

COMPLIANCE IN TIMES OF DISCRIMINATION¹

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ABSTRACT

Coming to terms with discrimination in the workspace (including sexual harassment and racism) as an integral part of compliance in Germany and Switzerland in recent years, profit-oriented companies and non-profit organizations have increasingly had to deal with discrimination, especially sexual assault and racist behavior. This article deals with how these risks can be addressed in compliance management systems, which preventive measures are recommended and which special features should be taken into account when investigating and dealing with such incidents internally.

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I. INTRODUCTION

A modern Compliance Management System (CMS) not only covers the prevention and combating of white-collar crime, but also cases of discrimination and in particular sexual harassment and racist behavior in the workspace.² The reasons for this lie primarily in economic factors, legal requirements and a value-based understanding of compliance. The combination of these three aspects makes it clear what position discrimination incidents in the workspace (including sexual harassment and racism) should have within CMS today.

The growing number of studies on sexual harassment in the workspace highlights the often unnoticed dimension of the problem. In the German-speaking countries, for example, about half of the population made their first-hand experience of sexual assault: in Switzerland, about 55% of female employees and 49% of male employees have been confronted with sexual harassment during the course of their working lives.³ According to a study by the German Federal Anti-Discrimination Office, about half of the people questioned have experienced legally prohibited harassment at work.⁴ And in Austria, approximately 56% of employed women have been sexually harassed at their workplace.⁵ Even lawyers are not safe from discrimination and sexual harassment at their workplaces, as the study published in 2019 by the International Bar Association shows: one of 3 women and one of 14 men surveyed were sexually harassed at work.⁶

Robust studies on racial discrimination specifically in the workspace are currently scarce or non-existent for Switzerland, Germany or Austria. This may change with the increased significance of this topic, fostered in particular by the “Black Lives Matter” movement. Reports on racial discrimination in Switzerland show that the workspace is the area in which – consistently over years – discriminatory behavior was most frequently reported.⁷ Pursuant to a study from 2019 in Germany, 21% of the

² All internet sources based on the original article were last accessed on 4/15/2020; this article deals with *unwanted* sexual assaults, harassment, racial and other discrimination. With regard to consensual relations in the workspace and their regulation in a code of conduct, see the Wal-Mart decision of the LAG Düsseldorf, 11/14/2005 – 10 TaBV 46/05, BB 2006, 335 Ls, NZA-RR 2006, 81.

³ Risiko und Verbreitung sexueller Belästigung am Arbeitsplatz, Eine repräsentative Erhebung in der Deutschschweiz und in der Romandie, 2008. According to a recent nationwide survey of women aged 16 and over, 73% consider sexual harassment to be very common, 64% personally know women who have been sexually harassed, with 33% of sexual harassment occurring in the workspace, *Jans u. a.*, gfs. Bern, May 2019, 7, 9 u. 12.

⁴ Studie der Antidiskriminierungsstelle des Bundes, Sexuelle Belästigung am Arbeitsplatz dated 3/3/2015, see https://www.antidiskriminierungsstelle.de/SharedDocs/Downloads/DE/publikationen/Umfragen/Handout_Umfrage_sex_Belaestigung_am_ArbPlatz_Beschaefigte.pdf;jsessionid=31664677A3430789E110157E2DEC7EE5.2_cid340?__blob=publicationFile&v=4.

⁵ This is also confirmed by the Working Climate Index (Arbeitsklima Index) November 2018, according to which 56% of employed women in Austria have been sexually harassed in their workspace; Kammer für Arbeiter und Angestellte für Oberösterreich, see https://ooe.arbeiterkammer.at/beratung/arbeitsundgesundheit/arbeitsklima/arbeitsklima_index/Arbeitsklima_Index_2018_November.html.

⁶ *Kieran Pender*, Us Too?, Bullying and Sexual Harassment in the Legal Profession, International Bar Association, May 2019, 8 („2019 IBA Study”), see <https://www.ibanet.org/bullying-and-sexual-harassment.aspx>. In this study, 6 980 interviews with lawyers in law firms, companies, bar associations, courts and public services were conducted in 135 countries.

⁷ For Switzerland see „Rassistische Diskriminierung in der Schweiz. Bericht der Fachstelle für Rassismusbekämpfung 2018“ issued by Fachstelle für Rassismusbekämpfung FRB, see https://www.edi.admin.ch/dam/edi/de/dokumente/FRB/Neue%20Website%20FRB/Monitoring%20und%20Berichterstattung/Bericht/FRB%20Bericht%202018.pdf.download.pdf/Rassistische-Diskriminierung%202018_de_WEB.pdf.

questioned employees reported having been victim or witness of racial discrimination in the workspace.⁸ Often, such discrimination goes hand in hand with other forms of discrimination such as bullying or mobbing.⁹ It is to be expected that the number of unreported cases of racist discrimination in the workspace is high.¹⁰

II. ECONOMIC FACTORS

A. Changes in the Social Perception and Assessment of Discrimination Cases

Harvey Weinstein, formerly one of Hollywood's most influential producers, was sentenced to 23 years in prison by the Supreme Court of New York on March 11, 2020. Two weeks earlier, he was found guilty by a jury court of having committed a criminal sex act and rape in the third degree of women from his professional environment. Weinstein is registered in a publicly accessible register for sexual criminals.¹¹ The Weinstein case follows on from other sexual assaults by well-known personalities in the industrial sector, such as that of US actor Bill Cosby and Bill O'Reilly, television journalist at US channel Fox News, and Roger Ailes, former CEO of Fox News. The testimonies of the victims of Weinstein and Co. made the hashtag #MeToo known worldwide as a campaign against all forms of sexual assault.¹²

#MeToo's main effect has been to ensure that victims of sexual assault are taken seriously, can hope to be heard and have their evidence carefully considered, even if there is no actual proof, only circumstantial evidence.¹³

⁸ Diversity & Inclusion Study 2019 by Glasdoor, see <https://about-content.glassdoor.com//app/uploads/sites/2/2019/10/Glassdoor-Diversity-Survey-Supplement-1.pdf>. For Austria, no comparable studies could be identified. The Austrian ZARA (Zivilcourage und Anti-Rassismus Arbeit) noted in its "Rassismus Report 2019" a number of 59 cases in or in connection with the workspace.

⁹ Rassistische Diskriminierung in der Schweiz. Bericht der Fachstelle für Rassismusbekämpfung 2018" issued by Fachstelle für Rassismusbekämpfung FRB, see https://www.edi.admin.ch/dam/edi/de/dokumente/FRB/Neue%20Website%20FRB/Monitoring%20und%20Berichterstattung/Bericht/FRB%20Bericht%202018.pdf.download.pdf/Rassistische-Diskriminierung%202018_de_WEB.pdf.

¹⁰ See Rassistische Diskriminierung in der Schweiz. Bericht der Fachstelle für Rassismusbekämpfung 2018" issued by Fachstelle für Rassismusbekämpfung FRB, see https://www.edi.admin.ch/dam/edi/de/dokumente/FRB/Neue%20Website%20FRB/Monitoring%20und%20Berichterstattung/Bericht/FRB%20Bericht%202018.pdf.download.pdf/Rassistiche-Diskriminierung%202018_de_WEB.pdf, p. 48.

¹¹ Langer, Historisches Urteil für #MeToo-Bewegung, NZZ dated 3/12/2020, see <https://www.nzz.ch/panorama/urteil-gegen-harvey-weinstein-ld.1545842>. Harvey Weinstein is facing further proceedings, NZZ dated 4/10/2020, see <https://www.nzz.ch/panorama/harvey-weinstein-zu-23-jahren-gefaengnis-verurteilt-ld.1532074>.

¹² Tenz/Fischer, Der „Fall Weinstein“ – Chronik eines Skandals, DW dated 3/9/2020, see <https://www.dw.com/de/der-fall-weinstein-chronik-eines-skandals/a-51881759>.

¹³ Binswanger/Widmer, Im Zweifel für die Opfer, Tagesanzeiger dated 2/25/2020, see <https://www.tagesanzeiger.ch/kultur/im-zweifel-fuer-die-perspektive-der-opfer/story/12636044>.

This is not an exclusive problem of the US film and television industry. Incidents of sexual discrimination occur regardless of industry or country: They can, inter alia, be found in the financial¹⁴ and consulting¹⁵ industry, at universities¹⁶, opera houses¹⁷ or royal houses¹⁸, at NPOs¹⁹ and in politics²⁰.

The typical pattern in many of these cases is the exploitation of hierarchical or economic positions of power. It is also typical that cases of discrimination and sexual harassment in the workspace are in most cases not made public at all.²¹ The reasons for this are mainly the dread of the consequences (financial or professional ruin, loss of reputation), the status of the discriminating person, the normalization of such incidents in the workspace, difficulties in providing evidence and the fear of having to report and relive what has been experienced over and over again.²² In the #MeToo movement, those affected have found a community that allows them to step out of the role of victim and to defend themselves. This is accompanied by the disappearance of the previous tacit tolerance of the exploitation of power positions for sexual discrimination and the trivialization of such behavior.

Ubisoft, a prominent French creator and publisher of video and online games with over 16,000 employees worldwide, was accused in Summer 2020 of tolerating a culture of sexual harassment and

¹⁴ Credit Suisse: Interne Untersuchung nach Firmenausflug, Finews.ch dated 6/27/2018, see <https://www.finews.ch/news/banken/32335-cs-investmentbanker-untersuchung-usa-praktikantin-belaestigung>; Sexual Harasment: Credit Suisse feuert zwei Londoner Banker, Finews.ch dated 8/23/2018, see <https://www.finews.ch/news/banken/32970-credit-suisse-sexuelle-belaestigung-entlassung>. Big accounting firms are affected too: <https://www.tagesanzeiger.ch/wirtschaft/standardey-stellt-mitarbeiter-nach-vorwuerfen-per-sofort-frei/story/22803713>.

