECD criticizes the lack of sanctions for those who take retaliation measures against a whistleblower and the lack of regulations on securing the

2 ACFE, Report to the Nations on Occupational Fraud and Abuse, 2018 Global Fraud Study, 17 (2 Mar., 2020) https://www.acfe.com/report-to-the-nations/2018/.

3 Christian Hauser, Nadine Hergovits &Helene Blumer, *Whistleblowing Report 2019*, Chur 2019, 61.

4 DIRECTIVE (EU) 2019/1937 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 23 October 2019 on the protection of persons who report breaches of Union law, OFFICIAL JOURNAL OF THE EUROPEAN UNION, L 305, 17, (2 Mar., 2020) https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019L1937&from=EN.

5 The OECD report dated 15.3.2018 states: "The examiners recommend that Switzerland adopt urgently an appropriate regulatory framework to compensate and protect private sector employees who report suspicions of foreign bribery from any discriminatory or disciplinary action. (…) Finally, the examiners recommend that the Working Group should follow up on prosecutions brought in Switzerland against whistleblowers who report suspected financial offences including, in particular, foreign bribery." OECD, Implementing the OECD Anti-Bribery Convention, Phase 4 Report: Switzerland, page 13 et seq.; (2 Mar., 2020) https://www.oecd.org/corruption/anti-bribery/Switzerland-Phase-4-Report-ENG.pdf.

confidentiality of reports and protecting the whistleblower's identity from being disclosed.[6] The gap in statutory law regarding the legal protection of whistleblowers was meant to be closed by a law on the protection of whistleblowers. However, the draft law was clearly rejected by the Swiss National Council (*Nationalrat*) on 3 June 2019 by 144 to 27 votes and again on 5 March 2020 by 147 to 42 votes.[7]

II. HISTORY

Switzerland has been discussing the protection of whistleblowers and several draft laws for over a decade. As early as 22 June 2007 the Swiss parliament passed the Gysin motion "Statutory protection of whistleblowers from corruption" (No. 03.3212). On 5 December 2008 the Swiss Federal Council (*Bundesrat*) submitted the first pre-draft of the partial revision of the Swiss Code of Obligations (CO) for consultation, and the Federal Department of Justice and Police (FDJP) developed a bill for the consultation process. On 1 October 2010 a pre-draft for the partial revision of the CO on the sanctions of abusive or unjustified notice was opened.[8] The Swiss Federal Council (*Bundesrat*) submitted a report on the partial revision of the CO to the parliament on 20 November 2013[9] which the Swiss Council of States (*Ständerat*) accepted with few amendments on 22 September 2014. On 5 May 2015, however, the Swiss National Council (*Nationalrat*) clearly rejected the submission by 134 to 49 votes and instructed the Swiss Federal Council (*Bundesrat*) to phrase the draft more clearly and simply.[10] The Swiss Council of States (*Ständerat*) unanimously agreed to the rejection of the submission.[11] After this lengthy history the Swiss Federal Council

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6 OECD Anti-Bribery Convention, Phase 4 Report: Switzerland (15 March 2018), 16.

7 Results of the voting as of 3.6.2019, viewed on 2.3.2020 under: https://www.parlament.ch/de/ratsbetrieb/amtliches-bulletin/amtliches-bulletin-die-verhandlungen?SubjectId=46133#votum21 x respectively results of the voting as of 5 March 2020, viewed on 13 March 2020 under: https://www.parlament.ch/de/ratsbetrieb/amtliches-bulletin/amtliches-bulletin-die-verhandlungen?SubjectId=48524#votum13.

8 See Diana Imbach Haumüller, *Whistleblowing in der Schweiz und im internationalen Vergleich – ein Bestandteil einer effektiven internen Kontrolle?* Diss. Universität Zürich, Zürich/Basel/Genf 2011; Diana Imbach Haumüller, Whistleblowing – *Bestandteil einer effektiven internen Kontrolle*, GesKR 2013, 71 et seq.; Nicole Jungo, *Whistleblowing – Lage in der Schweiz*, recht. 2012, 65, 72 et seq.

9 BBl 2013 9513.

10 See Sara Licci, *Codes of Conduct im Arbeitsverhältnis mit besonderem Blick auf das Whistleblowing*, AJP 2015, 1168.

11 See the summary of the starting position in: Additional Report to the partial revision of the Swiss Code of Obligations (*Zusatzbotschaft zur Teilrevision des Obligationenrechts (Schutz bei Meldung*

(*Bundesrat*) affirmed anew its intention to legislate whistleblowing. The council then passed an amended draft[12] (CH-Draft-CO) and a corresponding additional report, preserving the principles of the preceding version,[13] on 21 September 2018.

As both the Swiss National Council (*Nationalrat*) and the Swiss Council of States (*Ständerat*) engaged in the draft law, the legislative process was formally in the procedure of reconciling after the first refusal by the Swiss National Council (*Nationalrat*) on 3 June 2019. The Swiss Council of States (*Ständerat*), however, did not follow the Swiss National Council (*Nationalrat*) and approved the draft law without changes on 16 December 2019. The draft law was therefore resubmitted to the Swiss National Council (*Nationalrat*). The Legal Affairs Committee of the Swiss National Council (*Nationalrat*) advised its council in January 2020 to stick to its resolution and not to enter into the submission.[14] Unsurprisingly, the draft law was again dismissed by the Swiss National Council (*Nationalrat*) on 5 March 2020, with the consequence that the submission is now definitely rejected.

