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White-Collar Crime

Switzerland: Trends & Developments

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chambers.com

2020

Trends and Developments

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Administrative Criminal Law under the Spotlight

Introduction

In the Swiss legal system, administrative law plays a predominant role. This can be explained by the ever-increasing intervention of the state in social and economic life, conferring rights on private individuals and, in return, imposing obligations on them.

Administrative law very often includes criminal provisions that make it possible to punish transgressions when specific conditions are met. In this case, we speak of administrative criminal law (lato sensu), which covers all the criminal provisions set forth in laws other than the Swiss Criminal Code (SCC).

In view of the variety of situations covered by administrative criminal law, the legislator deemed it necessary to unify this field of law to some extent. Thus, the Federal Act on Administrative Criminal Law (ACL), adopted by the Swiss parliament on 22 March 1974, came into effect on 1 January 1975. In particular, the ACL sought to achieve the following objectives:

- ensure uniform treatment of matters that fall within the scope of ancillary criminal legislation;
- set out a brief catalogue of recurring special offences;
- establish rules of procedure for this matter that meet the standards of the European Convention on Human Rights (ECHR); and
- ensure a straightforward and swift procedure, in particular by entrusting the criminal investigation to an administration that generally has more time and more in-depth knowledge than the ordinary criminal prosecution authorities in the often-technical matters covered by administrative law.

Since it came into force, the ACL has not undergone any substantial revision and now seems obsolete in various respects. In particular, the procedural provisions of the ACL have only been adapted to a very limited extent following the introduction of the Swiss Criminal Procedure Code (CrimPC) in 2011. There is no longer any doubt that administrative criminal law is strictly speaking criminal law, with all the consequences that this entails in terms of respect for fundamental rights and procedural guarantees that the accused can avail themselves of, and which the ACL usually does not deal with. Thus, delicate questions of articulation arise between the ACL and the Swiss Criminal Code (SCC) on the one hand, and between the ACL and the CrimPC on the other.

The purpose of this report is to familiarise the readers with Swiss administrative criminal law and some of its particularities, in order to enable them to grasp a topic which is under the spotlight and which is becoming increasingly important in practical terms.

Scope of application

The scope of application of the ACL depends primarily on the subject matter of the criminal investigation and the authority in charge of it. In substance, the ACL comes into play when:

- the offence in question falls within the scope of federal administrative law; and
- the competence to prosecute and to judge the offence lies with a federal administration, the identity of which depends on the subject matter in question.

For example, the criminal provisions set forth in the Swiss financial markets laws (which include, among others, the Federal Act on Combating Money Laundering and Terrorist Financing – AMLA) are subject to the ACL and the competence to prosecute and to judge them lies with the Federal Department of Finance (FDF).

In another topic area, violations of the Federal Act on the Application of International Sanctions (Embargo Act – EmbA) are also subject to the ACL and fall within the competence of the State Secretariat for Economic Affairs (SECO).

Conversely, the ACL generally does not apply when the competence for prosecution lies with a cantonal public prosecuting authority, unless the relevant law refers to the ACL for specific matters.

In addition, some federal administrative laws refer either to the jurisdiction of a cantonal authority or to that of a federal administration (in which case, the ACL will apply), depending on the offence in question.

As an example, the Federal Act on the Federal Direct Tax (LIFD) refers to the jurisdiction of the Federal Tax Administration (FTA) for the exclusive prosecution of certain serious tax offences, such as (a) the continuous evasion of large amounts of tax; (b) the use of false, falsified or inaccurate documents with the intent to mislead the tax authority; and (c) the misappropriation of tax at source.

Participants
The administrative criminal procedure mainly involves the competent federal administration and the accused, whether they are a natural or a legal person. The investigation is carried out by an "investigating officer", ie, a member of the criminal department of the administration in question.

In addition, in the event that:

- a complaint is filed against decisions issued in the course of the investigation; or
- the accused request to be tried by a court (see below); or
- the accused face a custodial sentence,

then the procedure also involves a court, ie, an independent and impartial judicial authority within the meaning of Article 6 ECHR.

When a case is sent for trial before a court, the file is transferred to a cantonal or, as the case may be, a federal public prosecutor's office, which has the possibility to attend the trial or even to support the prosecution alongside the federal administration before the court.