¹⁵ Binswanger, „Zeig doch deine Assets ;-)\", Tagesanzeiger dated 12/11/2018, see <https://www.tagesanzeiger.ch/wirtschaft/unternehmen-und-konjunktur/zeig-doch-deine-assets/story/23578823>.

¹⁶ Rau, Sie wirft Professor Übergriffe vor – und fühlt sich nun abgekanzelt, Tagesanzeiger dated 12/18/2019, see <https://www.tagesanzeiger.ch/schweiz/standard/was-darf-eine-betroffene-nach-einem-missbrauchsfall-erwarten/story/30203736>; Pfändler, Nach Vorwurf der sexuellen Belästigung: ETH-Professor gibt Rücktritt bekannt, NZZ dated 1/29/2019, see <https://www.nzz.ch/zuersch/nach-vorwurf-der-sexuellen-belaestigung-eth-professor-gibt-ruecktritt-bekannt-ld.1455635?reduced=true>; Petersen, Einzelfälle? Strukturwandel? Zivilcourage?, Hochparterre dated 2/20/2019, see <https://www.hochparterre.ch/nachrichten/architektur/blog/post/detail/einzelfaelle-strukturwandel-zivilcourage/1550606879/>.

¹⁷ Widmer, #MeToo: Placido Domingo ist der nächste Täter, Tagesanzeiger dated 2/25/2020, see <https://www.tagesanzeiger.ch/kultur/klassik/metoo-placido-domingo-ist-der-naechste-taeter/story/14340543>.

¹⁸ US-Behörden wollen Prinz Andrew zum Fall Jeffrey Epstein befragen, Zeit Online dated 1/27/2020, see <https://www.zeit.de/gesellschaft/zeitgeschehen/2020-01/sexueller-missbrauch-jeffrey-epstein-prince-andrew-fbi>.

¹⁹ Pikó, CB 2018, 221, 222.

²⁰ On the resignation of the British Secretary of State for Defense Michael Fallon, Süddeutsche dated 11/1/2017, see <https://www.sueddeutsche.de/politik/grossbritannien-verteidigungsminister-fallon-tritt-zurueck-1.3732225?print=true>; Vice-President of Israel resigns due to allegations of misconduct, DW dated 12/20/2015 see <https://www.dw.com/de/israels-vizepremier-tritt-wegen-missbrauchsvorwürfen-zurück/a-18931246>; Unia gibt Roman Burger den Schuh, Handelszeitung dated 9/16/2016, see <https://www.handelszeitung.ch/politik/unia-gibt-roman-burger-den-schuh-1204108>; Resignation of the St. Galler canton council member Marcel Dietsche, Tagblatt dated 5/1/2019, see <https://www.tagblatt.ch/schweiz/verdacht-auf-sexuelle-belaestigung-kantonsrat-marcel-dietsche-tritt-zurueck-ld.1115212>.

²¹ According to the 2019 IBA study, 57% of mobbing incidents and 75% of sexual harassment incidents go unreported.

²² Pender, Us Too?, Bullying and Sexual Harassment in the Legal Profession, International Bar Association, May 2019, p. 8, see <https://www.ibanet.org/bullying-and-sexual-harassment.aspx>; Miller, Know My Name, New York 2019; Farrow, Catch and Kill, Lies, Spies and a conspiracy to protect predators, 2019.

racist behavior by its managers. As a consequence, at least six managers had to leave the company.²³ Zalando was confronted with the accusation - published via social media - of racist behavior by some of its employees. Zalando reacted in August 2020 by conducting an internal investigation and publishing a clear statement that such behavior shall not be tolerated.²⁴ These recently published cases indicate that racist discrimination in the workspace is getting more public attention and that organizations will have to deal with such cases more actively.

B. Costs of Damage to Reputation

Accusations of sexual harassment, racism or other discrimination in the workspace can pose a serious risk - for companies and the accused themselves - due to the damage it may cause to their reputation.

The economic consequences of the loss of reputation can be rapid and dramatic, as the following examples show: On October 5, 2017, *Jodi Kantor* and *Megan Twohey* published an article in the New York Times accusing *Harvey Weinstein* of sexual harassment.²⁵ Three days later *Harvey Weinstein* was fired by his own company, The Weinstein Company, and nine days later *Harvey Weinstein* resigned from the company's management. The company filed for bankruptcy just under five months later on March 19, 2018.²⁶ Former Uber employee *Susan Fowler* published a blog on 2/10/2017 about the sexist culture at Uber and the ignoring by Uber of the relevant internal reports. The following day an internal investigation was launched and later published as the Holden Report.²⁷ 215 discrimination cases were investigated and 20 Uber employees were dismissed. The Managing Director of Uber in Asia, *David Bonderman*, member of the Executive Board, and the co-founder, majority shareholder and CEO *Travis Kalanick* also had to leave Uber in the wake of the scandal.²⁸ Television journalist *Gretchen Carlson* sued the then CEO of Fox News, *Roger Ailes*, for sexual harassment.²⁹ Subsequently, not only *Roger Ailes* but also television journalist *Bill O'Reilly* had to leave the company without notice. *Carlson* received a payment of USD 20 million as compensation for the injustice suffered. As a result, more than 60 major companies cancelled their TV commercials at Fox News. In the end, 21st Century Fox Inc. also paid a settlement sum of USD 90 million to shareholders who had sued management for lack of supervision in connection with the sexual harassment scandals on its Fox News Channel.³⁰

²³ *Schreier*, Ubisoft Family Accused of Mishandling Sexual Misconduct Claims, see <https://www.bloomberg.com/news/articles/2020-07-21/ubisoft-sexual-misconduct-scandal-harassment-sexism-and-abuse>.

²⁴ <https://corporate.zalando.com/de/newsroom/news-stories/zalando-veroeffentlicht-untersuchungsergebnisse-und-verstaerkte-massnahmen-fuer>.

²⁵ *Kantor/Twohey*, Harvey Weinstein Paid Off Sexual Harassment Accusers for Decades, The New York Times dated 10/15/2017, see <https://www.nytimes.com/2017/10/05/us/harvey-weinstein-harassment-allegations.html>.

²⁶ *Tenz/Fischer*, Der „Fall Weinstein“ – Chronik eines Skandals, DW dated 3/9/2020, see <https://www.dw.com/de/der-fall-weinstein-chronik-eines-skandals/a-51881759>.

²⁷ Uber Report: Eric Holder's Recommendations for Change, The New York Times dated 6/13/2017, see <https://www.nytimes.com/2017/06/13/technology/uber-report-eric-holders-recommendations-for-change.html>.

²⁸ *Isaac*, Uber Founder Travis Kalanick Resigns as C.E.O., The New York Times dated 6/21/2017, see <https://www.nytimes.com/2017/06/21/technology/uber-ceo-travis-kalanick.html?hp&action=click&pgtype=Homepage&clickSource=story-heading&module=first-column-region®ion=top-news&WT.nav=top-news>.

²⁹ *Remke*, Eine Afroamerikanerin nannte er sein „heißes Stück Schokolade“, Welt dated 4/20/2017, see <https://www.welt.de/vermischtes/article163873247/Eine-Afroamerikanerin-nannte-er-sein-heisses-Stueck-Schokolade.html>.

³⁰ Reuters dated 11/21/2017, see <https://www.reuters.com/article/us-fox-settlement/21st-century-fox-in-90-million-settlement-tied-to-sexual-harassment-scandal-idUSKBN1DK2NI>.

Acute discrimination cases are not the only threat to companies: Inadequately handled cases can also generate unwelcome publicity, as the case of an auditing firm shows.³¹ The cases of discrimination by Oxfam employees in Haiti occurred in 2011 but were picked up again by the UK media in early 2018, resulting in the loss of 7,000 donors within ten days and ultimately a GBP 16 million loss of funds.³²

C. Other Negative Consequences

According to the study by *Does/Gundemir/Shih*³³, even a single accusation of sexual harassment may dramatically worsen the public perception of an entire organization. Not only is the organization seen as less fair and just than an organization without such an accusation. This organization is also seen as less fair and just compared to organizations against which allegations of financial misconduct (e.g. fraud) are made. According to the study, accusations of sexual harassment are more likely to be seen as an indication of a problem with the company's culture rather than a misbehaving employee in the sense of a "rotten apple". The study states that the interviewees also draw negative conclusions from these accusations regarding fairness with regard to hiring and promotion in the company concerned. The loss of reputation may have a correspondingly negative effect on the hiring of new talent and the review of employees.³⁴

The topic is recently also being included in the legal documentation of M&A deals: M&A contracts are increasingly beginning to include assurances in the form of so-called "Weinstein clauses" ("#MeToo Rep") in order to limit possible negative effects.³⁵ Sources of damage can be legal proceedings, loss of reputation as well as indirect cost sources, such as loss of employees and recruiting difficulties due to negative "employer branding", reduced performance or a worsened working atmosphere.³⁶ According to a study, 45 of approximately 1,200 M&A transactions filed with the SEC in 2018 contained such assurances.³⁷ It is likely that German or Swiss companies with references to the US capital market will also have to deal with such assurances in contracts in the future. Such representations may need to be extended to include racist discrimination, too.

Finally, more and more investors are looking at investments based on ESG criteria (environmental, social and governance). This not only concerns ecological issues, but also questions of justice and honesty. Powerful investors such as Blackrock, State Street and Vanguard expect a more balanced

³¹ *Binswanger/Alich*, #MeToo bei EY: Kadermann per sofort freigestellt, Tagesanzeiger dated 12/14/2018, see <https://www.tagesanzeiger.ch/wirtschaft/standardey-stellt-mitarbeiter-nach-vorwurfen-per-sofort-frei/story/22803713>.