III. THE SWISS DRAFT LAW IN LIGHT OF THE EU WHISTLEBLOWER PROTECTION DIRECTIVE

A. Regulatory Approach

Pursuant to a current study, a large part of Swiss companies, i.e. 71.2% of large Swiss companies and 50.5% of SMEs with 20 to 249 employees, have – without any statutory obligation – already incorporated a reporting office for whistleblowers. The reasons for the incorporation of a reporting office by these Swiss companies are, in particular, to strengthen a corporate image of ethics and integrity and to avoid financial damages; but the move is also driven by an intrinsic conviction of the benefit and efficiency of a reporting office. The most important reasons cited for not setting up a reporting office were the absence of any statutory obligation and the intention to avoid a culture of denunciation.[15]

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von Unregelmässigkeiten am Arbeitsplatz) as of 21 September 2018 (*Zusatzbotschaft*), BBl 2019 1409, 1411 et seq.

12 The File Number of CH-Draft-CO is 13.094 published at BBl 2019 1433 et seq.

13 Additional Report (*Zusatzbotschaft*), BBl 2019 1409 et seq.

14 Media release of the Legal Commission of the Swiss National Council as of 31 January 2020; (2 Mar., 2020) https://www.parlament.ch/press-releases/Pages/mm-rk-n-2020-01-31.aspx.

15 Christian Hauser, Nadine Hergovits & Helene Blumer, *Whistleblowing Report 2019*, Chur 2019, 17, 18 and 20.

Despite the introduction of whistleblowing systems by Swiss companies already being far advanced, the Swiss Federal Council (*Bundesrat*) proposed to introduce statutory regulations on this topic. Through these regulations the Swiss Federal Council (*Bundesrat*) aimed to procure legal certainty in all areas. The following describes the CH-Draft-CO as proposed to the Swiss National Council (*Nationalrat*).

Employees obtain the right to report[16] and, in safeguarding their fiduciary duty under labor law, shall receive clarity on the conditions under which they may make a report. By this the reporting is legitimized. The employer, when introducing internal whistleblowing systems, shall receive clarity on which procedures must be complied with to reduce the risk that their employees will make reports to authorities or to the public. The CH-Draft-CO thereby proposes legal *incentives* instead of a statutory duty to implement an internal reporting office.

In contrast to the CH-Draft-CO, the EU Whistleblower Protection Directive obliges corporates and communities that provide for a certain size to implement whistleblowing systems and determines minimum standards.

B. Personal Scope of Application

The CH-Draft-CO applies to reports in the context of employment relationship in the private sector. For this reason, the protection of whistleblowers shall be incorporated into the Swiss Code of Obligations (*Obligationenrecht*, CO). The regulations of the CH-Draft-CO shall be embedded in connection with the fiduciary duty of an employee towards his or her employer and the obligation to secrecy resulting therefrom, pursuant to Art. 321a CO (Art. 321a$^{bis\,0}$ et seq. CH-Draft-CO).

Accordingly, voluntary, pro bono and retired employees and self-employed persons do not fall within the scope of application. The Swiss Federal Personnel Act (*Bundespersonalgesetz*, BPG)[17] applies to public service employees and regulates in Art. 22a BPG the right and the duty to report in the case of detected grievances.[18] Customers, suppliers, shareholders and other stakeholders with no employment relationship with the corporation also do not fall within the

16 The question whether employees are subject to a duty to report irregularities is not addressed in this article. In that respect see Diana Imbach Haumüller, *Whistleblowing in der Schweiz und im internationalen Vergleich – ein Bestandteil einer effektiven internen Kontrolle?* Diss. Universität Zürich, Zürich/Basel/Genf, 2011 Rn. 73; Sara Licci, *Codes of Conduct im Arbeitsverhältnis mit besonderem Blick auf das Whistleblowing*, AJP 2015, 1168, 1180.

17 BPG, SR 172.220.1.

18 The BPG is not addressed any further in this article. In that respect see Nicole Jungo, *Whistleblowing – Lage in der Schweiz*, recht. 2012, 65, 68 et seq.

scope of application of the CH-Draft-CO, and nor do third parties who often are permitted to report within the whistleblowing systems of large international groups.

In practice, Swiss enterprises offer, in addition to their employees, further groups of persons the possibility to use their reporting office. These groups include, among others, customers (40.6%), shareholders (22.4%), employees of suppliers (22.4%) or competitors (13%).[19]

The protection under the EU Whistleblower Protection Directive, in contrast, is not limited to the private sector but, pursuant to Art. 4, also includes public law employment relationships (including public officials) as well as the self-employed within the meaning of Art. 49 TFEU, shareholders and persons belonging to the administrative, management or supervisory body of an enterprise, including non-executive members, as well as volunteers, trainees, and persons working under the supervision and direction of contractors and suppliers. In addition, the protective measures also apply to facilitators and third parties such as colleagues and relatives of the whistleblower.

A further difference between the CH-Draft-CO and the EU Whistleblower Protection Directive is as follows: The EU Whistleblower Protection Directive leaves it up to the individual member state's law whether the duty to implement reporting channels applies only to employers with 50 or more employees, or respectively to communities of more than 10,000 inhabitants (Art. 8)[20]. Enterprises in the financial services sector are obliged to implement the channels irrespective of their size (Art. 8 (4)).[21] The CH-Draft-CO does not provide for such distinctions, with the result that the regulations apply in theory from one employee and upwards; the draft, however, does not impose a duty to implement reporting channels.

