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White-Collar Crime and
Compliance

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Developments in Corporate Criminal Law

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Key Take-aways

1.
Criminal investigations against companies, in particular for money laundering and corruption offences, are on the rise in Switzerland.

2.
Case law on essential substantive and procedural issues of corporate criminal law is largely absent, which leads to considerable legal uncertainty in practice.

3.
To avoid disproportionate collateral damage for companies and their stakeholders, an instrument for an alternative resolution of criminal proceedings (deferred prosecution agreements) is needed.

1 Introduction

Almost two decades ago, Switzerland introduced a law on **corporate criminal liability** with Article 102 of the Swiss Criminal Code (**SCC**). Under this concept, companies are held liable for certain white-collar crime offenses (in particular, money laundering, corruption offenses, and financing of terrorism) if they failed to take all necessary and reasonable organizational measures to prevent these offenses.

In the first years after its entry into force on 1 October 2003, corporate criminal law did not play any role in legal practice. However, legal scholars who had suggested that Article 102 SCC is a dead letter proved to be wrong, as the prominent Alstom and Swiss Post investigations showed in 2011: The Office of the Attorney General of Switzerland (**OAG**) convicted a Swiss subsidiary of the French Alstom Group, by summary penalty order, for corruption offenses committed abroad. Swiss Post was convicted of money laundering by a court of first instance in the canton of Solothurn, but was later acquitted by the appellate courts. Since then, **corporate criminal law** has **considerably gained significance** and investigations into Swiss and foreign companies are on the rise.

In practice, investigations mainly focus on **money laundering and corruption** concerning, in particular, the industrial sector, the banking sector, and commodity trading. The publicly known sanctions imposed on companies ranged from one Swiss franc, in a case of voluntary self-disclosure, to nearly the statutory maximum penalty of CHF 5 million. In addition, disgorgements, confiscations and compensations have been ordered in the amount of more than CHF 100 million in individual cases. In a number of cases, closure orders were issued on the basis of considerable reparation payments based on Article 53 SCC.

It is noticeable that companies often aim to **settle corporate criminal investigations** amicably with the prosecution authorities. Therefore, cases are rarely brought before the courts by way of indictment or following a complaint against investigative measures. The proceedings are usually concluded by a **summary penalty order or a closure order** from the public prosecutor's office. As a result, precedent on corporate criminal law is sparse, which in practice leads to considerable legal uncertainty. This briefing aims to shed some light on the limited case law available and some of the major unresolved legal issues; followed by a short account of the status quo in corporate criminal law and a discussion of alternative procedural means for the resolution of criminal investigations.

2 Case law

According to recent case law, Article 102 SCC does not constitute a stand-alone criminal offense in itself. Rather, the provision attributes the main offense committed by employees to the company ("*strafrechtliche Zurechnungsnorm*"; FSC 146 IV 68 et seq.; FCC, BB.2016.359; SOG 2012 No. 11). As a result, the qualification of the main offense as a crime or misdemeanor predetermines essential substantive and procedural questions, such as the statute of limitations for corporate criminal liability.

A leading case in the area of corporate criminal law is the **Swiss Post decision** rendered by the **Federal Supreme Court** (FSC 142 IV 333 et seq.): Swiss Post was investigated for allegations of money laundering in connection with a cash withdrawal by a customer. On appeal, a guilty verdict of the trial court was quashed by the Solothurn High Court and Swiss Post was acquitted from the charges. The Federal Supreme Court confirmed the acquittal and held that the objective and subjective elements of the main offense committed by the employees form a **pre-condition for corporate criminal liability** ("*objektive Strafbarkeitsbedingung*") and must thus be sufficiently established. The public prosecutor's office had previously discontinued the money laundering proceedings against the Swiss Post employees under investigation or issued non-prosecution orders, which led the Federal Supreme Court to conclude that this pre-condition was not met.

Another take-away from the Swiss Post investigation concerns corporate restructuring: In the course of the criminal proceedings, Swiss Post was converted into a stock company under special legislation and the business affected by the main offense was transferred to a subsidiary. The Solothurn High Court found that criminal liability remains with the **outsourcing parent company** after the restructuring had taken place (HC SO, STBER.2011.32). Similarly, the Federal Criminal Court held that the opening of bankruptcy proceedings against a company does not hinder the continuation of corporate criminal proceedings (FCC, BB.2016.359).

Other precedents address the relationship between the **investigations into the company and the individual offenders**. The courts held that the proceedings must, in principle, be **conducted separately**, which has a significant impact on rights of participation and the access to the case files for the company and its employees, respectively. In each case, the appeals filed against the separation orders were dismissed on account of practical reasons supporting the separate conduct of the proceedings (FCC, BB.2019.100; BB.2017.51; BB.2017.35; BB.2016.84; see also FSC, 6B_233/2018).

Article 102 SCC "attributes" criminal liability to a company.