³² *O'Neill*, Oxfam to cut staff after Haiti scandal leaves £16m shortfall, The Times dated 1/23/2020, see <https://www.thetimes.co.uk/article/oxfam-to-cut-staff-after-haiti-scandal-triggers-16m-shortfall-j763r7fr0>.

³³ *Does/Gundemir/Shih*, Research: How Sexual Harassment Affects a Company's Public Image, Harvard Business Review dated 6/11/2018, see <https://hbr.org/2018/06/research-how-sexual-harassment-affects-a-companys-public-image>.

³⁴ For example, PWC studies show that millennials consider the reputation of their employer to be important when choosing a job, PWC, The female millennial, a new area of talent, 2015, see <https://www.pwc.com/femalemillennial>.

³⁵ *Balthasar-Wach/Hofbauer*, juridikum 2019, 326 et seq.

³⁶ *Balthasar-Wach/Hofbauer*, juridikum 2019, 326, 327.

³⁷ *Peters/Clabaugh*, The Impact of Social, Political and data Privacy Issues on M&A Transactions, Intelligize Special Report, 3/26/2019, 4.

gender distribution in management bodies.³⁸ From here, it is no longer far from the idea that investors expect companies to treat sexual harassment, racist as well as other discrimination incidents (or the corresponding risks) just as professionally as other compliance incidents.

D. Conclusion

The cases listed are examples of the substantial business risks involved in discrimination cases, in particular, sexual harassment and racist discrimination incidents in the workspace. In many cases, even a public accusation of such behavior is sufficient to cause considerable damage to the company's reputation³⁹ - not to mention the demoralization and frustration of employees. In times of #MeToo and other social media campaigns, the public dissemination of such accusations is unstoppable. This makes it clear that the damage potential of (sexual) discrimination within the company is approaching other substantial corporate risks.

III. SELECTED LEGAL FACTORS

In connection with discrimination in the workspace, including sexual harassment and racism, employers are subject to certain legal obligations. It would go far beyond the scope of this article to cover all relevant legal provisions. The following explanations are a limited selection of certain legal aspects in the context of discrimination in the workspace.⁴⁰

A. Definition of Discrimination

The starting point for the legal definitions of sexual harassment and racism in the workspace in both Germany and Switzerland is the definition of the general prohibition of discrimination in employment relationships.

1. Discrimination

The definition of discrimination in the workspace in German law is laid down in the General Equal Treatment Act (Allgemeines Gleichbehandlungsgesetz, AGG).⁴¹ According to Section 1 AGG, the purpose of the law is to "prevent or eliminate discrimination on the grounds of race or ethnic origin, gender, religion or belief, disability, age or sexual identity". According to Section 6 AGG, the provisions of the AGG apply to the relationship between employees and employers.⁴² Section 1 AGG does not

³⁸ *Meier*, Verwaltungsrätin dringend gesucht, Tagesanzeiger dated 2/12/2018, see <https://www.tagesanzeiger.ch/wirtschaft/standardverwaltungsraetin-dringend-gesucht/story/27061853>.

³⁹ See, for example, the media coverage of the #MeToo case at the Swiss Federal Criminal Court, which turned out not to be a case: *Knellwolf*, Sex – und Mobbingvorwürfe am Bundesstrafgericht, Tagesanzeiger dated 2/1/2020, see <https://www.tagesanzeiger.ch/schweiz/standard/das-bundesstreitgericht/story/21337041>.

⁴⁰ In particular, criminal law, data protection law, public law aspects and employee participation rights are not dealt with here.

⁴¹ Allgemeines Gleichbehandlungsgesetz dated 8/14/2006 (BGBl. I S. 1897), last modified by Article 8 SEPA-Begleitgesetz vom 4/3/2013 (BGBl. I S. 610). The AGG converts the European legal basis, RL 2000/42/EG, RL 2000/78/EG, RL 2004/113/EG and RL 2006/54/EG into national law.

⁴² *Bauer/Krieger/Günther*, Allgemeines Gleichbehandlungsgesetz und Entgelttransparenzgesetz, 5. Aufl. 2018, § 6, Rn. 2.

contain any specific facts or legal consequences of its own, so that it only acquires significance in conjunction with other provisions of the AGG.⁴³

The legal framework for discrimination in employment relationships in Switzerland is narrower. The Swiss Federal Act on Equal Opportunities for Men and Women (Gleichstellungsgesetz, CH-GIG)⁴⁴ aims to promote the actual equality of women and men (Article 1) and thus focuses on gender equality in employment relationships. The CH-GIG thus only regulates discrimination in employment relationships based on gender, but not discrimination based on other characteristics such as racism. Accordingly, the scope of the prohibition of discrimination in Article 3 CH-GIG is narrowly defined: "Employees may not be discriminated, either directly or indirectly, on grounds of their gender, in particular on the grounds of marital status, family situation or, in the case of female employees, pregnancy".

2. Sexual Harassment in the Workspace

Both the AGG and the CH-GIG each contain a specific definition of sexual harassment in the workspace.

According to Section 3 paragraph 4 AGG, sexual harassment is "a disadvantage in relation to Section 2 paragraph 1 no. 1 to 4, if an unwanted, sexually explicit conduct, including unwanted sexual acts and requests for such acts, sexually explicit physical contact, comments of sexual content as well as unwanted showing and visible affixing of pornographic images, has the purpose or effect of violating the dignity of the person concerned, in particular if an environment characterized by intimidation, hostility, humiliation, degradation or insult is created."

The AGG distinguishes between physical, verbal and non-verbal sexual harassment. In this context, even a one-off specific sexual behavior may constitute a criminal offence.⁴⁵ This definition is based on the idea of the right to sexual self-determination: Anyone can decide for themselves about an intrusion into the private sphere through physical contact. For example, the BAG has repeatedly regarded the intentional touching of primary or secondary sexual characteristics of another person as sexually determined in the sense of Section 3, paragraph 4 AGG because it is an assault on the intimate physical sphere.⁴⁶

Other acts which do not directly have sexuality as their object, such as hugging, may be qualified as sexual as a result of a sexual intention pursued with them.⁴⁷ Whether an act is deemed to be sexual within the meaning of Section 3 paragraph 4 AGG does not depend solely on the subjectively desired goal of the person acting. According to the German Federal Labour Court (Bundesarbeitsgericht, BAG), sexual motivation is also not necessarily required. Rather, such sexual harassment is often an expression of hierarchies and the exercise of power rather than of sexually determined lust.⁴⁸

⁴³ *Bauer/Krieger/Günther*, Allgemeines Gleichbehandlungsgesetz und Entgelttransparenzgesetz, 5. Aufl. 2018, § 1, Rn. 1.

⁴⁴ Bundesgesetz über die Gleichstellung von Frau und Mann dated 3/24/1995, SR 151.1, AS 1996 1498; effective 7/1/2020, AS 2019 2815.

⁴⁵ BAG, 6/29/2017 – 2 AZR 302/16, Rn.17.

⁴⁶ BAG, 6/29/2017 – 2 AZR 302/16 and BAGE 150, 109.

⁴⁷ BAG, 6/29/2017 – 2 AZR 302/16, Rn.18 with references to further BAG judgements.

⁴⁸ BAG, 6/29/2017 – 2 AZR 302/16, Rn.19; *Linde*, BB 1994, 2412, 2415.

According to Section 3 paragraph 4 AGG, the decisive factor for the assessment of the conduct is ultimately whether the person concerned objectively recognizably experiences the conduct as undesirable.⁴⁹ The prerequisite that the undesired behavior violates or intends to violate the dignity of the person concerned acts as an objective criterion.⁵⁰ It protects against hypersensitivity and abuse.

Article 4 CH-GIG is systematically structured in a comparable manner, according to which sexual harassment is expressed as a special case of the general prohibition of gender discrimination in employment relationships regulated in Article 3 CH-GIG. According to Article 4 CH-GIG, sexual discrimination is defined as "any harassing behavior of a sexual nature or any other behavior based on gender that affects the dignity of women and men at work. This includes, in particular, threats, promises of benefits, the imposition of coercion and the exertion of pressure to obtain sexual favors".

The enumerations in Article 4 paragraph 2 CH-GIG only refer to cases of abuse of power. However, the definition is not exhaustive and, according to the Swiss Federal Supreme Court's case law, covers all behavior that affects the dignity of the employee and contributes to the creation of a hostile working climate.⁵¹ According to the Swiss Federal Supreme Court, sexual harassment can take various forms: sexist statements, use of pornographic material, embarrassing invitations, advances with promises of rewards or threats of reprisals, as well as inappropriate jokes. Ultimately, the definition covers all unwanted behavior of a sexual nature.⁵² The individual act itself does not necessarily have to have a sexual reference, it is sufficient if this is apparent from the context.⁵³ Thus, as in German law, the form that sexual harassment can take is not limited.⁵⁴ The CH-GIG also requires that the act violates the dignity of the person concerned (Article 4).

3. Racist Discrimination in the Workspace

As laid out above, in Germany the AGG covers racist discrimination in the workspace in the same manner as sexual harassment. In Switzerland, the legislation on racist discrimination is fragmentary. The Swiss Constitution (Bundesverfassung) states in its Article 8 paragraph 2 that no one must be discriminated (inter alia) due to origin or race.⁵⁵ Article 261^{bis} of the Swiss Criminal Code penalizes anyone who publicly incites racism and hatred with imprisonment of up to three years.⁵⁶ However, this rule is limited to especially severe racist discrimination in the public. No specific legislation comparable to the CH-GIG addresses discrimination on grounds of race in the workspace in Switzerland.

⁴⁹ BAG, 6/9/2011 – 2 AZR 323/10, Rn. 23; *Bauer/Krieger/Günther*, Allgemeines Gleichbehandlungsgesetz und Entgelttransparenzgesetz, 5. Aufl. 2018, § 3, Rn. 52.

