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Aspects of Swiss Law Regarding Corporate Criminal Liability and Self-Reporting

By Saverio Lembo

Bär & Karrer
Lawyers

Zürich
Bär & Karrer AG
Brandschenkestrasse 90
CH-8027 Zurich
Phone: +41 58 261 50 00
Fax: +41 58 261 50 01
zuerich@baerkarrer.ch

Genf
Bär & Karrer SA
12, quai de la Poste
CH-1211 Geneva 11
Phone: +41 58 261 57 00
Fax: +41 58 261 57 01
geneve@baerkarrer.ch

Lugano
Bär & Karrer SA
Via Vegezzi 6
CH-6901 Lugano
Phone: +41 58 261 58 00
Fax: +41 58 261 58 01
lugano@baerkarrer.ch

Zug
Bär & Karrer AG
Baarerstrasse 8
CH-6302 Zug
Phone: +41 58 261
Fax: +41 58 261
zug@baerkarrer.ch

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A Introduction

In Switzerland, statistics show a trend where increasing numbers of corporate entities face prosecution. While corporate criminal liability has existed since 2003, it has never been applied as often as nowadays. In cases such as *HSBC*, *Petrobras*, *1MDB* and more recently *Addax*, criminal authorities show a clear willingness to go after corporate entities, rather than individuals. Against such a background, this paper highlights some features of corporate criminal liability (B), self-reporting (C), and enforcement tools in Switzerland (D).

B General aspects and conditions of corporate criminal liability

I Relevant provision under Swiss law

It is possible for a company to be liable for acts committed by its employees and directors, under specific conditions that are set out in further detail below.

Article 102 of the Swiss Criminal Code (**SCC**) contains two forms of corporate criminal liability: ***secondary*** criminal liability, pursuant to Article 102, para. 1 SCC, and ***primary*** criminal liability, pursuant to Article 102, para. 2 SCC. It should be noted that the application of Article 102 para. 1 is subsidiary to Article 102 para. 2 SCC.

The purpose of this provision is to provide a pragmatic solution for situations where the conviction of an individual is not sufficient or equitable, or where it is impossible to hold any natural person criminally liable due to a lack of reasonable and adequate organisational precautions being taken by the company. Nonetheless, it should be noted that Art. 102 SCC has not yet been applied extensively by public prosecutors. Accordingly, although over the last few years one can observe growing numbers of cases involving the prosecution of companies, a common standard practice related to its application has yet to develop fully.

In the following paragraphs, a summary of the conditions applicable to both ***primary*** and ***secondary*** corporate criminal liability precedes the presentation of the specific conditions of these two forms of criminal liability.

II Definition of a company under Article 102 SCC

Article 102 SCC has a wide scope of application. Indeed, its application *ratione personae* includes not only companies *stricto sensu*, but also other legal entities. According to Article 102, para. 4 SCC, the following entities can be a criminal legal subject: any legal entity under private law (subsection a); any legal entity under public law with the exception of local authorities (subsection b); companies (subsection c); and sole proprietorships (subsection d).

Subsection (a) encompasses Associations[1], Foundations[2], Companies Limited by Shares[3], Partnerships Limited by Shares[4], Limited Liability Companies[5], Cooperatives[6] and Common Land Cooperatives[7] and similar bodies. Subsection (b) deals with any entity governed by public law (e.g., a public transport company). Subsection (c) includes General Partnerships[8], Limited Partnerships[9] and Simple Partnerships[10]. Lastly, subsection (d) covers any person doing business or engaged in commercial activities and operating as a commercial entity or company.

III General conditions for liability under Article 102 SCC

1 Offences committed by someone within the company

In order for a company to be liable under Article 102 SCC, the actual perpetrator must be a natural person involved in the company and a strong hierarchical and organisational link must exist between the natural person and the company. The perpetrator may have the role of a unipersonal formal or informal corporate body (*organe de droit* or *de fait; formelle* or *faktische Organe*) of the company, or may be a member of a collective corporate body, a partner, an agent, or an employee, including those performing the functions of an officer. Whether the perpetrator has decision-making power within the company is therefore inconsequential. It is an additional requirement that the objective and subjective elements constituting a criminal offence (*actus reus* and *mens rea)* be fulfilled by the individual(s) who committed the underlying offence.

2 Offences committed in the exercise of commercial activities

The purpose of Article 102 SCC is the prohibition of illicit behaviour that is nevertheless aimed at obtaining a lawful corporate objective.