C. Material Scope of Application

At present there is legal uncertainty in Switzerland for employees regarding

19 Christian Hauser, Nadine Hergovits & Helene Blumer, *Whistleblowing Report 2019*, Chur 2019, 38.

20 The regulation contained in the draft version of the EU Whistleblower Protection Directive pursuant to which the obligation applies only to civil law entities with an annual turnover or an annual balance of more than EUR 10 million is no longer part of the passed version.

21 Based on a risk assessment, Member State rules may also oblige entities from other sectors to implement reporting systems, irrespective of their size (recital 48), and to incentivize smaller entities below the minimum size to implement reporting systems (e.g. by reducing the requirements) (recital 49); P8_TA-PROV(2019)0366, p. 32.

whether and to whom at their place of employment they may report irregularities without breaching their fiduciary duty (Art. 321a para. 4 CO) and whether they render themselves liable to prosecution by doing so (Art. 162 Swiss Criminal Code (CH-StGB)).[22] The CH-Draft-CO addresses these aspects and states the conditions under which employees may lawfully report irregularities while respecting their fiduciary duty under labor law.

In line with this logic, the supplementary report rules that compliance with the conditions for a report qualifies as a statutory justification in the meaning of Art. 14 CH-StGB. A whistleblower acting in compliance with the regulations of the CH-Draft-CO is therefore not threatened by sanctions under criminal law.[23]

1. Irregularities

Pursuant to Art. 321a$^{bis\ 0}$ CH-Draft-CO, employees may report irregularities. Criminal acts, breaches of statutory law, and violations of internal regulations of the employer (Art. 321a$^{bis\ 0}$ para. 2 CH-Draft-CO)[24] that come within the confidentiality duty of the employee resulting from the employment relationship (Art. 321a para. 4 CO) qualify as irregularities. This includes all confidential facts the employee learns of while in the service of the employer, in particular industrial and business secrets as well as all other facts which the employer under certain circumstances wants to be kept confidential.[25] Facts that are not subject to this confidentiality duty do not meet the conditions for a legitimate report pursuant to Art. 321a$^{bis\ 0}$ para. 2 CH-Draft-CO.[26]

The term "irregularity" is partially non-mandatory law[27] on the first level of cascade[28]. This because the employer may determine, in addition to violations of

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22 Art. 162 CH-StGB states: "Any person who betrays a manufacturing or trade secret that he is under a statutory or contractual duty contract not to reveal, any person who exploits for himself or another such a betrayal, is liable on complaint to a custodial sentence not exceeding three years or to a monetary penalty."; Swiss Criminal Code, SR 311.0 (CH-StGB).

23 Additional Report (*Zusatzbotschaft*), BBl 2019 1409, 1414.

24 This listing is not exhaustive; Additional Report (*Zusatzbotschaft*), BBl 2019 1409, 1416.

25 Each fact that is cumulatively known to a limited circle of persons and not publicly available, in respect of which the employer has a legitimate interest in maintaining confidentiality and in respect of which the employer has a will to maintain confidentiality which is, at least, apparent from the circumstances or probable; *Ullin Streiff & Adrian von Kaenel & Roger Rudolph,* Arbeitsvertrag, Praxiskommentar zu Art. 319–362 OR, 7. Aufl., Zürich 2012, Rn. 12 zu Art. 321a OR .

26 Additional Report (*Zusatzbotschaft*), BBl 2019 1409, 1414 et seq. and 1422.

27 Additional Report (*Zusatzbotschaft*), BBl 2019 1409, 1425.

28 See section. III. D.1.

criminal and administrative law and other statutory regulations which are verifiable by authorities, that further violations (e.g. of internal regulations) qualify as irregularities in the meaning of Art. 321a$^{bis\ 0}$ CH-Draft-CO. It is therefore at the discretion of the employer to determine in the corporate code of conduct what additional cases may be reported, such as cases of discrimination or sexual harassment. Irregularities that may be reported to authorities or that may be disclosed to the public are exclusively defined by law, however, and therefore do not fall within the non-mandatory category.[29]

The material scope of application of the EU Whistleblower Protection Directive governs the minimum standard applicable to all EU Member States by referring to breaches of EU law in the categories listed in Art. 2. These include, in particular, public procurement, financial services, financial products and financial markets, the prevention of money laundering and financing of terrorism, product safety, environmental protection, food safety, public health, customer protection, protection of privacy and personal data, and the safety of network and information systems. Breaches are defined as acts or omissions that are unlawful and relate to the above-listed areas or that defeat the object or purpose of the rules in these areas (Art. 5 No. 1).

2. Special Case Professional Duty of Confidentiality

The special case of professional duty of confidentiality must be differentiated from the confidentiality duty of an employee pursuant to Art. 321a para. 4 CO. In respect of employees the CH-Draft-CO contains a reservation regarding professional secrecy (Art. 321 CH-StGB, Art. 47 CH-BankG[30], Art. 43 BEHG[31]) and exempts the employees from the new regulations (Art. 321a^{septies} CH-Draft-CO). This concerns, next to medical confidentiality, inter alia, attorney-client privilege and banking secrecy. To the extent that no other legal justifications apply, professionally privileged persons reporting irregularities can rely only on the justifications of safeguarding justified interests.[32] In Art. 3 para. (3) the EU Whistleblower Protection Directive states that the Directive does not affect the protection of legal and medical professional privilege.

