

Criminal Liability of Corporations Requires Actual Proof of an Underlying Offence

In a recently released decision (6B_124/2016 dated 11 October 2016), the Swiss Federal Supreme Court (SFSC) held, for the very first time, that the criminal liability of corporations and undertakings (hereafter: corporations) under Swiss law requires the actual proof of an underlying offence committed by one or several individuals, regardless whether the latter are subject or not to prosecution.

The purpose of this briefing is to summarize the SFSC's reasoning and to anticipate the practical impact of this case law on present or future investigations, in which local or foreign corporations are subject or exposed to criminal prosecution in Switzerland.

Background

Criminal liability of corporations entered into force in Switzerland in October 2003 (Art. 102 of the Swiss Criminal Code). Notwithstanding, subject to the widely-commented Swiss Post matter and certain further isolated cases echoed in the press (e.g. Alstom, Stanford Group, Nitrochem), only very few prosecutions were conducted so far against corporations, let alone have resulted in their condemnation. However, as evidenced by the public announcements made recently by the Office of the Attorney General of Switzerland in connection with the 1MDB scandal, it seems that the latest trend is to launch more systematically criminal investigations against corporations (such as financial institutions), in particular in matters relating to money-laundering or corruption.

In a nutshell, a Swiss or foreign corporation may be held criminally liable for any misdemeanor or crime that was committed within itself in the course of its commercial activities, if and provided that such offence cannot be imputed to a determined natural person (e.g. officer or employee) due to the corporation's deficient organization (Art. 102 I SCC, 'secondary

liability'). Moreover, in connection with a limited number of offences (including money-laundering, corruption in the public or private sector, financing of terrorism), a corporation's criminal liability may also be engaged irrespective of the criminal liability of the natural persons, if its deficient organization has caused or failed to prevent the commission of such offence (Art. 102 II SCC, 'primary liability'). If found guilty based on Art. 102 SCC, a corporation faces a monetary penalty of up to CHF 5 million. Besides, the corporation may be exposed to confiscation of assets.

One of the questions that was controversial so far, is whether the prosecution authorities have to prove the actual commission of an underlying offence by a natural person within the corporation. Indeed, according to certain scholars, the criminal liability of corporations should also apply where the constitutive elements of such underlying offence are fulfilled, however in a more diffuse fashion, split across a number of individuals involved in its commission.

This is the key issue that the SFSC addressed in its reported decision of 11 October 2016.

Summary of the matter submitted to the SFSC

In early February 2005, an account opened by a company with Swiss Post was used for the reception of a total amount of EUR 5 million which stemmed from a fraudulent scheme. Shortly thereafter, the director of that company withdrew CHF 4.6 million in cash. According to his explanations (which were later found to be untrue), he needed this amount for the purchase of a gemstone. In the framework of the criminal investigation that followed, Swiss Post was accused pursuant to Art. 102 II SCC of having failed to take the necessary steps and implement an appropriate organization which would have prevented acts of money-laundering.

Having said that, the proceedings relating to suspicions of money laundering engaged against the Chief Cashier, who was involved in the preparation of the CHF 4.6 million that were handed over in cash to the fraudster were discontinued in the course of the investigation, for lack of intention. Moreover, the prosecution authorities never extended the investigation to the Swiss Post Compliance Officer who had been contacted by the Chief Cashier and who approved the transaction before the amount was actually paid out.

Whilst Swiss Post was found guilty of money laundering by the Court of first instance of Solothurn in April 2011 and sentenced to a fine of CHF 250'000, such verdict was eventually overturned and Swiss Post fully acquitted by the Court of Appeal in November 2015.

Ultimately, such acquittal was challenged by the Public Prosecutor of Solothurn before the SFSC on the grounds, in substance, that the criminal liability of a corporation based on Art. 102 II SCC should also apply where the objective and subjective elements of an underlying offence (in casu money laundering) cannot be imputed to a determined individual but to the corporation as such.

The SFSC's reasoning

The SFSC dismissed the appeal. Against the argumentation of the Public Prosecutor, the SFSC affirmed the approach of the Court of Appeals and ruled that

a corporation's criminal liability under Swiss law requires actual proof that all the objective and subjective constitutive elements of an offence committed by at least one individual within such corporation are fulfilled.

This applies not only in the context of Art. 102 I SCC (secondary liability), where the deficient organization of the corporation makes it impossible to impute the underlying offence to a determined person, but also in relation to Art. 102 II SCC (primary liability), where such deficient organization caused the commission of such offence. The fact that a corporation's criminal liability may be engaged under Art. 102 II SCC "irrespective of the criminal liability of the natural persons" only means that the prosecution or conviction of such persons is not required for this provision to apply.

Hence, according to the SFSC, there is no room for a *causal liability* and the corporation shall be acquitted (or, as the case may be, the investigation against it discontinued) if the prosecution authorities fail to prove the fulfillment of the underlying offence. Moreover, it goes without saying that the authorities also have to prove that the corporation's organization was defective.

Practical impact

The SFSC's decision 6B_124/2016 is well founded from a legal perspective and should be welcomed, as it sets a clear threshold that needs to be reached before a corporation's criminal liability can be engaged under Swiss law.

As a downside, however, the SFSC's decision could in particular

- force prosecution authorities to investigate more thoroughly the actions and omissions of the individuals (e.g. officers, employees) potentially involved in the underlying offence, thereby increasing their personal exposure;
- potentially prompt the prosecutors to adopt a more cautious approach before discontinuing criminal proceedings against individuals within the corporation, to the extent that such discontinuation could be deemed an admission that no underlying offence was committed.

Author:

Dr. Andrew M. Garbarski
Partner
andrew.garbarski@baerkarrer.ch
T: +41 58 261 57 22

Zurich

Bär & Karrer AG, Brandschenkestrasse 90, CH-8027 Zurich,
T: +41 58 261 50 00, F: +41 58 261 50 01, zurich@baerkarrer.ch

Geneva

Bär & Karrer SA, 12, quai de la Poste, CH-1211 Geneva 11,
T: +41 58 261 57 00, F: +41 58 261 57 01, geneva@baerkarrer.ch

Lugano

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

Zug

Bär & Karrer AG, Baarerstrasse 8, CH-6301 Zug,
T: +41 58 261 59 00, F: +41 58 261 59 01, zug@baerkarrer.ch

www.baerkarrer.ch