Accordingly, in order to be liable under Article 102 SCC, the offence must be committed in the conduct of commercial activities that are linked, even indirectly, with the aims of the company. The production and exchange of goods, as well as the provision of services will always be considered to be commercial activities. In order to hold the company criminally liable, these business activities must be compatible with the general corporate aims of the company. It should be stressed that this also holds true for non-profit companies.

1 Art. 60ff Swiss Civil Code.
2 Art. 80ff Swiss Civil Code.
3 Art. 620ff Swiss Code of Obligations.
4 Art. 764ff Swiss Code of Obligations.
5 Art. 772ff Swiss Code of Obligations.
6 Art. 828ff Swiss Code of Obligations.
7 Art. 59 para. 3 Swiss Civil Code.
8 Art. 552ff Swiss Code of Obligations.
9 Art. 594ff Swiss Code of Obligations.
10 Art. 530ff Swiss Code of Obligations.

Only that conduct that entails typical risks linked to the lawful and normal business activities of the company may lead to corporate criminal liability. The offence must appear to be the concretization of these typical risks.

The situations whereby a company could be held liable are therefore limited by requiring that the underlying conduct be inherently linked to the company's corporate objectives and be carried out in the exercise of commercial activities.

IV Primary corporate criminal liability

Article 102, para. 2 SCC provides for the primary, solidary and independent criminal liability of the company. Primary corporate criminal liability occurs only in limited cases where the company has failed to take all reasonable organisational measures to prevent the realisation of a defined set of offences.

1 Applicable only to a limited number of criminal offences

For a finding of primary corporate criminal liability, one of the following underlying offences must have occurred: participation in criminal organisations[11], financing terrorism[12], money laundering[13], bribery of Swiss public officials[14], granting an advantage[15], bribery of foreign public officials[16] or corruption[17].

2 Independent liability

Primary corporate liability can be established irrespective of the criminal liability of the natural person, which means that the prosecution or conviction of the perpetrator is not required for this provision to apply.

Moreover, it is important to stress that in the context of Article 102, para. 2 SCC, even if the individual could be exempt from liability, the company is still liable. In other words, even if the individual can successfully invoke a defence against criminal liability, the company can still be liable.

3 Lack of reasonable organisational measures

As mentioned above, for the company to be liable under Article 102, para. 2, it must have failed to take reasonable organisational measures that would have prevented the commission of the underlying offence.

The company must effectively take all of the measures that appear appropriate to prevent the commission of the offences listed in Article 102, para. 2 SCC. In this

11 Art. 260ter SCC.
12 Art. 260quinquies SCC.
13 Art. 305bis SCC.
14 Art. 322ter SCC.
15 Art. 322quinquies SCC.
16 Art 322septies SCC.
17 Art. 322octies SCC.

regard, it is essential that the company took all of the measures and not only what might be considered as the most important ones. Thus, the competent criminal authority will have to analyse, on a case-by-case basis, the measures implemented and then assess whether the company has fulfilled its organisational duty.

For a finding of criminal liability, there must also be a causal link between the organisational deficiencies and the underlying offence.

The organisational measures required under Article 102, para. 2 SCC are more specific that those under Article 102, para. 1 SCC as they must relate to the prevention of the limited number of offences mentioned in section IV (1) above. For example, for the crime of corruption, the lack of an anti-corruption platform within the company strongly suggests a lack of reasonable organisational measures.

V Secondary corporate criminal liability

Under the theory of secondary corporate criminal liability, a company can be found criminally liable if any offence occurred in the course of its business and the actual perpetrator(s) cannot be identified due to deficiencies in the organisation of the company. Consequently, secondary criminal liability under Article 102, para. 1 SCC is applicable only if the offence cannot be attributed to any specific natural person. This is why is it also defined as a subsidiary form of liability. However, according to a recent decision of the Swiss Federal Supreme Court[18], in the case of secondary corporate criminal liability, as is the case for primary corporate criminal liability, it must be proven that at least one individual, albeit unidentifiable, fulfilled the objective and subjective constitutive elements of an offence.

1 Impossibility of attributing the offence to a specific natural person

Secondary corporate criminal liability can only occur if it is impossible to identify the specific individual(s) who committed the offence by fulfilling the objective and subjective elements of such offence.

However, there are situations whereby the company is not liable notwithstanding the fact that an individual cannot be held criminally responsible, in particular:

- If the individual cannot be convicted because of a valid defence (mental incapacity[19], or the person acted under an erroneous belief[20] or could not be aware that they were acting unlawfully[21]), the company is not liable because the offence can still be attributed to the individual.

