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White-Collar Crime

Switzerland: Trends & Developments

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Trends and Developments

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Introduction

Corporate criminal liability has been applicable in Switzerland since October 2003. The key provision is Article 102 of the Swiss Criminal Code (SCC), which applies not only to private legal entities, but also to public entities (with the exception of local authorities), partnerships and sole proprietorships. For ease of reference, the word "corporation" used here is deemed to encompass any of the above entities.

In the first decade following its adoption, Article 102 SCC was only used on very rare occasions. However, over the last couple of years, the trend has changed and shows that the number of criminal investigations launched against corporations is steadily increasing. Some of these investigations relate to widely reported cases such as the prosecutions launched, on a cantonal or federal level, against Alstom, HSBC, Addax Petroleum, Petrobras, 1MDB, SICPA and NotaSys, to name a few.

Criminal investigations are very burdensome for the corporation involved, both in terms of human resources and financial costs. The corporation may face additional, unpleasant measures as a result of an ongoing criminal investigation such as dawn-raids of its premises, the seizure of its electronic and physical data and/or records, the interview of its staff, the freezing of its assets (whether or not related to the offence under investigation), and bad publicity. In addition, any ongoing criminal investigation will necessarily increase the scrutiny of the regulator, where applicable.

At the same time, criminal investigations against corporations can turn out to be a difficult and lengthy process for the prosecution authorities, in particular if means of evidence need to be gathered abroad through mutual legal assistance channels. Hence, until the outcome of the criminal proceedings, there always remains a degree of uncertainty as to what extent the authority will be rewarded for the time and energy deployed.

Against this backdrop, a corporation, and also the prosecution authorities, may have sound reasons to consider the possibility of settling the criminal proceedings by way of negotiation.

In order to better understand the incentives negotiated justice may represent for both the indicted corporations and the prosecution authorities, we will first briefly set out below the requirements of Article 102 SCC before turning to the options that are currently available under Swiss law in view of achieving a negotiated outcome. We will then present a procedural tool, inspired by both the Anglo-Saxon Deferred Prosecution Agreement and the French "*Convention Judiciaire d'Intérêt Public*", which could eventually find its way into the Swiss Criminal Procedure Code (CrimPC) in the future.

General Conditions for Liability Under Article 102 SCC

The application of Article 102 SCC assumes that the following three general requirements are met:

- a felony or a misdemeanour was committed by an individual within the corporation;
- such felony or misdemeanour was committed in the exercise of the commercial activities of the corporation; and
- such activities are consistent with the purpose of the corporation.

In addition, a particular link must be established between the felony or the misdemeanour committed within the corporation and the corporation's deficient organisation. As explained below, the nature of the link varies within Article 102 SCC, depending on the type of liability model that is applied.

Regarding the felony or misdemeanour committed by the individual within the corporation, the Swiss Federal Supreme Court recently held, in a milestone decision involving the Swiss Post, that the criminal authorities have to prove that the underlying offence is fulfilled in all its objective and subjective components. As a result of this case law, nowadays prosecution authorities tend to target more systematically all the individuals involved in the commission of the offence, which makes it vital for the defence teams advising the corporation and the relevant individuals to properly coordinate their actions in the frame of the proceedings.

Subsidiary liability

Article 102 paragraph 1 SCC establishes a model of what is called "subsidiary liability". Pursuant to this model, which is applicable to any felony or misdemeanour, the corporation's criminal liability may be triggered where the underlying offence cannot be attributed to a determined natural person, due to a deficient organisation of the corporation.

The purpose of Article 102 paragraph 1 SCC is, essentially, to avoid gaps in criminal liability. Hence, where the natural person who committed the offence is identified, Article 102 paragraph 1 SCC does not apply.