⁵⁰ *Bauer/Krieger/Günther*, Allgemeines Gleichbehandlungsgesetz und Entgelttransparenzgesetz, 5. Aufl. 2018, § 3, Rn. 59 and Rn. 43.

⁵¹ BGer 4A_105/2018 dated 10/10/2018, Erw. 4.2.1; BGer 4C.289/2006 dated 2/5/2007, Erw. 3.1, with reference to BGE 126 III 395, Erw. 7b/bb.

⁵² BGer 4A_544/2018 dated 8/29/2019, Erw. 3.1 with further references.; BGer 4A_18/2018 dated 11/21/2018, Erw. 3.1 with further references.

⁵³ BGer 4A_544/2018 dated 8/29/2019, Erw. 7.2.

⁵⁴ *Kaufmann*, in: Kaufmann/Steiger-Sackmann (Hrsg.), Kommentar zum Gleichstellungsgesetz, 2. Aufl. 2009, Art. 4, Rn. 54.

⁵⁵ Bundesverfassung der Schweizerischen Eidgenossenschaft of April 18, 1999 (Effective July 1, 2020), SR 101.

⁵⁶ Schweizerisches Strafgesetzbuch of December 21, 1937 (Effective July 1, 2020), SR 311.0.

4. Job Reference

In Germany and Switzerland, the legal regulations mentioned above only cover sexual harassment (and racist discrimination in Germany) in the context of a dependent employment relationship or in the case of the initiation of a self-employed employment relationship.⁵⁷ A necessary connection to the employment relationship is given if the discrimination occurs in the workspace. Outside working hours, a connection to the employment relationship is given if there is an operational connection.⁵⁸

According to the view taken here, the workspace includes all premises and means of transport used in the course of the exercise of the profession (such as office buildings, external conference and seminar rooms, hotels, restaurants, railways, aircraft, taxis, etc.), including business trips, training events or celebrations organized by the employer (e.g. office or Christmas party), as well as the journey to and from these places.⁵⁹

5. Discriminating Person

Discrimination in the workspace can be carried out internally by superiors, subordinates, colleagues or externally by third parties⁶⁰ such as customers, service providers, partner companies or suppliers.

6. Company definition of Sexual Harassment and Racial Discrimination

A literal reproduction of the above mentioned legal definitions is obviously not very suitable for a company's own code of conduct. These standards are too technical. Employees should be given a short and clear explanation of what is understood by sexual and racial discrimination in their own organization.

The starting point for a company's own definition of sexual harassment can be that sexual harassment in the workspace is understood as a particularly severe form of discrimination.⁶¹ In addition, there is the basic understanding that sexual harassment can take many different forms: A first approach to differentiating between forms of sexual harassment is to differentiate between quid pro quo harassment and hostile working atmosphere. In the first case, the person concerned is specifically threatened with disadvantages in the employment relationship either if he or she rejects the sexual advances or if the expectations are fulfilled and advantages are promised. In the second case, a hostile

⁵⁷ *Bauer/Krieger/Günther*, Allgemeines Gleichbehandlungsgesetz und Entgelttransparenzgesetz, 5. Aufl. 2018, § 6, Rn. 4, 6; *Kaufmann*, in: Kaufmann/Steiger-Sackmann (Hrsg.), Kommentar zum Gleichstellungsgesetz, 2. Aufl. 2009, Art. 4, Rn. 65.

⁵⁸ *Köhler/Koops*, BB 2015, 2807, 2808; *Bauer/Krieger/Günther*, Allgemeines Gleichbehandlungsgesetz und Entgelttransparenzgesetz, 5. Aufl. 2018, § 3, Rn. 50; *Kaufmann*, in: Kaufmann/Steiger-Sackmann (Hrsg.), Kommentar zum Gleichstellungsgesetz, 2. Aufl. 2009, Art. 4, Rn. 64.

⁵⁹ *Schlachter*, NZA 2001, 121, 124; *Kaufmann*, in: Kaufmann/Steiger-Sackmann (Hrsg.), Kommentar zum Gleichstellungsgesetz, 2. Aufl. 2009, Art. 4, Rn. 64; *Tag*, Sexuelle Übergriffe in Betrieben, Unternehmen und Verwaltungen, in: Senn (Hrsg.), Diskriminierung – Wahrnehmung und Unterordnung, 2009, S. 35, 52 f; *Bauer/Krieger/Günther*, Allgemeines Gleichbehandlungsgesetz und Entgelttransparenzgesetz, 5. Aufl. 2018, § 3, Rn. 50.

⁶⁰ Section 12 Abs. 4 AGG.

⁶¹ Former Swiss Federal Council member *Arnold Koller* described it as a "particularly degrading form of gender discrimination", AmtBull NR 1994 249.

working atmosphere is generally created.⁶² However, sexual harassment is not limited to this and should be defined openly. Sexual harassment can manifest itself in particular (but not conclusively) by addressing physical characteristics, staring, unwanted intrusions, stalking, sexist language, jokes or allusions, gestures, obscene statements, unwanted sexual advances as well as sexual assaults, bullying, coercion, physical violence or threats of it up to and including rape.⁶³ The term sexual harassment also includes sexist behavior. This includes any behavior without sexual reference which discriminates against or degrades people on the basis of their sex.⁶⁴

A possible definition for the company's own code of conduct could therefore be as follows: Sexual discrimination in the workspace is understood to be any behavior with a sexual connotation that is undesirable from one side and which violates a person's dignity.⁶⁵ By using the gender-neutral term "person", it is made clear that sexual assault, harassment and discrimination can affect women and men, as well as people with the gender entry "diverse".

The decisive factor here should not be the motivation of the perpetrator, but the perception of the victim.⁶⁶ In our view, this is the only way to achieve effective protection of the person concerned. An objectification - and thus also a protection of the accused person against misunderstandings, hypersensitivity and abuse – is made by the second criterion, according to which the conduct must violate the dignity of a person.⁶⁷ The company's own definition can be supplemented by examples to make the non-tolerated behavior clearer to the employees.

Racist behavior in the workspace may take many forms. E.g. starting from discriminatory job advertisements, discriminatory preselection, discriminatory employment to discriminatory contract contents, discriminatory project assessment, and of course discriminatory behavior by racist speech or gestures.⁶⁸

⁶² Kaufmann, in: Kaufmann/Steiger-Sackmann (Hrsg.), Kommentar zum Gleichstellungsgesetz, 2. Aufl. 2009, Art. 4, Rn. 23.

⁶³ See also the listing in the guidance regarding Verordnung 3 zum Schweizerischen Arbeitsgesetz, SECO March 2014, 302 – F.

⁶⁴ Tag, Sexuelle Übergriffe in Betrieben, Unternehmen und Verwaltungen, in: Mischa Senn (Hrsg.) Diskriminierung – Wahrnehmung und Unterordnung, 2009, S. 35, 52. This is also the definition of the Federal Office for the Equality of Women and Men from January 2008. If unwanted advances are not reciprocated, the perpetrator's behavior can turn into bad-mouthing or mobbing of the resisting person, as happened in the described case in: Binswanger, „Zeig doch deine Assets ;-)\", Tagesanzeiger dated 12/11/2018, see <https://www.tagesanzeiger.ch/wirtschaft>, see <https://www.tagesanzeiger.ch/wirtschaft/unternehmen-und-konjunktur/zeig-doch-deine-assets/story/23578823>.

⁶⁵ Based on the definition by the Federal Office for Gender Equality of January 2008; guideline on Verordnung 3 zum Schweizerischen Arbeitsgesetz of March 2014, 302 – G.

⁶⁶ Likewise, the definition of the Federal Office for Gender Equality from January 2008; Section 3 paragraph 4 AGG, which speaks of "undesirable" behavior.

⁶⁷ In our opinion, even the attempt is sufficient to trigger the examination of measures by the company. According to Section 3 paragraph 4 AGG, it is sufficient for sexual harassment to have occurred if an act is intended to violate the dignity of the person concerned.

⁶⁸ As with the definition of sexual harassment it makes sense to specify the organization's understanding of racist discrimination in its code of conduct.

B. Employer Obligations

1. Germany

The employer is obliged to actively protect its employees against discrimination, including sexual harassment and racist discrimination (Section 12 paragraph 1 in conjunction with Section 3 AGG). In doing so, the employer should take preventive measures to ensure that there is no discrimination in the workspace (Section 12 paragraph 2 AGG).⁶⁹ The employer can achieve this by indicating the inadmissibility of such discrimination in the context of initial and further vocational training and by ensuring that sexual and other harassment does not occur. The employer is not legally obliged to take these preventive measures and training courses. However, this does give him the possibility of exculpation (Section 12 paragraph 2, sentence 2 AGG). For if the employer violates the duty to protect his employees from such harassment, he is liable for damages in the event of prohibited discrimination (Section 15 AGG).⁷⁰

Paragraph 3 of Section 12 AGG obliges the employer to intervene in the event of a violation by an employee and to put an end to the violation. This implicitly obliges the employer to investigate a reported violation internally or by a third party.⁷¹ Only in this way can he determine whether a violation has actually occurred, who is involved in it and what the appropriate, necessary and reasonable measures are. Pursuant to Section 12 paragraph 4 AGG, the employer is obliged to take measures to protect employees from discrimination by third parties within the scope of their professional activities.

The employer is also explicitly obliged to follow up on any indications of discrimination and to inform the whistleblower of the result (Section 13 paragraph 1 AGG).⁷²

2. Switzerland

In Switzerland, Article 328 of the Swiss Code of Obligations (CH-OR)⁷³, Article 6 of the Federal Law on Work in Industry, Trade and Commerce (CH-ArG)⁷⁴ and Article 3 to 5 CH-GIG are relevant to the employer's corresponding obligations.