18 BGE 142 IV 333
19 Art. 19, para. 1 SCC.
20 Art. 13 SCC.
21 Art. 21 SCC.

- If the specific individual is not identified but another natural person is liable by reason of being subject to a duty of care (*position de garant; Garantentstellung*).

- If there is an obstacle to the criminal action (for example, the perpetrator is dead yet they are identifiable).

2 Deficiencies in the organisation of the company

For liability under Article 102, para. 2 SCC, there must be a causal link between the organisational deficiencies and the impossibility of attributing the offence to a specific natural person.

Examples of inadequate organisation include: lack of description of employees' responsibilities and duties; lack of proper documentation; absence of work schedules; and lack of supervision of employees.

C Self-reporting and cooperation with domestic state authorities

I Legal bases

It should be stressed that Swiss legislation on self-reporting is somewhat lacking. Indeed, only two provisions cover the matter in Swiss legislation. However, in order to prevent money laundering more efficiently, effective 1 January 2016, the Anti-Money Laundering Act (**AMLA**) and the SCC have included the aggravated tax misdemeanour as a possible underlying infraction that can or must be reported.

1 Duty to report for financial intermediaries Art. 9 AMLA

A financial intermediary must immediately file a report to the domestic competent authority if it knows or has reasonable grounds to suspect that assets involved in the business relationship either have a link to corruption or to an aggravated tax misdemeanour, or are in the hands of a criminal organisation, or serve the financing of terrorism.

It is important to stress that insofar as lawyers are covered by attorney-client privilege, they do not have this duty, to the extent that the service provided is "typical" to the profession of lawyer (i.e. the activity of asset management would clearly not be privileged).

2 Right to report Art. 305ter, para. 2 SCC

Any person who, as part of their profession, accepts, holds on deposit, or assists in investing or transferring outside assets has the right to report to the domestic

competent authority any observations that indicate that assets originate from a crime or an aggravated tax misdemeanour.

II Interaction between Art. 9 AMLA and Art. 305ter, para. 2 SCC for financial intermediaries

The wording of Art. 9 AMLA and Art. 305ter, para. 2 SCC may lead to confusion regarding their respective application in the case of financial intermediaries.

According to Art. 9 AMLA, financial intermediaries have an **obligation to report** if they know or have reasonable grounds to suspect that assets involved in the business relationship are linked to certain infractions (corruption/aggravated tax misdemeanour/criminal organisation/terrorism) or to any crime. On the other hand, according to Art. 305ter, para. 2 SCC, the same financial intermediaries have only a **right to report** if their suspicions do not meet the threshold required by Art. 9 AMLA, i.e. if they do not have reasonable grounds.

Consequently, insofar as the financial intermediary does not have reasonable grounds to suspect the criminal origin of the assets being handled, it does not have a duty to report it to the competent authority, but simply a right to do so.

D Enforcement tools in Switzerland: practice of the prosecution authorities

I Introduction

As an alternative to ordinary criminal proceedings, which are costly and time-consuming, there are other enforcement tools available to Swiss public prosecutors that allow for a better management of the justice system. Recourse to any of these alternatives must be based on the factual matrix of the case. As discussed hereafter, some interesting alternative tools include: the Summary Penalty Order Procedure (II); Accelerated Proceedings (III); and Reparation (IV). These tools are especially relevant when dealing with corporate criminal liability, as they can be applied in most cases.

The Summary Penalty Order Procedure and the Accelerated Proceedings options were introduced with the new Criminal Code of Procedure (CrimCP), in force as of 1 January 2011. These two tools allow for the settlement of cases where the accused has recognised the charges brought against them.

The third option, Reparation, allows for cases to be dismissed where the accused has repaired the wrong they caused. This possibility is regulated by Art. 53 SCC.

These enforcement tools can be used both by prosecutors and by defence counsel. The practice and the way in which public prosecutors and lawyers

interact might greatly vary between different local jurisdictions (*cantons*), as well as at the federal level.

In this context, and due to the high frequency of federal prosecutors being involved in matters that occurred in Geneva, the Geneva Bar Association and the Office of the Attorney General have issued a joint statement to provide a framework for the interaction between federal prosecutors and lawyers based in Geneva.[22]

This framework vastly improved the opportunity for and the quality of the interactions between these two actors within the Swiss legal system, thus furthering a better administration of justice. Indeed, informal discussions among these actors have increased, which has led to a better use of alternative enforcement tools as opposed to ordinary proceedings.