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29 Additional Report (*Zusatzbotschaft*), BBl 2019 1409, 1425.

30 Swiss Federal law on banks and saving banks as of 8 November 1934 (*Bundesgesetz vom 8. November 1934 über die Banken und Sparkassen, Bankengesetz, BankG*) SR 952.0.

31 Swiss Federal law on stock exchanges and securities trading as of 24 March 1995 (*Bundesgesetz vom 24. März 1995 über die Börsen und den Effektenhandel, Börsengesetz, BEHG*) SR 954.1.

32 BGE 6B_1369/2016, E.6. dated 20 July 2017.

D. Three-Step Reporting Cascade

The CH-Draft-CO provides for a three-step reporting cascade pursuant to which the whistleblower shall report, first, to the employer, then to the competent authority, and only in the last step to the public. Provided that employees comply with this cascade and its preconditions the report of an irregularity is basically deemed to comply with the fiduciary duty (Art. 321a$^{bis\ 0}$ CH-Draft-CO). This reporting cascade codifies the rulings of the Swiss Federal Supreme Court on permitted whistleblowing in Switzerland.[33]

Also, employees do not violate their fiduciary duty if they obtain advice from a person subject to statutory confidentiality regarding their right to report irregularities (Art. 321a^{sexies} CH-Draft-CO).

In detail, the conditions and requirements of each cascade remain complex for employers as well as employees in spite of the statutory basis.

1. Report to Employer (1st Cascade)

Employees must generally always report irregularities first to the employer (1st Cascade).

In this respect the CH-Draft-CO provides for a statutory assumption that a report to the employer has an effect if the employer creates an independent office for the receipt and handling of reports, draws up rules on the subsequent treatment thereof, prohibits terminations and other detriments due to a report, and allows for reports to be made anonymously (Art. 321a^{quater} para. 2 CH-Draft-CO). Therewith, the legislator intends to set an incentive for the implementation of whistleblowing systems. If a whistleblowing system is introduced, the whistleblower must prove that the reporting procedures are ineffective and that a report to the employer would therefore have no impact.[34] Thus, in the case of an implemented reporting system, a report directly to the competent authority is possible only in exceptional circumstances.[35] The legislator does not explicitly state, however, that the lack of a whistleblowing system authorizes the whistleblower to report directly to the authorities. Even if a whistleblowing system is not in place, such reporting, pursuant to the wording of the draft law, is permitted only if the whistleblower may legitimately expect that a report (e.g. to the superior) will have no effect.

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33 BGE 127 III 310 dated 30 March 2001; BGE 4A-2/2008 dated 8 July 2008.

34 Additional Report (*Zusatzbotschaft*), BBl 2019 1409, 1417.

35 Additional Report (*Zusatzbotschaft*), BBl 2019 1409, 1427.

The EU Whistleblower Protection Directive, too, sets a preference and clarifies that the use of internal channels is preferred over external channels in cases where the breach can be addressed effectively internally (Art. 7 (2)).

a) Internal Whistleblowing Systems

The employer is left with sufficient freedom in designing its whistleblowing system: Art. 321a^{bis} CH-Draft-CO does not contain – contrary to the regulations pursuant to Art. 321a^{quater} para. 2 CH-Draft-CO – any specifications on how to design an internal whistleblowing system. It must be suitable for the appropriate handling of reports and secure an independent handling of the report.[36]

aa) Permitted Reporting Channels

The CH-Draft-CO differentiates between *internal* and *external persons* and *offices* that are authorized to accept a report (Art. 321a^{bis} para. 1 letter b. CH-Draft-CO). An authorized internal *person* may be the superior, the management, the board of directors (*Verwaltungsrat*) of a stock corporation,[37] or the compliance officer. As an internal *office* nominated by the employer and authorized to accept a report, the compliance department or the HR department may be considered in particular. Mostly, in Swiss practice, the management, the compliance department, and the HR department are responsible for accepting reports.[38]

Alternatively, the employer may delegate these roles and appoint an external representative. In that respect the employer may rely on its own solution (e.g. appointment of an attorney as ombudsperson) or on an industry solution, i.e., a solution offered by a third party to a specific business sector. In the latter case, associations for example could create an ombudsman's office for their sector for those members who for cost reasons cannot afford their own ombudsperson. This could be a solution, for example, for non-profit organizations such as charitable foundations or associations.[39]

If an employer has implemented a reporting office, the whistleblower is deemed to be acting in accordance with his or her fiduciary duty only if he or

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36 Additional Report (*Zusatzbotschaft*), BBl 2019 1409, 1417.

37 Additional Report (*Zusatzbotschaft*), BBl 2019 1409, 1416 and 1422.

38 Christian Hauser, Nadine Hergovits & Helene Blumer, *Whistleblowing Report 2019*, Chur 2019, 43.

39 Rita Pikó, *Compliance bei Non-Profit-Organisationen – Teil 2, Unter besonderer Berücksichtigung von gemeinnützigen Stiftungen und Vereinen in Deutschland und der Schweiz*, CB, 263, 264 et seq. (2018).

she delivers the report to such a reporting office (Art. 321a^{bis} para. 1 letter b. CH-Draft-CO).