Article 328 CH-OR sets out the employer's general duty of care to ensure the protection and health of employees. This results in a clear duty to act within the bounds of what is reasonable from an operational point of view, because the employer "must respect and protect the personality of the employee in the employment relationship, take due account of his or her health and ensure that morality is upheld. (...)". Article 328 paragraph 1 CH-OR subsequently explicitly emphasizes protection against sexual harassment: "(...) In particular, he [the employer] shall ensure that workers are not subjected to sexual harassment and that victims of sexual harassment do not suffer further

⁶⁹ *Bauer/Krieger/Günther*, Allgemeines Gleichbehandlungsgesetz und Entgelttransparenzgesetz, 5. Aufl. 2018, § 4, Rn. 4.

⁷⁰ For details of the prevention measures, see section V.

⁷¹ *Bauer/Krieger/Günther*, Allgemeines Gleichbehandlungsgesetz und Entgelttransparenzgesetz, 5. Aufl. 2018, § 12, Rn. 30.

⁷² Finally, the employer is prohibited from taking repressive measures against the employee concerned, his or her supporters and witnesses (Section 16 Abs. 1 AGG).

⁷³ Bundesgesetz betreffend die Ergänzung des Schweizerischen Zivilgesetzbuchs (Fünfter Teil, Obligationenrecht) dated 3/30/1911 (Effective: 1.4.2020), SR 200.

⁷⁴ Bundesgesetz über die Arbeit zu Industrie, Gewerbe und Handel (Arbeitsgesetz) dated 12/9/2018, SR 822.11.

disadvantages. This duty of care thus also includes prevention, acute protection in the event of an incident (such as immediate and long-term measures) and protection against repression.⁷⁵ The employer's obligation pursuant to Article 328 CH-OR comprises all aspects of discrimination, including on grounds of origin or race.⁷⁶

In addition, the CH-GIG prohibits in Article 3 in conjunction with Article 4 the sexual harassment of employees as a special case of the general prohibition of discrimination. It does not impose any further explicit legal obligations on the employer. However, in Article 5 paragraph 3 CH-GIG, the law grants the employee concerned a right to compensation if employers cannot prove that "they have taken measures which are necessary and appropriate to prevent sexual harassment according to experience and which can reasonably be expected of them". The employer is thus liable if he has not taken sufficient and reasonable preventive measures.⁷⁷ In our view, this should also apply if the employer, following an established case of harassment, does not take reasonable and appropriate measures to prevent continuing harassment.⁷⁸

Finally, Article 6 paragraph 1 of the CH-ArG stipulates that the employer "(...) shall take the necessary measures to protect the personal integrity of the employees". This protection corresponds to the protection of personality according to Article 328 CH-OR. The provisions of public employment law reinforce this effect.⁷⁹

3. Conclusion

Employers in Switzerland as well as in Germany are legally obliged to protect their employees from discrimination, including sexual harassment and racist behavior by other employees or third parties in their workspace.

Prevention is not mandatory by law. However, employers are strongly recommended to do so - if only for the basic idea of the duty of protection towards employees, for the idea of treating the risk of discrimination equally with other compliance risks, and in order to preserve the possibility to exculpate oneself in accordance with legal requirements.

Employers in Germany and Switzerland, on the other hand, are legally obliged to appropriately investigate any indication of sexual harassment and other discrimination, to clarify the facts of the case (as far as possible) and to take measures to prevent further harassment. This also includes taking immediate measures in the event of further harassment.

⁷⁵ Ulrich, Sicherheit & Recht 2014, 223, 225.

⁷⁶ See <https://www.rechtsratgeber-frb.admin.ch/lebensbereiche/d101.html>.

⁷⁷ Kaufmann, in: Kaufmann/Steiger-Sackmann (Hrsg.), Kommentar zum Gleichstellungsgesetz, 2. Aufl. 2009, Art. 4, Rn. 52.

⁷⁸ In case of sexual harassment, in addition to compensation (Article 328 CH-OR) and satisfaction (Article 49 CH-OR), the person concerned may claim compensation for lack of prevention in the amount of up to six average monthly Swiss wages (Article 5 paragraph 3 CH-GIG), should the employer not be able to exculpate himself. Such an exculpation is not available if the employer himself commits the sexual harassment; Kaufmann, in: Kaufmann/Steiger-Sackmann (Hrsg.), Kommentar zum Gleichstellungsgesetz, 2. Aufl. 2009, Art. 4, Rn. 55.

⁷⁹ Wegleitung zum Arbeitsgesetz, Article 6, SECO, November 2006, 006-2.

IV. VALUES OF AN ORGANIZATION

A value-based corporate culture describes a culture in which an organization aligns its decisions and actions internally and externally with the corporate values it has laid down.⁸⁰

Organizations for which such corporate values are more than just lip service also align their CMS to adhere to the corporate values. In order to give these corporate values a meaning that can be lived and experienced and to allow identification with these values, they should be explained and defined.

It is advisable not to let the values be determined by the management alone, but to involve (selected) employees.

Clearly formulated corporate values provide employees with basic orientation, especially in complex situations, and thus help them to make stringent and comprehensible decisions. This also applies to conflict situations among employees on a personal level. Whether behavior towards colleagues in the workspace is tolerable can also be measured by corporate values such as "respectful" or "appreciative" treatment.

V. INTEGRATION OF SEXUAL DISCRIMINATION CASES INTO A VALUE-BASED COMPLIANCE MANAGEMENT SYSTEM

The approach to and management of the risk of sexual, racist and other discrimination in the workspace can be well integrated into existing CMS, taking into account specific aspects. When setting up new CMS, it is advisable to incorporate the handling of discrimination incidents from the outset.

A. Preventive measures to protect against sexual harassment, racist and other discrimination

One of the aims of CMS is prevention. This includes measures to mitigate compliance risks.⁸¹ Organizations may implement various preventive measures to protect against sexual harassment, racist and other discrimination, which have varying degrees of effectiveness. The typical measures vary in particular between fact sheets, internal company policies, general compliance training and codes of conduct. However, these measures often do not lead to the desired goal: according to the 2019 IBA Study, employees in workspaces with policies and training are as likely to become victims of discrimination as employees in workspaces without such measures.⁸²

There is a need for further measures that go beyond this and clearly address, in particular, the following aspects: Raising awareness, reviewing and implementing anti-discrimination policies and

⁸⁰ In-depth see *Grüniger*, in: Wieland/Steinmeyer/Grüniger (Hrsg.), *Handbuch Compliance Management*, 2. Aufl. 2014, S. 41, 52 et seq.

⁸¹ *Grüniger*, in: Wieland/Steimeyer/Grüniger (Hrsg.), *Handbuch Compliance-Management*, 2. Aufl. 2014, S. 41, 60, Rz. 24.

⁸² *Pender*, *Us Too?*, *Bullying and Sexual Harassment in the Legal Profession*, International Bar Association, May 2019, see <https://www.ibanet.org/bullying-and-sexual-harassment.aspx>, p. 8.

standards, introducing regular, tailor-made training on discrimination in the workspace, taking responsibility, collecting data and improving transparency.⁸³

1. Corporate Culture

One of the most important preventive measures a company can take is to establish and live a corporate culture in which all employees are safe from discrimination. A prerequisite for this is the living of this culture by the management ("tone from the top"). Mindfulness is a key aspect of such a corporate culture. This means that it is part of the duty of care of the employer and its managers to look and act responsibly in the event of discrimination. Because "looking away is looking on, and looking on is enabling: Structural abuse of power does not mean that everyone acts abusively, but that the structures tolerate those who do not".⁸⁴

The basis for this is (repeated) communication to employees and other stakeholders⁸⁵ that discrimination and, in particular, sexual harassment or racist behavior will not be tolerated by the employer and will be consistently sanctioned. This alone has a deterrent effect. It also includes informing employees and other stakeholders about how the company defines such different types of discrimination. After all, unclear circumstances are an invitation to infringements.⁸⁶ According to the authors, it is also important that this communication is made by the top management of the company so that the topic is understood as correspondingly serious and important.

The implementation of such a corporate culture and the corresponding communication is often accompanied by the concern that (especially anonymous) reports encourage the misuse of a whistleblower system. For this reason, it must also be made clear in the communication that an abusive report also constitutes misconduct and will be sanctioned accordingly.

In the authors' view, consistent action in this context means that any credible report of discrimination must be investigated and, in the event of a proven violation, sanctioned. This should apply without exception, regardless of the hierarchical positions of the persons involved. In the context of sexual harassment, this is particularly important as it often occurs in connection with abuse of power. As in compliance incidents of other categories, employees only trust the CMS if they see that they are implemented. And only in this case do they function preventively.

2. Diversity & Inclusion

A corporate culture of mutual respect and esteem, irrespective of a person's personality traits, can be created in particular through diversity and inclusion measures. The authors understand the term "diversity" to mean the active identification of existing diversity within the company and the creation of the desired diversity. "Inclusion" stands for the efficient linking of this diversity into productive and innovative units. The economic benefits of inclusion can only be realized in an environment of mutual

⁸³ Pender, *Us Too?*, *Bullying and Sexual Harassment in the Legal Profession*, International Bar Association, May 2019, see <https://www.ibanet.org/bullying-and-sexual-harassment.aspx>, p. 8.

⁸⁴ Petersen, *Einzelfälle? Strukturwandel? Zivilcourage?*, *Hochparterre* dated 2/20/2019, see <https://www.hochparterre.ch/nachrichten/architektur/blog/post/detail/einzelfaelle-strukturwandel-zivilcourage/1550606879/>.

⁸⁵ This includes third parties (such as service providers and customers) and investors.

⁸⁶ *Wegleitung zur Verordnung 3 zum Arbeitsgesetz*, SECO March 2014, 302-H.

respect and appreciation. The required respect also operates as a preventive measure against sexual harassment and other discrimination.