3 Unresolved legal issues

Many unresolved legal issues exist in **international cases**: According to the **principle of territoriality**, foreign parent companies generally are within the reach of **Swiss jurisdiction** for offences committed within their Swiss subsidiaries. However, questions arise as to which law determines organizational deficiencies or requirements for

piercing the corporate veil. It is doubtful that a purely Swiss standard should be applied and the law applicable to the foreign parent company should be disregarded, although this is regularly done by Swiss prosecution authorities.

The **reverse setup** also raises questions: Contrary to prosecution practice, the Swiss domicile of a parent company alone is, in our view, not sufficient to establish Swiss jurisdiction for the prosecution of offenses committed within their foreign subsidiaries or branches. Rather, the relevant organizational deficiencies must, **at least partially, have occurred in Switzerland**, or jurisdiction must be based on the active personality principle under Article 7 SCC. The latter would mandatorily require dual criminality for both the main offense and the corporate offense abroad and in Switzerland.

Many unresolved legal issues exist in international cases.

Irrespective of jurisdiction, for offenses committed abroad the question arises as to how the main offense and the organizational deficiencies are to be established. In our opinion – again, contrary to prosecution practice – **a purely Swiss standard is not sufficient**. Rather, the relevant conduct must be liable to prosecution under both foreign law applicable at the place of commission and Swiss law, following the principle laid down in Article 305bis(3) SCC for foreign predicate offenses to money laundering. The same must apply to the required organizational deficiencies: Compliance with local organizational requirements abroad by a Swiss company eliminates criminal liability. However, a violation of foreign organizational regulations alone does not suffice. There must be proof that the Swiss parent company additionally breached Swiss organizational regulations with respect to its foreign subsidiaries.

Finally, from a **procedural point of view**, the question arises as to the capacity in which **employees** of companies under investigation are to be **interrogated**. Article 178 let. g of the Swiss Code of Criminal Procedure (**CrimPC**) states that anyone who has been or could be appointed to represent the company in the criminal investigation, as well as his or her staff, is deemed to be a person providing information and thus has a right to refuse testimony. Theoretically, any employee with individual or joint signatory rights could be appointed as a company representative. This raises the question whether such employees have to be treated as persons providing information only for as long as a company representative has not been appointed yet, or whether a general right to refuse to testify is to be derived from Article 178 let. g CrimPC for virtually all members of management and their staff throughout the investigation. Although this does not quite facilitate criminal prosecution, the company's defense rights must, in our view, be taken seriously and Article 178 let. g CrimPC be applied broadly.

4 Need for alternative procedural instruments for the settlement of corporate criminal cases

Almost two decades after its entry into force, there remains a vast amount of unchartered territory in corporate criminal law, although the number of corporate criminal proceedings has increased significantly. Clearly, the **evidentiary standards** for a conviction under Article 102 SCC are **high**. The main offense and the required organizational deficiencies as well as a causal link between the two must be fully established, which may be very challenging at times. In many proceedings, companies are, as a matter of consequence, **exposed to pressure** from criminal prosecution authorities **to enter into a settlement**. At the same time, companies often seek to resolve investigations in an expeditious and controlled manner and shy away from time-consuming and public hearings in front of trial courts. Therefore, **"negotiated" summary penalty orders** are often regarded as a viable option if an abandonment of the proceedings seems difficult to achieve. Such compromise is hardly convincing, but procedural law does not provide for any other practicable alternatives. The closure of proceedings on the basis of a reparation payment is not commonly accepted, which is why the OAG discontinued this practice.

Deferred Prosecution Agreements would be desirable in Switzerland.

Against this background, the OAG's proposal to consider the **introduction of *Deferred Prosecution Agreements* (DPA)** based on the Anglo-American model is welcome. According to this proposal, indictments in criminal proceedings against companies are deferred on the condition that the company cooperates in the preliminary investigation and enters into an agreement with the public prosecutor's office. This agreement would address, among other things, the admitted facts of the case and the fine, the assets to be forfeited and the compensation to be paid to the private plaintiffs, as well as the obligation to resolve any organizational deficiencies under the supervision of a monitor. Upon successful completion of the probation period, the proceedings against the company would be **discontinued**.

The **advantages** of such model are obvious: The company may avoid any collateral damage associated with a criminal conviction (by summary penalty order or a court verdict) through appropriate efforts. Also, the required conditions for settlement would, in our opinion, in many cases, serve the public interest better and more sustainably than a criminal conviction. Last but not least, DPAs may contribute to a more efficient allocation of the limited resources of prosecution authorities.

The OAG's proposal was not adopted in the Federal Council's **draft bill for a revision** of the Criminal Procedure Code. If Parliament follows this position, the procedural instruments available in Switzerland will remain limited. Companies and their stakeholders (including shareholders and employees) would continue to face considerable consequences, which may far exceed any wrongdoing. International cooperation would also remain affected, which may have a negative impact on Switzerland as a business hub. While DPAs often lead to an expeditious resolution of criminal proceedings abroad, negotiated summary penalties require an advanced investigation, which, timewise, regularly puts the OAG behind foreign prosecution authorities.

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