The EU Whistleblower Protection Directive follows the same understanding, pursuant to which reporting channels may be operated internally by appointed persons or offices or externally by a third party (Art. 8 (5)).

bb) Plausible Suspicion

A further condition for the employee to comply with the fiduciary duty, next to reporting to a reporting office determined by the employer, is the existence of a plausible suspicion (Art. 321a^{bis} para. 1 letter a. CH-Draft-CO). In the new version of the draft law the term *sufficient suspicion* ("*hinreichender Verdacht*") was replaced by *traceable suspicion* ("*nachvollziehbarer Verdacht*") to achieve a better cohesion between the French- and the Italian-language versions of the draft law.[40] Accordingly, at the time of reporting the whistleblower must have had objective reasons to assume an irregularity.

cc) Reporting Channels

A decisive factor in the successful use of whistleblowing systems is positive communication and information for employees on the available reporting channels. The whistleblowing system will be used only if its existence is known of and trusted. It is left to the discretion of the employer to decide what channels are permitted for the reporting. Reports may be made through meetings in person, in writing (letter, fax, email), by phone or through special reporting channels such as mobile apps, social media, or Internet-based whistleblowing systems. In practice, Swiss companies offer three different reporting channels: email, meetings in person at the responsible office, and reporting by phone. Only 31% of the companies offer an Internet-based whistleblowing system.[41]

Pursuant to the EU Whistleblower Protection Directive, reports must be allowed in writing and/or orally as well as through meetings in person (Art. 9 (2)).

dd) Anonymous Reporting

The EU Whistleblower Protection Directive leaves it to the respective Member State whether anonymous reports must be accepted and handled (Art, 6 (2)).

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40 Additional Report (*Zusatzbotschaft*), BBl 2019 1409, 1422.

41 Christian Hauser, Nadine Hergovits & Helene Blumer, *Whistleblowing Report 2019*, Chur 2019, 36.

The CH-Draft-CO permits *anonymous* reports[42] and therewith recognizes that anonymous reports may, under given circumstances, be the only means by which a whistleblower may report irregularities without risk.[43] Among the large corporations in Switzerland, 73% allow for anonymous reports. The need for such a solution is demonstrated by the fact that 58% of the initial reports received by these corporations do not refer to the identity of the whistleblower.[44]

ee) Abuse of the Whistleblowing System

It is often feared that the implementation of whistleblowing systems – in particular, if anonymous reporting is permitted – increase abuse and bolster false accusations.[45] No statistical evidence, however, supports such a fear: one study shows that only 3% of all reports qualify as abusive. On the contrary, anonymous whistleblowers basically report in good faith.[46] Besides, the anonymous reporting has – contrary to the often-voiced concerns – no influence on the amount of abusive reports.[47]

The employer should clearly communicate its expectations when implementing a whistleblowing system, similar to the implementation of other compliance measures. Accordingly, a clear signal that the abuse of the whistleblowing system for one's own purposes or even defamation will trigger disciplinary sanctions is recommended. For this reason, Art. 23 (2) of the EU Whistleblower Protection Directive states that the Member States must provide for effective, appropriate and dissuasive penalties in respect of persons where it is established that they knowingly reported false information. In addition, measures for compensatory damages resulting from such false reporting must be provided for.

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42 Art. 321a^{quater} Para. 2 letter d. CH-Draft-CO.

43 The additional report mentions the internet-based whistleblowing system of the Swiss Federal Audit Office (*Eidgenössische Finanzkontrolle*) as an example (https://www.efk.admin.ch/de/whistleblowing-d.html) as well as of the Federal Office of Police (*Bundesamtes für Polizei*) (https://www.bkms-system.ch/EFK-de www.whistleblowing.admin.ch); BBl 2019 1409, 1423.

44 Christian Hauser, Nadine Hergovits & Helene Blumer, *Whistleblowing Report 2019*, Chur 2019, 39/59.

45 SwissHoldings Sessionsticker (Sommerssession 2019) dated 29 May 2019, 2 (2 Mar. 2020) https://swissholdings.ch/wp-content/uploads/2019/05/Ticker-Sommersession-2019.pdf.

46 Christian Hauser & Lea Stühlinger, *Meldestellen für Hinweisgeber: Unternehmen und Politik sind gefordert*, CB, 447 (2018).

47 Christian Hauser, Nadine Hergovits & Helene Blumer, *Whistleblowing Report 2019*, Chur 2019, 10.

b) Duty of Action for Employers

aa) Taking of Adequate Measures

The employer is obliged to follow up on a report, irrespective of whether the employer provides for an internal reporting system or not.[48] The CH-Draft-CO refers in this respect to the duty to take adequate (*genügende*) measures to handle the report (Art. 321a^{bis} para. 2 letter c. CH-Draft-CO). Deliberately, it is not specified what is meant by the term "*genügend*".[49] Whether measures in the specific case are adequate shall be objectively reasoned and may not be judged from the subjective point of view of the employer or the whistleblower. Criteria for the judgement of the measures taken by the employer are, in particular, the speed and appropriateness of the employer's reaction in respect of the reported irregularity.[50]

An example for a sufficient measure for handling a report is an initial, preliminary examination of the merits, followed by a triage. The office carrying out the examination must decide whether the case should be investigated and, in particular, whether the investigation should be conducted internally or with external support. Corporates should standardize these processes in an early stage, to be able to conduct, upon receipt of a report, the processes in an efficient, speedy and effective way. According to one study, only 50% of the questioned corporations actually follow this advice.[51]