Measures to create diversity and inclusion in companies are diverse and individual. A fundamental element is the sensitization of employees and management to their own unconscious bias. Building on this, measures can be taken to raise awareness of the existing diversity and the diversity that needs to be expanded, to reduce fears and to demonstrate the possibility of personal involvement in promoting diversity and inclusion in the company.

Diversity and inclusion measures can also be effectively demanded by business partners. In early 2020, Novartis announced that it will only hire law firms that meet fixed diversity benchmarks: at least 30% of billable associate and 20% of partner time must be provided by women, ethnically diverse lawyers or lawyers belonging to the LGBTQ+ community.⁸⁷

3. Specific Training

It is questionable whether general compliance training meets the requirements for prevention or training in Section 12 paragraph 2 sentence 1 AGG or Article 5 paragraph 3 CH-GIG.⁸⁸ The 2019 IBA Study shows that mere guidelines and training do not seem to have the desired effect. Employees in companies with such measures become victims of sexual harassment to the same extent as employees in companies without such measures.⁸⁹

On the other hand, according to the US study by *Johnsons/Keplinger/Kirk/Barnes*, specific training on sexual harassment, microaggression and unconscious bias can not only encourage civil behavior but also enable colleagues and managers to intervene when they see bullying or harassment in the workplace.⁹⁰ Because “racism isn’t biological, bias is”.⁹¹

One promising and simple measure is to empower employees to actively intervene and resolve an acute discrimination situation. According to the *Johnsons/Keplinger/Kirk/Barnes* study, these efforts are most successful when - in the case of harassment of women - organizations successfully involve male allies in the discussion on gender equality.⁹² With the ability to defend themselves and with the support of allied colleagues, the number of investigations, e.g. inappropriate remarks, could also be reduced. It is also more likely to enable the staff concerned to work constructively together again after a clarifying discussion than if an official internal investigation is conducted to this end.

⁸⁷ Press release dated 2/12/2020 see <https://www.novartis.com/news/novartis-preferred-firm-program-legal-services-launched>.

⁸⁸ See also *Köhler/Koops*, BB 2015, 2807, 2810, Fn. 47.

⁸⁹ *Pender*, Us Too?, Bullying and Sexual Harassment in the Legal Profession, International Bar Association, May 2019, see <https://www.ibanet.org/bullying-and-sexual-harassment.aspx>, p. 8.

⁹⁰ *Johnson u. a.*, Has Sexual Harassment at Work Decreased Since #MeeToo?, Harvard Business Review 7/18/2019, see <https://hbr.org/2019/07/has-sexual-harassment-at-work-decreased-since-metoo>.

⁹¹ *Khalil Smith/David Rock*, 3 Reasons why “Anti-Bias” may solve more than “Anti-Racism”, Forbes, 9/18/2020.

⁹² *Johnson u. a.*, Has Sexual Harassment at Work Decreased Since #MeeToo?, Harvard Business Review 7/18/2019, see <https://hbr.org/2019/07/has-sexual-harassment-at-work-decreased-since-metoo>.

4. Procedure for Dealing with Acute Incidents

Despite optimal prevention, sexual harassment and other discrimination in the workspace cannot be completely prevented. Accordingly, as part of prevention, organizations should have standardized and implemented their processes for dealing with acute incidents in the same way as they do with regard to other compliance risks. In particular, this includes defining responsibilities and ensuring that the process can run without conflicts of interest.⁹³ This prevents, for example, the bizarre situations where management itself investigates allegations of sexual harassment against management and thus fails to provide evidence of exculpation.⁹⁴

B. Contact Person and Whistleblower System

Depending on its size the organization may offer its employees a contact person for discrimination incidents. This is an offer by the organization to have a trained contact person available who can provide competent assistance and initiate appropriate processes. However, it is not enough to have this contact person present. It is just as important that employees are aware of this person because, according to the study by the German Federal Anti-Discrimination Agency (Antidiskriminierungsstelle des Bundes), one third of those questioned are unaware of the existence of a contact person.⁹⁵ It is known from various cases that victims did not know who to turn to.⁹⁶ In order to successfully establish such role the organization should repeatedly and positively communicate such role to its employees.

In addition to or as an alternative to the contact person, a reporting office for information can be set up, to which employees can send their report of a violation, even anonymously. These reporting offices are the whistleblower systems to be provided according to the EU Whistleblower Directive⁹⁷, which also guarantees protection to the whistleblower. In Switzerland there is currently no legal protection for whistleblowers.⁹⁸ It is advisable to standardize the reporting of discrimination cases and the subsequent procedure.

Simply making reporting points available does not necessarily mean that misconduct can be identified early on: For example, according to the 2019 IBA study, three-quarters of harassed persons have not reported bullying or sexual harassment even in sectors such as legal advice. The surveyed persons mentioned the status of the harasser, fear of the consequences of a report and the endemic nature of such incidents in law firms as reasons for not reporting.⁹⁹ This shows that a company must first win the trust of its employees. Employees must be confident that their report will be treated confidentially, a

⁹³ See section VI.B.

⁹⁴ BGE 126 III 395, Erw. c).

⁹⁵ Studie der Antidiskriminierungsstelle des Bundes, Sexuelle Belästigung am Arbeitsplatz dated 3/3/2015, see https://www.antidiskriminierungsstelle.de/SharedDocs/Downloads/DE/publikationen/Umfragen/Handout_Umfrage_sex_Belaestigung_am_ArbPlatz_Beschaefigte.pdf;jsessionid=31664677A3430789E110157E2DEC7EE5.2_cid340?__blob=publicationFile&v=4.

⁹⁶ *Honegger*, Nach Sex-Vorwürfen an der Uni Basel: Umstrittener Dozent kehrt zurück, BZ dated 9/14/2019, see <https://www.bzbasel.ch/basel/basel-stadt/nach-sex-vorwuerfen-an-der-uni-basel-umstrittener-dozent-kehrt-zurueck-135618864>.

⁹⁷ 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, PE/78/2019/REV/1 ABI. L 305 dated 11/26/2019, S. 17–56.

⁹⁸ See *Pikó*, CB 2019, 235-242; *Pikó*, Swiss Legal Status on the Protection of Whistleblower, CEJ (6) 2020, p. 32 – 50.

⁹⁹ *Pender*, US Too?, Bullying and Sexual Harassment in the Legal Profession, International Bar Association, May 2019, p. 8, see <https://www.ibanet.org/bullying-and-sexual-harassment.aspx>.

legitimate report will not trigger reprisals, the company will fulfil its duty of investigation - regardless of the status of the people involved - and that the company will sanction the harasser appropriately.

C. Risk Analysis

The risks of discrimination, in particular sexual harassment and racist behavior, must also be seriously evaluated as part of the regular internal compliance risk analysis.

Such cases may be categorized according to whether they are already known to the company and have been dealt with legally, those that are already known but have not yet been dealt with legally and finally those that are unknown to the employer.¹⁰⁰ But be careful: the mere absence of reported cases should not be taken as a lack of discrimination incidents. The reason for such absence may be that the whistleblower system does not exist, does not work, employees are not aware of the reporting possibilities, they do not trust the whistleblower system or are simply afraid or ashamed to talk about the incident.¹⁰¹

Furthermore, as with any risk analysis, the risks must be qualified according to the probability of occurrence and potential damage.

D. Data Collection

In order to be able to assess measures taken and existing or future risks with regard to discrimination in the organization, data should be collected within the limits of data protection laws. For example, it is worth considering compiling anonymous statistics on the cases that have occurred in order to identify possible patterns at an early stage. Such data can also be used to draw conclusions about the efficiency of internal investigations.

E. Transparency

Transparency is a difficult point to communicate in relation to discrimination in the workspace, in particular, when it comes to sexual harassment. No company wants to be associated with such behavior. If one follows the statistics mentioned at the beginning, one cannot help but accept that sexual harassment (like other forms of discrimination) will occur over time in any larger (and perhaps smaller) company. Against this background, it is important to consider how proactively this issue can be dealt with. Regular factual information of employees about investigated and sanctioned compliance incidents (including discrimination) can have positive effects: employees (and other stakeholders) can conclude that the company not only communicates but also acts on reported discrimination. Employees are made aware that violations have consequences and that reports are investigated. This transparency can thus contribute to prevention as well as to early detection of risks of sexual, racist and other discrimination in the organization.

¹⁰⁰ Corresponding to *Balthasar-Wach/Hofbauer*, *juridikum* 2019, 326, 331.

¹⁰¹ In addition, non-disclosure agreements, usually with monetary payments to the employee concerned, may also explain the absence of reports.

VI. INTERNAL INVESTIGATIONS ON SEXUAL ASSAULT AND OTHER DISCRIMINATION CASES

A. Aim of the Internal Investigation

As explained above¹⁰², the employer is legally obliged or at least incentivized to investigate the report of a discrimination incident in the organization. If there is reasonable suspicion, the employer is obliged to take measures; in particular, the employer must immediately protect the employees concerned from further disadvantages and take action against further harassment. The conduct of an internal investigation is suitable for this purpose.¹⁰³ The internal investigation may relate to both current and past cases. According to a study, 23 percent of the German employers surveyed in response to #MeToo have reopened previous investigations of sexual harassment.¹⁰⁴

The aim of an internal investigation is to establish the facts of the case and, if misconduct has been established, to identify the persons responsible for it. Properly conducted internal investigations also have a preventive effect. Finally, they contribute to the improvement of existing processes in the remediation phase. These principles apply to all compliance violations. Investigations of discrimination cases, in addition, show some special features which are dealt with below.

First of all, the following decisive difference should be mentioned: In contrast to compliance incidents of a white-collar criminal nature (such as fraud, corruption and competition agreements), sexual harassment, racist and other discrimination incidents involve a victim who is personally affected in his or her private or intimate sphere. While economic compliance incidents are mainly about the identification of the persons involved and the determination of the extent of the damage,¹⁰⁵ in case of sexual harassment or racist discrimination it is equally important to protect and take care of the victim.