Primary liability

Article 102 paragraph 2 SCC establishes a model of "primary liability", pursuant to which the corporation's criminal liability may be triggered where the underlying criminal offence was caused or facilitated by the deficient organisation of the corporation. Under this model, the corporation's liability may be engaged independently of, or in parallel to, that of the natural person who committed the underlying offence. Even if the offender lacks legal responsibility, eg, due to a mental disorder, through being found to have only a diminished responsibility or having passed away, the corporation may still be held liable for the criminal offence.

This second form of liability finds application only in relation to a limited number of criminal offences, which are exhaustively listed in Article 102 paragraph 2 SCC. The concerned offences are the following:

- participation, or support of a criminal organisation (Article 260ter SCC);
- the financing of terrorism (Article 260quinquies SCC);
- money laundering (Article 305bis SCC);
- bribery of Swiss public officials (Article 322ter SCC);
- granting of an advantage (Article 322quinquies SCC);
- bribery of foreign public officials (Article 322septies SCC); and
- bribery in the private sector (Article 322octies SCC).

In the case of Article 102 paragraph 2 SCC, the corporation is held liable for having failed to take all the reasonable organisational measures that were required to prevent the commission of the underlying offence.

Fine, forfeiture and criminal record

Whether in the context of Article 102 paragraph 1 or paragraph 2 SCC, the maximum penalty incurred by the corporation under Swiss criminal law is a fine not exceeding CHF5 million. The actual amount of the fine is determined on the basis of the seriousness of the offence, the extent of the deficient organisation, the damage resulting thereof and the financial capacity of the corporation.

On top of the criminal fine, the authorities may also order the forfeiture of the assets that constitute the proceeds of the underlying criminal offence or, where such assets are no longer available and provided that the other requirements applicable to the forfeiture are fulfilled, the issuance of a compensatory claim in favour of the State, which is not limited by the maximum amount of the criminal fine foreseen by Article 102 SC.

There is currently no criminal record in Switzerland designed to reflect the convictions of corporations.

Available Negotiation Tools

Experience shows that, subject to certain exceptions (the case involving the Swiss Post being the most prominent example), most of the criminal investigations launched against corporations, so far, have never ended up in a trial before a Court. Leaving aside the scenario where a discontinuation of the proceedings is issued for lack of criminal conduct or other technical reasons (such as the expiration of a statute of limitation).

The three key negotiation tools currently available under Swiss law are abbreviated proceedings, summary penalty order and reparation.

Abbreviated proceedings

Abbreviated proceedings are governed by Article 358 et seq. CrimPC. Inspired by the Anglo-Saxon plea bargain, abbreviated proceedings apply where the accused is prepared to confess all or part of the relevant facts reproached by the prosecution authority in exchange of a negotiation of conviction, the quantum and nature of the penalty and/or the extent of assets forfeiture. Furthermore, the accused must, in principle, recognise the civil claims raised by any private plaintiffs participating in the criminal proceedings. Abbreviated proceedings may only be initiated, officially, upon the request of the accused, however, in practice it is often the prosecution authority who informally sounds out the accused to test their appetite to engage such proceedings.

Once an agreement stands between the accused, the prosecution authority and, as far as the civil claims are concerned, the private plaintiffs, the agreement is turned into an accusation act (indictment) and submitted to the Court for approval. The Court holds a hearing and renders a judgment, ratifying the agreement reached, if it is satisfied inter alia that the accused has duly confirmed its confessions and that the charges brought are supported by the file of the proceedings.

It is important to note that, under the auspices of the CrimPC, the Office of the Attorney General Switzerland (OAG), ie, the federal prosecution authority, has developed its own practice, whereby abbreviated proceedings may also ended up in a summary penalty order (see below), rather than an actual judgment from a Court. This practice does not seem compatible with the terms of the law and has been criticised by practitioners. In any event, it avoids the risk that the agreement is not ratified by the Court and the potentially negative publicity inherent to the hearing before the Court. It remains to be seen whether the OAG will uphold, amend or abandon such approach in the future.