The employer can determine the subsequent measures only after the incident has been investigated and resolved. By regularly informing the whistleblower on the status of the investigation and how it is being handled, the employer can signal to the whistleblower that the report is being taken seriously and is being investigated. This shall strengthen trust both in the employer and in the whistleblowing system.

bb) Deadlines for Handling the Report

The CH-Draft-CO imposes duties on the employer to act on a received report. Under the draft, the employer must establish an appropriate deadline of no more than 90 days from receipt of a report for its handling (Art. 321a^{bis} para. 2

48 Additional Report (*Zusatzbotschaft*), BBl 2019 1409, 1427.

49 Additional Report (*Zusatzbotschaft*), BBl 2019 1409, 1419.

50 Additional Report (*Zusatzbotschaft*), BBl 2019 1409, 1424.

51 Christian Hauser & Lea Stühlinger, *Meldestellen für Hinweisgeber: Unternehmen und Politik sind gefordert*, CB, 446 (2018).

letter a CH-Draft-CO). The CH-Draft-CO thereby aims to address different possibilities: simple and urgent cases that require a quick response and a correspondingly shorter deadline, and more complex cases that may require a longer investigation.[52] It seems that the Swiss legislator intended to oblige the employer to conclude an investigation of a report on irregularities within no more than 90 days. For complex matters, however, practice shows that this deadline cannot be met. Certain internationally known compliance cases that have been investigated internally have taken several years to conclude. A different, more practically orientated interpretation of this draft provision would be that the employer is obliged to start investigation measures within the deadline of 90 days but need not, by law, have concluded them within that time.

The employer is obliged to inform the whistleblower on the receipt and the handling of the report (Art. 321a^{bis} para. 2 letter b. CH-Draft-CO) independently of whether a whistleblowing system has been implemented or not.[53] The employer is exempt from this obligation only if the report is anonymous, which makes the obligation impossible or apparently unreasonable for the employer to fulfil. The CH-Draft-CO does not state at what point in time the employer must inform the whistleblower on the handling of a report (Art. 321a^{bis} para. 2 letter b. CH-Draft-CO).

The EU Whistleblower Protection Directive is more concrete in these aspects: the employer must confirm receipt of a report within seven days to the whistleblower (Art. 9 (1) letter b). Within three months of that confirmation the employer is obliged to inform the whistleblower on the subsequent measures taken (Art. 9 (1) letter f). Such subsequent measures include actions to assess the accuracy of the allegations made in the report and to stop the reported violation (Art. 5 No. 12).

2. Report to Authorities (2nd Cascade)

If an employer does not comply with its statutory duties upon receipt of a report on irregularities (see above section D.1.b.) the whistleblower is entitled to inform the competent authorities on the irregularities without violating his or her fiduciary duty (Art. 321a^{ter} CH-Draft-CO). The same applies if, due to his or her report to the employer, the whistleblower's employment contract is terminated or the whistleblower experiences other detrimental consequences (Art. 321a^{ter} letter b. CH-Draft-CO).

A whistleblower may signal a report directly to an authority, i.e. without a pre-

52 Additional Report (*Zusatzbotschaft*), BBl 2019 1409, 1424.

53 Additional Report (*Zusatzbotschaft*), BBl 2019 1409, 1427.

vious report to the employer, if there exists plausible suspicion and the whistleblower may assume that (i) a report to the employer will have no effect, or (ii) the competent authority would be prevented in its duties without an immediate report to it, or (iii) there exists an immediate and severe threat to lives, health or the safety of persons or the environment or an immediate danger of great damage. (Art. 321a^{quater} CH-Draft-CO). Whether, in a given situation, a danger exists or merely threatens is based on the assessment by the whistleblower.[54]

The authority competent to verify compliance with the violated regulation is the recipient of a report on irregularities: the prosecution authorities in the case of criminal acts, and the administrative authorities in the case of a violation of public law. The CH-Draft-CO specifies that, to be able to report to authorities, the irregularities must concern regulations subject to control by an authority. This basically excludes irregularities in civil law that concern, exclusively, a legal relationship between private persons. Irregularities may, however, be reported to authorities in spite of their association with civil law where the legal relationship is between a private person and an authority and is covered, for example, by the law on the protection of adults (*Erwachsenenschutzrecht*) or company registration law.[55]

Accordingly, additional violations determined by the employer that do not qualify as a violation of law verifiable by authorities cannot be reported to an authority. Rather, the employee would in such a case probably be in breach of his or her fiduciary duty. Any informing of the public in a case that does not breach fiduciary duty is not intended by the CH-Draft-CO either, as such a report mandatorily requires, first, a report to the competent authority (Art. 321a^{quinquies} CH-Draft-CO, see below section III.D.3.).

In this context it should be further noted that the regulations apply only to reports to domestic and not to foreign authorities.[56] A report to a German authority of a criminal irregularity by an employee of a Swiss subsidiary of a German company, for example, would therefore not be protected by the CH-Draft-CO.

Pursuant to Art. 10 of the EU Whistleblower Protection Directive, employees may report to authorities after having made use of internal channels. Alternatively, subject to certain conditions, they may report directly to the competent authority.

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54 Additional Report (*Zusatzbotschaft*), BBl 2019 1409, 1428.