II Summary penalty order procedure

Within the framework of minor offences, the Summary Penalty Order Procedure allows the prosecutor to offer a deal to the accused in order to avoid the lengthy standard procedure and thus issue a Penalty Order.

For the prosecutor to be able to offer a deal to the accused, the following cumulative conditions must be fulfilled.[23] First, the facts must have been recognised by the accused or have been satisfactorily established. Second, the sanction sought by the prosecutor must be either a fine, a monetary penalty related to no more than 180 days, community service of no more than 720 hours, and/or a custodial sentence of no more than six months.

This procedure is particularly relevant for companies accused of criminal wrongdoings, as the only possible sanction against them is a fine.[24]

If unchallenged within a ten day period, the Penalty Order becomes akin to a final and binding judgment.[25]

1 Remarks

The Penalty Order differs from the "*plea bargain*" of the U.S. in several respects. First, the maximum penalty is limited to six months' detention, whereas in the U.S. there is no material limit. Second, where the defendant does not accept the Summary Penalty Order, the likely sentence imposed through the standard procedure cannot considerably increase. In the U.S., the difference between the offered sentence/penalty in a plea bargain and what could be decided by a court

22 *De officis entre l'Ordre des avocats de Genève (ODAGE) et le Ministère public de la Confédération (MPC)*, 1 September 2015.

23 Art. 352 of Criminal Code of Proceedings (**CrimCP**)

24 Art. 102 SCC.

25 Art. 354 para. 3 CrimCP.

of justice can be significant. Lastly, a plea bargain in the U.S. normally requires the intervention of a lawyer, whereas in Summary Penalty Order proceedings the presence of a lawyer is not mandatory.

Moreover, it is important to note that this procedure cannot be compared to a Deferred Prosecution Agreement, as the accused must recognise the facts and their guilt.

It should also be noted that the Penalty Order can have the same effects as a seizing order. Indeed, it can contain the details of any seized property or assets that are to be released or forfeited.[26] However, the person who has legal title over the seized assets or property has a right to oppose the Penalty Order.[27]

Moreover, as the name suggests, the Summary Penalty Order Procedure is a summary procedure, which implies that it is an "exception" to regular proceedings. However, in practice this is the usual way of proceeding (in 2015, 78% of cases were resolved by a Penalty Order in Geneva).

At the federal level, one of the most notable cases resolved recently through a Penalty Order is that of Odebrecht (Petrobras) whereby over CHF 200 million (CHF 4.5 million fine along with the forfeited sum) were due to Switzerland.

III Accelerated proceedings

1 Cases of application

Another enforcement tool in the Swiss justice system is that of accelerated proceedings.

In general, the option of accelerated proceedings will be chosen when the evidence required to shed light on the truth of what happened is either difficult to establish or, at the least, uncertain. In these situations, accelerated proceedings allow for the actual truth to be replaced by a formal (or a negotiated) one.

Of course, if it is clear that the accused is either innocent or guilty of the charges brought against him or her, there will be no interest in negotiating with the prosecutor. However, if for instance the Prosecutor wishes to qualify an offence of fraud[28] but encounters difficulties in proving the wilful behaviour of the perpetrator, they could decide to settle for the lesser offence of misappropriation[29].

26 Art. 354 para. 1 lit. h CrimCP.
27 Art. 354 para. 1 lit. c CrimCP.
28 Art. 146 SCC.
29 Art. 138 SCC.

2 Requirements

2.1 Request from the accused person

Only the accused person can request the initiation of accelerated proceedings[30]. This requirement seeks to prevent the prosecutor's office from pressuring the accused person into such proceedings, for instance by making promises on the outcome.

Similarly, to prevent the risk of the prosecutor's office pressuring the accused person to accept charges and to protect the equality of arms in the elaboration of the indictment, in accelerated proceedings the accused must be represented by a lawyer.[31]

The decisive moment for the mandatory appointment of a defence counsel is when the prosecutor's office agrees to commence accelerated proceedings.

In practice, however, the prosecutor's office is free to inform the accused person of the possibility of requesting accelerated proceedings and of the fact that if the accused should decide to file a request, it would be favourably received by the prosecutor's office.

2.2 Admission of relevant facts and acceptance of civil claims

The accused who requests that accelerated proceedings be conducted must have admitted all the relevant facts beforehand as well as all the civil claims, at least in principle.