Administrative criminal procedure
The administrative criminal procedure is divided into two main phases – the investigation phase and the judicial phase – to which must be added the complaint procedure, whenever acts and/or decisions of the investigating officer are challenged in the course of the investigation.

The first stage of the administrative criminal procedure, ie, the investigation phase, is conducted under the lead of the federal administration (via its investigating officer) and its purpose is to collect the relevant evidence and establish the facts. The investigating officer has powers and means of coercion similar to those of a public prosecutor. The accused are often notified about the investigation upon its opening and thereafter, are involved in its progress, although the accused are under no obligation to actively participate in the establishment of the facts.

Upon completion of the investigation, the investigating officer may either propose the issuance of a dismissal order, should he or she feel that the case for a criminal offence is not met, or he or she may issue a final protocol setting out the requirements of the relevant offence should he or she feel these have been fulfilled. The final protocol is notified to the accused who can then exercise their right to be heard by inspecting the file or by requesting further investigation measures. It should be noted that neither the final report, nor the potential refusal of the federal administration to proceed with further investigation measures, are subject to complaint.

After the accused have had an opportunity to fully exercise their right to be heard, the administration to which the investigating officer belongs will either issue a dismissal order, in which case the proceedings will stop, or a repression warrant and/or a confiscation order if he or she believes that assets should be forfeited, regardless of the guilt of the accused.

The accused have the possibility to oppose the repression warrant and/or the confiscation order within 30 days of their notification. The federal administration reconsiders the contested decision and then issues a criminal ruling and/or a new confiscation order, unless it decides to terminate the proceedings.

The second stage of the administrative criminal procedure corresponds to the judicial phase, ie, before the court. This phase takes place when the accused face a custodial sentence or when the accused have requested to be tried by a tribunal within ten days of service of the criminal ruling and/or the confiscation order.

The case is transferred to the cantonal court or to the Federal Criminal Court, depending on their respective competences and the case at hand. From that point on, the general rules of the CrimPC apply, unless otherwise provided in the ACL.

The accused may withdraw their request to be tried by a court – and escape the risk of a more severe penalty imposed by the court (principle of reformatio in pejus) – until the notification of the first instance judgment. Once the judgment has been notified, an appeal is open, before a possible appeal to the Federal Supreme Court.

Criminal liability
The principle according to which criminal liability lies primarily with the individual(s) who committed the offence is also applicable in administrative criminal law.

Under certain conditions however, the ACL allows criminal liability to be extended to the superior of the offender and/or to the principal of the company, if they can be accused of not having prevented the commission of the offence by their subordinate, in violation of a guarantor's obligation.

The principle of the criminal liability of natural persons within a company is nevertheless subject to an exception. Under certain restrictive conditions, the company may be sued instead of the natural persons at the origin of the offence: the fine must not exceed CHF5,000 and the investigation against the natural persons responsible for the offence would require disproportionate investigation measures compared to the penalty incurred.

Numerous federal administrative laws have increased the maximum fine that can be imposed on the company instead of the natural persons. For example, the Federal Act on the Swiss Financial Market Supervisory Authority (FINMASA) provides for an amount up to CHF50,000, while the Federal Customs Act raises the maximum amount to CHF100,000.

It should be noted that the SCC also provides for the subsidiary criminal liability of the company, but this is subject to different conditions. The offence must:

- have been committed in the exercise of commercial activities in accordance with the purpose of the company;
- not be attributable to a natural person; and
- result from a failure in the organisation of the company.

The fine incurred by a company under the SCC can amount to up to CHF5 million.

The criminal liability of a company under ordinary criminal law can, in certain cases, be transposed to administrative criminal law, even if the relationship between the two regimes is a controversial topic and has not yet been definitively decided by case law.

Revision of the ACL

As mentioned above, the ACL has not been substantially revised since it came into effect in 1975. It is now outdated in several respects, including the rights of the accused.

Following a parliamentary motion at the end of 2014 to modernise administrative criminal law, work has recently been launched by the Federal Office of Justice to examine the nature and scope of the changes to be made to the ACL.

This process will take some time; we do not expect the new regulations to come into force before two to three years, depending also on how far the revision of the ACL will go.

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Authors

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