55 Additional Report (*Zusatzbotschaft*), BBl 2019 1409, 1426.

56 Additional Report (*Zusatzbotschaft*), BBl 2019 1409, 1417.

3. Disclosure to the Public (3rd Cascade)

Pursuant to the CH-Draft-CO, disclosure to the public by a whistleblower is an exception. The whistleblower that discloses irregularities to the public is deemed to comply with his or her fiduciary duty only if (i) the whistleblower reported the irregularity to the competent authority and received no appropriate response within 14 days thereafter, or (ii) the whistleblower's employment contract was terminated following the report to the authority, or (iii) the whistleblower experienced other detrimental consequences (Art. 321a^{quinquies} letter c. CH-Draft-CO). A further condition is that the whistleblower has serious reasons to believe – in good faith – that the reported circumstances are true (Art. 321a^{quinquies} letter a. CH-Draft-CO). By these conditions the legislator increases the hurdle compared to the preceding steps of cascades that require only that a whistleblower has a plausible suspicion.[57] Under Art. 14 CH-StGB, the whistleblower is deemed to be acting justly only if all these conditions are met.[58]

In the final version of the EU Whistleblower Protection Directive the conditions for protection of a whistleblower if he or she discloses information to the public was redefined (Art. 15). Accordingly, a whistleblower must (i) initially report to an internal or external reporting channel or directly externally if no appropriate action was taken in response to the report within the relevant timeframe, and (ii) the whistleblower has reasonable grounds to believe that (iii) the violation may constitute an imminent or manifest danger to the public interest or, in the case of external reporting, there is a risk of retaliation or there is low prospect of the violation being effectively addressed.

57 Additional Report (*Zusatzbotschaft*), BBl 2019 1409, 1417.

58 Additional Report (*Zusatzbotschaft*), BBl 2019 1409, 1414.

3rd Cascade (Public)	**Disclosure to the Public**		
	complies with the employee's fiduciary duties, if • employee has **serious reasons** to consider the reported circumstances to be true • **after reporting to the competent authority** AND • competent authority did not inform employee on the handling of the report **within 14 days** despite request OR • employee was **laid-off** after the report to the authority or has experienced other detrimental consequences		
2nd Cascade (Authority)	**Report to Competent Authority without prior report to employer**	**Report to Competent Authority following report to employer**	**Compulsory Measures by Authority**
	is compliant with employee's fiduciary duty, if • employee has **plausible suspicion** of an irregularity AND • employee **did not previously** report to employer AND • employee reasonably deems that report to employer **will not have any effect** OR • competent authority would **be prevented** in its duties without immediate report to it OR • there is an **immediate** and **severe threat** to lives, health or the safety of persons or the environment or an immediate danger of great damage	is compliant with employee's fiduciary duty, if • employee has **plausible suspicion** of an irregularity AND • employee **did previously** report to employer first AND • employer **did not take compulsory measures within 90 days** OR • employee was **laid-off** after the report or has experienced other **detrimental consequences**	• competent authority must inform employee on the handling of the report **within 14 days**
1st Cascade (Employer)	**Report to Employer**	**Report to Employer**	**Compulsory Measures by Employer**
	is compliant with employee's fiduciary duty, if • employee has **plausible suspicion** of an	is compliant with employee's fiduciary duty, if • employee has **plausible suspicion** of an	• duty to handle report **within 90 days**

	• **irregularity** = - breach of **law** - breach of **internal regulations** • **no** reporting office exists	• **irregularity** = - breach of **law** - breach of **internal regulations** • reported to **reporting office**	• **confirmation of receipt** of report + treatment steps • initiation of **sufficient measures**

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Whistleblower		
• employee in the **private** sector • **right to report** • **anonymous** reports are permitted • employee may take advice from a person subject to statutory confidentiality duty		
Regulatory Approach	**Protection of Employer from reports to Third Parties**	**Protection of Employee**
• **no statutory or self-regulatory duty** to implement a reporting system. • however, legal **incentive** to implement an internal reporting system to prevent reporting to authority or public	protection of employer from reports by employee to authority or public through **statutory assumption** that a report has an effect, if employer • provides for an independent office for the receipt and handling of reports • provides for regulations for the handling of reports (whistleblowing procedures) • prohibits dismissals and other detrimental consequences • allows for anonymous reports	• termination of employment contract by employer is abusive if employee reports in compliance with fiduciary duty • employer is obliged to ensure that employer incurs no detrimental consequences due to submitting a report

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E. Employer's Duties Regarding the Protection of the Whistleblower

The employer must ensure that the whistleblower incurs no disadvantages when reporting in compliance with the above described order of cascade. Fur-

ther, the whistleblower may incur no disadvantages from consulting on the reporting rights with a person subject to statutory secrecy obligations (Art. 328 para. 3 CH-Draft-CO). The legislator does not define the meaning of disadvantages, nor what protection measures must be implemented by the employer, nor what consequences are triggered by a breach of such duties.

The EU Whistleblower Protection Directive explicitly specifies in Art. 19 what actions qualify as retaliation and obliges the member states to take measures to prohibit any form of retaliation. Such retaliations include, inter alia, suspension, lay-off, demotion or withholding of promotion, reduction in wages, negative performance assessment, intimidation, discrimination, harm to the person's reputation, including the threat and attempt of these retaliations. In addition, extensive safeguards are provided: whistleblowers shall not incur any liability for breach of contractual or statutory restrictions on disclosure of information (Art. 21). Whistleblowers are entitled to fair proceedings and the right to be heard, effective remedy and right to access their file (Art. 22). Persons that hinder or try to hinder reports, retaliate or breach the duty of maintaining confidentiality duties are subject to penalties (Art. 23 (1)).