B. Receipt of a Report on a Discrimination Incident

In the vast majority of cases, an internal investigation is opened on the basis of a report of a discrimination incident. This may be on the basis of personal discussions with compliance staff, e-mail or the whistleblower reporting systems. Sources can be own employees, business partners, the persons concerned or media reports. The whistleblower may be a witness or a person directly or indirectly affected.

Responsibility for investigating a compliance incident related to discrimination allegations may lie with the Compliance Department, a separate Internal Investigations Department or other internal departments within the organization, such as HR, Internal Audit or Legal. It is a particular challenge for members of HR departments to conduct internal investigations if they remain involved in HR activities.

¹⁰² See section III.

¹⁰³ As far as can be seen at present, the draft *Verbandssanktionsgesetz* (VerSanG) shall only apply to cases of white-collar crime: The VerSanG is to regulate the sanctioning of associations for criminal offences by which obligations affecting the association have been violated or by which the association has been or should be enriched (Section 1 VerSanG). Whether and to what extent regulations of the VerSanG on internal investigations should also be applicable to those in connection with sexual harassment or other discrimination cases is not clear at present.

¹⁰⁴ *Littler*, press release dated 11/12/2018, *New Littler Research Reveals 79% of European Employers are Taking Action to Reduce Risks of Sexual Harassment*, see <https://www.littler.com/publication-press/press/new-littler-research-reveals-79-european-employers-are-taking-action-reduce>.

¹⁰⁵ And, depending on the circumstances, additionally cooperation with the investigating authorities.

This is because they have many points of contact with employees and must continue to work with their colleagues even after the investigation has been completed.

It must be ensured that the investigators do not have a conflict of interest. This may be challenging, especially if the company is medium-sized or small and has a limited number of employees. Or if an executive or other person important to the company (e.g. a key customer) is involved. It is irrelevant to the effectiveness of the investigation whether the conflict of interest actually affects the investigation. Even the (justified) appearance of a conflict of interest can have a fatal effect on the investigation. If employees or other stakeholders get the impression that the investigation process is not conducted fairly, any preventive effect is lost. It can also act as a deterrent to future reports and generally demotivate employees.

It is essential that confidentiality is maintained for both the person concerned and the accused. Careful consideration must be given to those who may have knowledge of the incident in order to protect the personal rights of both the person concerned and the accused.¹⁰⁶ This must always be considered when selecting, possibly questioning and involving witnesses, employees, translators, superiors etc. in the course of the investigation. If necessary, this is to be further secured by confidentiality agreements, even if confidentiality regulations should exist in a code of conduct.

C. Triage

The department designated as responsible for reported discrimination must carry out a triage immediately upon receipt of the notification. Triage is used to decide whether or not to open an investigation and to determine the priority of the investigation. Decision criteria for triage can be the nature and severity of the offence, the frequency of the misconduct, organizational factors favoring the misconduct as well as the position and hierarchical status of the persons involved.¹⁰⁷

When triage of discrimination cases is carried out, it is recommendable to divide the reports into categories, e.g. three priority levels. The first priority typically includes serious incidents as well as incidents involving persons with a senior management function (and thus a corresponding responsibility and role model function). Cases which do not belong to the first and third priority levels have second priority. The third priority includes cases that do not qualify as compliance violations.¹⁰⁸

The importance of this triage is shown by the cases of sexual harassment taken up by the media, whose internal investigations had to be repeated due to a lack of initial examination. This also has an impact on the reputation of the organization and the trust that employees place in the organization.¹⁰⁹ When in doubt, therefore, one should not look away, but rather take a close look right from the start.

¹⁰⁶ *Fritsche*, *Interne Untersuchungen in der Schweiz*, Zürich/St. Gallen, 2013, p. 67 f.

¹⁰⁷ Comparable to OCEG Anticorruption Illustrated Series, see <https://go.oceg.org/illustration-ac-part-5-how-to-conduct-investigations-of-corruption>.

¹⁰⁸ These include, for example, employee suggestions for improvements, general HR concerns or misguided communications.

¹⁰⁹ For example in the case described by *Binswanger/Alich*, #MeToo bei EY: Kadermann per sofort freigestellt, Tagesanzeiger dated 12/14/2018, see <https://www.tagesanzeiger.ch/wirtschaft/standardey-stellt-mitarbeiter-nach-vorwuerfen-per-sofort-frei/story/22803713>.

D. Emergency Measures and Initiation of Proceedings

If the triage decision is to carry out an internal investigation, the next step is to consider emergency measures. Particularly in the case of indications of sexual harassment, speed is required on the one hand and sensitivity and a sense of proportion on the other. The employer is required to find the right balance between protecting the victim from further harassment and protecting the accused person from false accusations. Depending on the severity of the incident, physical separation of the involved persons may be required. Further cooperation between the persons involved may also have to be suspended until further notice. Possible immediate measures can be, in particular, a temporary transfer to another location or to the home office, a paid temporary leave of absence or the official order to take accumulated leave. In the case of sexual assaults in particular, an official order to stay away from the persons affected or involved until the investigation is concluded can also be considered.

An important aspect is the decision whether the internal investigation should be conducted by the company's own employees or by external persons. In particular, the following reasons may speak in favor of an investigation by external persons: The internally responsible persons lack the specific training to conduct such an investigation of sexual harassment incidents, there is a lack of internal capacities for a quick and efficient investigation or management personnel are involved.¹¹⁰ It is particularly in cases of sexual discrimination that system-immanent difficulties repeatedly arise. For example, if a newly appointed head of HR's first official act is to investigate against the superior who recruited him.¹¹¹

In the phase of initiating proceedings, the investigating team has to decide on the subject of the investigation and determine the investigative measures. In the context of discrimination cases, the main focus is on interviewing witnesses, colleagues and persons involved.

E. Accompanying the Harassed Person

In contrast to investigations of white-collar crime, the employer is required to ensure the protection and welfare of the person concerned. First of all, the investigating team should always be aware of how much of an effort was required from the harassed person to report the incident or talk about it.

Many cases of sexual discrimination or even rape are not reported at all¹¹² or only years after the incident due to fear. The actress and director *Asia Argento* expressed what she was afraid of: *Weinstein*

¹¹⁰ Today, the attorney-client privilege probably plays a rather minor role in this question, since according to case law informal private interviews by attorneys are only protected by the attorney-client privilege to a limited extent. See for Switzerland: BGer, 9/26/2016 – 1B_85/2016 and for Germany: LG Hamburg, 10/15/2010 – 608 Qs 18/10; LG Mannheim, 3.7.2012 – 24 Qs 1/12, 24 Qs 2/12; LG Braunschweig, 21.7.2015 – 6 Qs 116/15.

¹¹¹ *Binswanger*, Der Fehler liegt im System, Nulltoleranz-Politik bei sexueller Belästigung ist bei vielen Firmen bloss ein Lippenbekenntnis, Tagesanzeiger dated 12/12/2018, see <https://www.tagesanzeiger.ch/schweiz/standard/der-fehler-liegt-im-system/story/14786255>.

¹¹² See, for example, *Pender*, Us Too?, Bullying and Sexual Harassment in the Legal Profession, International Bar Association, May 2019, p. 8; pursuant to which 75% of sexual harassment incidents are not reported by lawyers, see <https://www.ibanet.org/bullying-and-sexual-harassment.aspx>.

would destroy her career.¹¹³ The persons concerned describe anger, insult, degradation, powerlessness, disappointment, isolation, loneliness and above all shame.¹¹⁴

In her book, *Chanel Miller* has described in detail the ordeal for the affected person of having to repeat the incident over and over again in several places and over a long period of time.¹¹⁵ Therefore, it is the responsibility of the investigation team to spare the person concerned from this by good planning and questioning. For the same reason, internal investigations should not be prolonged. For example, a procedure that takes more than six months can lead to a severe strain on the person concerned.¹¹⁶ The interview should always be conducted by two persons of different sex. Depending on the incident, the employer's offer of psychological support may also be an appropriate response for the person concerned.

F. Obligations of care towards the Accused Person

Usually, the harassed person is questioned prior to the accused person. The employer, however, also has duties of protection and care towards the accused person pursuant to Section 241 paragraph 2 German Civil Code. During the internal investigation, the accused person may not be subjected to unreasonable investigations, so that the employer's repressive measures must comply with the standard of Section 12 paragraph 3 AGG, and may not be disproportionate for the latter.¹¹⁷ The same must apply in Switzerland under the employer's general duty of care pursuant to Article 328 paragraph 1 sentence 1 CH-OR.

G. Interrogation

In Germany, the employee's obligation to provide information is recognized as a secondary obligation arising from the employment relationship.¹¹⁸ In Switzerland, the duty of loyalty of employees includes, among other things, the duty to avert damage to assets and reputation of the employer and the associated obligation to provide information and notification.¹¹⁹ Employees are obliged to inform the employer unsolicited, truthfully, completely and in good time about all findings concerning possible grievances, disturbances, dangers or cases of damage.¹²⁰

When questioning the person accused of discriminatory behavior, certain instructions must be given. These include, among other things, information on logging, confidentiality, obligation to provide

¹¹³ *Farrow*, *Catch and Kill, Lies, Spies and a conspiracy to protect predators*, New York 2019, S. 247.

¹¹⁴ *Rau*, *Sie wirft Professor Übergriffe vor – und fühlt sich nun abgekanzelt*, *Tagesanzeiger* dated 12/18/2019, see <https://www.tagesanzeiger.ch/schweiz/standard/was-darf-eine-betroffene-nach-einem-missbrauchsfall-erwarten/story/30203736>.

¹¹⁵ *Miller*, *Know My Name*, New York 2019.