2.3 Temporal limit

The accused person must, at the latest, file their request before the prosecutor has formally filed the charges against them.

However, in practice, the request will only be made once the accused person and the prosecutor's office have reached an agreement pertaining to the charges and the sentence. This discussion takes place informally and cannot be used in the proceedings by either party.

2.4 Material limit

All criminal cases can *a priori* be subject to an accelerated proceeding, as long as the punishment sought by the prosecutor's office does not exceed five years of imprisonment.

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30 Art. 358, para 1 CrimCP

31 Art. 130 lit. e CrimCP.

In practice, however, the accelerated proceeding should not be used when the penalty degree is inferior to six months. Indeed, in that case, the prosecutor's office can have recourse to the Penalty Order (see above II), which presents the advantage of not being subject to the restrictive formalistic requirements of an accelerated proceeding.

IV Reparation

Another interesting enforcement tool in the Swiss justice system is reparation. This allows for the prosecutor to withhold any proceedings against the accused if there are no real interests, private and/or public, in prosecuting the matter.

The system of reparation is only applicable when a suspended sentence is envisaged. For this to be the case, two cumulative conditions must be met. First, the likely sentence must be a fine or a custodial sentence below two years. Here again, this option can easily apply to companies, as the only possible sanction is a fine.[32] Second, past convictions (if any) must not raise concerns about potentially negative future behaviour of the accused. Added to that, as already mentioned, there must exist only remote interests, both public and private, in prosecuting the accused. However, it should be stressed that compensation does not mean, per se, that the public interest is remote but it is often considered to be the case.

1 Remarks

Several remarks can be made about reparation.

First, reparation constitutes, in a way, an exception to the principle of legality of prosecution, which requires that authorities prosecute any offence they are made aware of. Second, it applies regardless of whether the offence protects a private or a public interest. Moreover, in the vast majority of cases, compensation consists of paying the victim/harmed person, but can also require the issuing of apologies or making a contribution to a charity. Furthermore, for the charges to be dropped due to reparation, the offender is not required to admit their guilt, but as a sign of their willingness to compensate the harm caused, they must acknowledge, notably to the victim/harmed person, that they acted improperly. Another notable feature of reparation is that, although Art. 53 SCC does not expressly mention it, the application of Art. 53 SCC can result from active negotiations between the authority and the offender.

2 Important distinction based on the stage of the proceedings

Reparation might occur at different stages of proceedings. However, if reparation occurs prior to the case being sent to trial, the authority should consider

[32] Art. 102 SCC.

discontinuing the proceedings. Conversely, if it happens during trial, the court will issue a guilty verdict, but one that carries no penalty or custodial sentence.

3 Notable cases

Two notable cases involving companies were discontinued through the use of reparation. In 2015, a prosecution against HSBC based on money laundering charges was discontinued as HSBC paid CHF 40 million to the Canton of Geneva (Falciani case). Recently, Addax was accused of corruption, but the charges were however discontinued as the company paid CHF 31 million to the Canton of Geneva.

E Conclusion

Due to the ongoing global attention focused on fighting white collar crime (aggravated tax misdemeanuor is since 2016 also considered as an underlying offence for money laundering) and corruption, Switzerland must expect in future years significant developments in the prosecution of corporate entities. Although NPAs or DPAs are unknown in Switzerland, Public prosecutors and attorneys have at their hands a plethora of tools to avoid ordinary criminal proceedings, which are often costly and time-consuming, and can therefore improve the efficiency of the judicial process.

Your contacts

Saverio Lembo
Partner

T: +41 58 261 57 00
saverio.lembo
@baerkarrer.ch

Andrew Garbarski
Partner

T: +41 58 261 57 00
andrew.garbarski
@baerkarrer.ch

Anne Valérie Julen Berthod
Counsel

T: +41 58 261 57 50
anne.julen
@baerkarrer.ch

Further Contacts:

Andreas Länzlinger
Partner

T: +41 58 261 50 00
andreas.laenzlinger@baerkarrer.ch

Pascal Hachem
Associate

T: +41 58 261 54 91
pascal.hachem@baerkarrer.ch

Sarah Mahmud
Associate

T: +41 58 261 52 24
sarah.mahmud@baerkarrer.ch

Bär & Karrer Ltd.
Quai de la Poste 12
CH-1211 Geneva

T: +41 58 261 57 00
F: +41 58 261 57 01
geneva@baerkarrer.ch

baerkarrer.ch
Zurich, Zug, Geneva, Lugano

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