F. Abusive Lay-Off

Swiss employment law is marked by the principle of freedom to terminate an employment contract. Employers and employees may ordinarily terminate an unlimited employment relationship without objective justification, subject to notice periods and termination dates pursuant to Art. 334 et seq. CO, respectively without notice pursuant to Art. 337 et seq. CO.

Art. 336 CO provides for an objective protection from termination by an exemplary listing of abusive circumstances. The draft law intends to extend these abusive circumstances to include the termination of the employment relationship by the employer due to the whistleblower reporting an irregularity in compliance with the cascade or due to the whistleblower taking advice in that respect (Art. 336 para. 2 letter d. CH-Draft-CO). In this case the whistleblower may, in accordance with Art. 336b (1) CO, raise an objection with the employer against the termination until the end of the period of notice.

The labor law consequences of an abusive termination are laid down in Art. 336a CO, respectively Art. 337c CO. In the case of an abusive ordinary termination the whistleblower is entitled to compensation of up to the equivalent of six months' salary. In the case of an abusive termination without notice the whistleblower is entitled, pursuant to Art. 337c CO, to what he or she would have earned had the employment relationship been terminated in compliance with the ordinary notice period.

The termination, however, remains effective. The Swiss Federal Council (*Bun-*

desrat) deliberately wishes to go no further.[59] The CH-Draft-CO does not provide for grandfathering of the whistleblower or an explicit prohibition of retaliation or even a penalty for abusive termination. Rather, the legislator relies on the deterrent effect of a whistleblower informing the public should the whistleblower be laid off or incur other detrimental consequences, and provided that the other conditions are satisfied.[60]

IV. OUTLOOK

Statutory regulation of the conditions for permissible whistleblowing in Switzerland is undoubtedly necessary to provide legal certainty for whistleblowers and employers. The Legal Affairs Committee of the Swiss National Council (*Nationalrat*) dismissed the draft of the Swiss Federal Council (*Bundesrat*) on "Whistleblowing", reasoning that following its revision the draft of the Swiss Federal Council (*Bundesrat*) still remains very complex and hard to understand for employees.[61] The Swiss National Council (*Nationalrat*) "neatly" buried the draft law the first time on 3 June 2019, and for the second time and definitely on 5 March 2020.[62] At the end of the debate of the Swiss National Council (*Nationalrat*) the Swiss Federal Councillor (*Bundesrätin*), Karin Keller-Sutter stated that she cannot promise a different or better submission; in effect, that

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59 Report of the partial revision of the Swiss Code of Obligations (*Botschaft über die Teilrevision des Obligationenrechts*) dated 20 November 2013, BBl 2013 9513, 9515: "An abusive or unjustified notice following a report which does not violate the fiduciary duty will continue to be sanctioned in accordance with applicable law. (...) An additional protection against notice just for the case of a report of an irregularities cannot be justified compared to other reasons for an abusive notice." („*Eine missbräuchliche oder ungerechtfertigte Kündigung im Anschluss an eine Meldung, die nicht gegen die Treuepflicht verstösst, wird weiterhin nach dem geltenden Recht sanktioniert. (...) Ein erweiterter Kündigungsschutz nur für den Fall der Meldung einer Unregelmässigkeit lässt sich im Vergleich mit anderen Gründen für eine missbräuchliche Kündigung nicht rechtfertigen.*").

60 It is noteworthy that the whistleblower may notify the public only if the employer gave notice to the whistleblower or the whistleblower incurred other detrimental consequences after his or her report to the authorities. Pursuant to the draft act, the whistleblower may not lawfully inform the public if (i) the whistleblower fruitlessly reported to the employer and the employer thereupon gave notice to the whistleblower (ii) the whistleblower thereupon fruitlessly informed the authorities, and the other conditions for the lawful information of the public are met. For Art. 321a^{quinquies} letter c. n^{o} 2 CH-Draft-CO states that the public may be informed only if the whistleblower was given notice after his or her report to the authority – but not before.

61 On 3 May 2019 the Legal Affairs Committee of the Swiss National Council dismissed the proposal of the Swiss Federal Council on "Whistleblowing" by 19 to 4 votes; press release of the Legal Affairs Committee of the Swiss National Council dated 3 May 2019, (13 Mar. 2020) https://www.parlament.ch/press-releases/Pages/mm-rk-n-2019-05-03.aspx.

62 Swiss National Council in favor of a "neat burial" of the whistleblowing proposal, notice dated 13 May 2020; https://www.parlament.ch/de/services/news/Seiten/2019/20190603185414556194158159041_bsd155.aspx.

the Swiss Federal Council (*Bundesrat*) will not be able to take action nor will it be able to present a new submission immediately.[63]

In the end, following a long legislative process, whistleblowers in Switzerland remain without statutory protection. Swiss corporations with foreign business must deal with foreign rules, i.e. the EU Whistleblower Protection Directive, on their own. Presumably, the OECD's evaluation of Switzerland may not become a positive evaluation in the short term.

63 Speech of Federal Councilor Karin Keller-Sutter, (13 Mar. 2020) https://www.parlament.ch/de/ratsbetrieb/amtliches-bulletin/amtliches-bulletin-die-verhandlungen?SubjectId=48524#votum12.