¹¹⁶ *Rau*, *Sie wirft Professor Übergriffe vor – und fühlt sich nun abgekanzelt*, *Tagesanzeiger* dated 12/18/2019, see <https://www.tagesanzeiger.ch/schweiz/standard/was-darf-eine-betroffene-nach-einem-missbrauchsfall-erwarten/story/30203736>.

¹¹⁷ *Krieger/Deckers*, *NZA* 2018, 1161, 1162.

¹¹⁸ *Weiß*, in: *Moosmayer/ Hartwig (Hrsg.)*, *Interne Untersuchungen*, 2012, S. 50; BAG, 6/23/1999 – 2 AZR 606/08, *BB-Rechtsprechungsreport Lipinski/Kumm*, *BB* 2010, 2444.

¹¹⁹ *Wantz/Licci*, *jusletter* dated 2/18/2019, 5 f.

¹²⁰ *Streiff/von Kaenel/Rudolph*, *Arbeitsvertrag*, *Praxiskommentar zu Article 319-362 OR*, 7. Aufl. 2012, *Article 321a OR*, N 7.

information and possible rights to refuse to provide information.¹²¹ The instructions also depend on who is conducting the internal investigation. If external lawyers conduct the internal investigation, they should inform the questioned person that they represent the employer's interests (so-called "Upjohn" or "Miranda" warning).¹²²

In particular, the accused person must be fully informed about the allegations. It must also be examined whether the circumstances permit or make it recommendable that the accused person be accompanied by his or her own lawyer.

Depending on the circumstances, the internal investigation of the discriminatory incident must be extended to include evidence such as telephone data, email history, Internet use, etc. In this respect the limits of data protection law must be observed. A particular challenge is the examination of emails or other messages marked as private, which could contain discriminatory elements and are located on servers or terminal equipment of the employer. In this case, it must be clarified in advance what legal access the employer has. This depends on the specific circumstances, e.g. what is agreed in the employment contract provision on the use of the electronic equipment, whether there is effective consent or whether there is an overriding interest of the employer.¹²³

H. Consequences and Sanctions against the Discriminating Person

If the internal investigation confirms the reported discriminatory behavior, the employer must draw the appropriate conclusions. The employer must take the appropriate, necessary and reasonable measures to stop the discrimination in the individual case, such as written warning, relocation, transfer or termination.¹²⁴

Here too, special attention must be paid to the person concerned and it must be ensured that the person concerned (and all other employees) is safe from further harassment. The question of whether and how future cooperation between the person concerned and the discriminating person should take place must also be specifically addressed, in particular, in cases of sexual harassment. Here the employer may have to consider accompanying or further measures, such as a change of job, a transfer or a termination. And above all, it must be decided who these measures will affect: The person affected or the discriminating person. This may be a decision based on ethical, business or other criteria ideally defined by the organization in advance.

The employer can (and in principle must) issue an extraordinary dismissal in the case of an established case of discrimination if there is no other reasonable way to continue the employment relationship because all milder possibilities are unreasonable for the employer.¹²⁵ In contrast, an extraordinary

¹²¹ *Fritsche*, *Interne Untersuchungen in der Schweiz*, Zürich/St. Gallen 2013, S. 173 ff u. 196 f.; *Wantz/Licci*, jusletter dated 2/18/2019, 26 et seq.; *Weiß*, in: Moosmayer/Hartwig (Hrsg.), *Interne Untersuchungen*, 2012, S. 53. The application of the nemo-tenetur principle to interviews in internal investigations remains controversial.

¹²² *Bloch/Gütling*, SZW 2019, 275, 280.

¹²³ At least for Switzerland: *Wantz/Licci*, jusletter dated 2/18/2019, 18 et seq.

¹²⁴ See regarding the potential labour law consequences: *Krieger/Deckers*, NZA 2018, 1161, 1164 et seq.

¹²⁵ BAG, 2.3.2017 – 2 AZR 698/15; BAG, 6/29/2017 – 2 AZR 302/16; Article 337 CH-OR, according to which "good cause is defined as, in particular, any circumstance, the existence of which renders it unreasonable to expect the person giving notice to continue the

dismissal is not possible under German law if there is a more lenient means of action, such as a written warning, transfer or ordinary dismissal, which also achieves the purpose pursued by an extraordinary dismissal - not the sanction of conduct in breach of duty, but the avoidance of the risk of future disruption of the employment relationship.¹²⁶ Also in case of an ordinary termination due to discriminatory conduct there must be appropriate grounds, as otherwise the employee may claim to continue the employment.¹²⁷

An important principle of labor law in Switzerland is the freedom of dismissal.¹²⁸ Employers and employees are in principle free to enter into and terminate an employment relationship. This freedom of termination is limited if the ordinary termination is due to abusive motives or if the employee is terminated without notice without good cause.¹²⁹ However, there is a fundamental difference to German labor law in this respect: In Switzerland, even an abusive ordinary termination or an unfounded termination without notice generally leads to the termination of the employment relationship. In this case, an employee who has been dismissed without notice in an abusive manner or without good cause can (only) claim compensation, but cannot demand reinstatement or continuation of the employment relationship.¹³⁰ There is a major exception to this rule in the context of Article 10 CH-GIG¹³¹: If an employee has filed an internal complaint of discrimination on grounds of his or her gender (including sexual harassment under Article 4 in conjunction with Article 3 CH-GIG) and such employee is subsequently dismissed without good cause¹³², the employee may contest the dismissal. If the challenge is successful, the notice of termination is invalid and the employee must continue to be employed. The employee is protected against a new termination during the proceedings to contest the termination and for six months after the conclusion of the proceedings

employment relationship in good faith". This is likely to be the case, in particular, if sexual "harassment" qualifies as a serious criminal offence within the meaning of the criminal code.

¹²⁶ BAG, 6/29/2017 – 2 AZR 302/16, Rn. 27.

¹²⁷ The German Employment Protection Act (Kündigungsschutzgesetz), where applicable, aims to protect employees against so-called "socially unjustified dismissals" (Section 1 of the German Employment Protection Act, KSchG). Accordingly, a dismissal is only socially justified if it is based on reasons which (1) lie in the person of the employee or (2) in the employee's conduct or (3) are due to urgent operational requirements (Section 1, paragraph 2, KSchG). A further condition is, inter alia, that it is not possible to continue employment at a different workplace, under changed working conditions or after reasonable retraining or further training measures (section 1, paragraph 2, sentence 2, no. 1 b) and section 1, paragraph 2, sentence 3 of the KSchG).

¹²⁸ The following explanations are limited to employment relationships under private law. Employment relationships under public law as well as regulations from collective labor agreements (Gesamtarbeitsverträge, GAV) or normal employment contracts (Normalarbeitsverträge, NAV) are not dealt with.

¹²⁹ Article 336 CH-OR regarding abusive ordinary termination and Article 337c CH-OR regarding termination without notice without good cause.

¹³⁰ In the event of wrongful ordinary termination, the compensation corresponds to an amount of up to six months' salary (Art 336a paragraph 2 CH-OR). In the event of unjustified termination without notice, the employee is entitled to compensation for what he or she would have earned if the employment relationship had been terminated by observing the period of notice or, in the case of a fixed-term employment relationship, by expiration (Article 337c paragraph 1 CH-OR). In addition, the judge may award the employee a compensation amounting to a maximum of six months' wages (Article 337c paragraph 3 CH-OR).

¹³¹ Article 10 CH-GIG is a special case which is covered by Article 366 paragraph 1 d. CH-OR. Accordingly, a notice of termination is abusive if the "other party asserts claims arising from the employment relationship in good faith".

¹³² See in respect of Article 10 Rz. 14 ff *Riemer-Kafka/Ueberschlag*, in: Kaufmann/Steiger-Sackmann (Hrsg.), *Kommentar zum Gleichstellungsgesetz*, 2. Aufl. 2009, Art. 10 Rn. 14 et seq.

(Article 10 CH-GIG).¹³³ The purpose of Article 10 CH-GIG is to protect a complaining employee from a revenge termination by the employer.¹³⁴

I. Remediation

Once the internal investigation has been completed, the final report should be analyzed with a view to subsequent remediation. This should include a root cause analysis and process review. Critical questions are to be asked, the answers to which may have an impact on the CMS and internal control systems (ICS). For example, the following may be reviewed: whether there were any warnings or complaints about the person causing the discrimination in advance, what the general working climate in the affected department is like, whether preventive measures have been taken and, if so, why these have not worked. Similarly, for example, the process of internal investigation can also be checked for efficiency.

VII. CONCLUSION

Cases of sexual harassment, racism and other discrimination are compliance incidents that are to be classified as serious compliance risks. Even if a compensation payment in the case of sexual discrimination and other discriminatory incidents in Switzerland or Germany is far from equal to the payments made in the USA, damage to the reputation of the organization and the associated loss of customers or employees can nevertheless be drastic. Organizations should therefore review and adjust their compliance management systems and processes to ensure that such risks can be professionally identified and managed. In comparison to white-collar crime, it should be noted that sexual and other discrimination always involves an employee who is personally affected in his or her private or intimate sphere. This is where the employer has a special duty of care. In addition, appropriate specific precautions must be taken for internal investigations.

¹³³ Another exception to the freedom of dismissal under Swiss law is that the employer cannot lawfully dismiss the employee during the so-called retention period. Blocking periods apply, among other things, to the performance of Swiss compulsory military or protection service or Swiss civilian service, in the event of illness or accident through no own fault or in the event of pregnancy (Article 336c CH-OR).

¹³⁴ See in respect of Article 10, Rz. 1. *Riemer-Kafka/ Ueberschlag* in: Kaufmann/ Steiger-Sackmann (Hrsg.), *Kommentar zum Gleichstellungsgesetz*, 2. Aufl. 2009, Art. 10, Rn. 1.