Summary penalty order

The summary penalty order (Article 352-357 CrimPC) is rendered in a special and simplified proceeding. Until very recently, summary penalty orders were very popular amongst the OAG, which has used this tool (most of the time in combination with the abbreviated proceedings) to substantially resolve all the criminal investigations it has conducted against corporations so far.

According to Article 352 CrimPC, the prosecution authority shall issue a summary penalty order where the accused has accepted liability for the offence or where its liability has otherwise been satisfactorily established, provided that the sanction sought by the prosecution authority is a fine, a monetary penalty not exceeding 180 days, or a custodial sentence of no more than six months. By way of reminder, the fine incurred by a corporation pursuant to Article 102 SCC may reach CHF5 million. In addition to this fine, the authorities

may order the forfeiture of the assets or the issuance of a compensatory claim in favor of the State.

The summary penalty order is not an actual judgment, but a judgment proposal submitted to the accused by the prosecution authority. The accused is free to accept or dismiss such proposal. However, in practice, where the criminal liability of a corporation is at stake, the content of the penalty order is negotiated upfront between the relevant corporation and the prosecution authority and a refusal is rather unlikely to happen, unless it emanates from a third party (eg, an employee or manager of the relevant corporation) impacted by its contents or outcome.

Reparation

The institution of "reparation" is the third option currently available to an accused natural person or corporation willing to negotiate the outcome of a criminal investigation. It is governed by Article 53 SCC, which provides, in essence, that where the accused has repaired the damage caused or made all the efforts that could be reasonably expected to compensate the harm, the authority shall refrain from prosecuting, sending to trial or sentencing the accused, if the following three cumulative conditions are satisfied:

- the accused faces either a suspended custodial sentence not exceeding one year, a suspended monetary penalty or a fine (without setting any pre-established ceiling);
- the public interest, as well as the private interest of the harmed party (if any) to prosecute the accused are deemed minimal; and
- the offender has admitted the facts.

Often depicted as creating a judicial bias in favour of the rich and powerful who have the financial means to avoid prosecution and potential conviction, Article 53 SCC has become the subject of increasing criticism over the past years. As a result, Article 53 SCC was eventually amended, effective 1 July 2019, to narrow down its scope of application.

It should be noted, however, that the new requirement, according to which the offender shall have admitted the facts, does not amount to an admission of guilt as it does not include any concession on the intention to commit the relevant offence. The reference to the "fine" was newly introduced in the legal provision to make it clear that it also applies to corporations in the context of Article 102 SCC.

When the requirements of Article 53 SCC are met, the prosecution authority has, in principle, the obligation to discontinue the proceedings. Having said that, the authority enjoys a certain degree of discretion in assessing the fulfilment of such requirements, in particular, as to whether a "sufficient" reparation was offered by the accused, as well as the minimal nature of the interests in continuing the prosecution.

In 2015, Article 53 SCC was applied by the Geneva Prosecution Office to discontinue the proceedings against HSBC in relation to money laundering charges. In consideration of the discontinuation, the bank had agreed to pay CHF40 million to the State of Geneva. The same approach was later used by the Geneva Prosecution Office against Addax Petroleum, which was prosecuted for bribery of foreign public officials. In the latter case, a compensation of CHF31 million was paid by the corporation to the State of Geneva. Most recently, in February 2019, the State of Geneva announced that it had discontinued, based on Article 53 SCC, the criminal proceedings launched for money laundering and mismanagement of public interests against Teodoro Obiang, Vice-president of Equatorial Guinea. The compensation paid to the State of Geneva amounted to CHF1.3 million. Additionally, 25 luxury cars were forfeited and the proceeds of their sale will be used to fund – under the auspices of the Swiss Federal Department of Foreign Affairs – a social program in favour of the local population in Equatorial Guinea.

In contrast to the practice of the Geneva Prosecution Office, the OAG has systematically refused, since 2017 at least, to apply Article 53 SCC to corporations, even in the cases in which the requirements of Article 53 SCC were met.

"Swiss Made" Deferred Prosecution Agreement

The OAG takes the position that the above-mentioned negotiation tools only partially achieve the objectives pursued, namely a remediation and improvement of compliance practices of the convicted corporations. Hence, in the context of discussions regarding a potential amendment of the CrimPC, in 2018 the OAG proposed to include a new Article 318bis CrimPC, which consists of a "Swiss made" deferred prosecution agreement mechanism, inspired by the practice of other countries (specifically the US, United Kingdom, France and Austria).

The purpose of such a deferred prosecution agreement would be to enable corporations, after full compensation of the consequences caused by their legal behaviour, to avoid criminal prosecution which often causes significant collateral damage both in the home country and abroad, such as losing the right to operate in a given jurisdiction, creating banking difficulties or affecting participation in public procurement tenders.

The agreement to be reached between the prosecution authority and the corporation within the framework of a deferred prosecution would pursue three main objectives:

- clarification of the facts;
- reparation of the damage caused; and
- elimination by the corporation of any organisational defects, in order to avoid the commission of further unlawful acts.

The main conditions imposed on the conclusion of such a deferred prosecution agreement would be, first, a spontaneous denunciation, or at least the swift acceptance, of the criminal investigation by the corporation. The full cooperation of the corporation encompasses an acknowledgment of facts and the identification of the natural persons to whom the commission of the underlying offence can be attributed. Secondly, the corporation would have to fully repair the damage caused and, finally, it would have to implement amendments to the corporation's internal procedures where appropriate. These last conditions include compliance with a probation period (between two and five years) and periodic verification of the obligations imposed on the corporation by an independent monitor.

The main benefit of the "Swiss made" deferred prosecution agreement, as proposed in 2018 by the OAG, would be to shape obligations and commitments that are precisely tailored to the corporation and guarantee that they are fully complied with. This would also help reduce the competitive disadvantage that Swiss companies are currently facing; indeed, the law enforcement authorities of several countries already have the necessary tools to defer prosecutions in a much swifter and cost-efficient way than Switzerland is currently able to do, with the consequence that Swiss companies are often first prosecuted abroad.

At this stage, however, it is uncertain whether Switzerland is ready for such an innovative procedural tool. There is a great level of skepticism about the possibility for a corporation to avoid criminal conviction by simply paying a fine and implementing compliance improvements. The Swiss Federal Council has, for instance, recently announced that it would not support the OAG's proposal and has decided to exclude it from the ongoing revision of the CrimPC. Having said that, the debate is not yet closed, as it will now continue before the Parliament, which may reopen the discussion.

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Conclusion

In conclusion, Swiss law distinguishes between the models of so-called primary and secondary criminal liability of corporations. The central and common element of both models is the corporation's defective organisation.

Prosecutions based on Article 102 SCC are often very complex and burdensome. If a corporation is willing to resolve a criminal investigation and try to negotiate a reasonable outcome with the prosecution authority, Swiss law currently offers three different procedural tools: abbreviated proceedings, summary penalty order and reparation.

Yet, these tools only partially enable the remediation of non-compliant practices within corporations. In this regard, the purpose of the "Swiss made" deferred prosecution agreement, as proposed by the OAG, is to provide enhanced incentives for corporations to investigate voluntarily, disclose and remediate potential wrongdoings, whilst at the same time protecting Swiss corporations that have international exposure.

US and UK law enforcement authorities have recently released updated Corporate Cooperation Guidelines clarifying the requirements that corporations should meet to receive "co-operation" credit. These Guidelines confirm that co-operating corporations shall identify and self-disclose the key persons involved in the commission of the offence in order to foster individual criminal prosecutions. Although it is currently uncertain if and to what extent it will be implemented in the CrimPC, the deferred prosecution agreement, as proposed by the OAG, is similarly encouraging corporations to co-operate, with the view to facilitate corporate investigations and to remediate to non-compliant business practices.