Legal challenges for monitorships in Switzerland and practical lessons to be learnt

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In summary

This chapter aims to provide an overview of the key aspects and challenges that arise when it comes to carrying out compliance monitorships from a Swiss perspective. We will first explore the context of compliance monitorships in Switzerland. We will then elaborate on the implementation of foreign compliance monitorships on Swiss soil with a focus on notable examples of monitorships and the practical lessons that can be drawn therefrom and on the main legal challenges that foreign monitors face when carrying out their mandate in Switzerland. Finally, we will open the discussion on what Switzerland must glean from its past and present experience with foreign compliance monitors and how it should approach the near future in order to correctly embrace this increasing trend of compliance monitorships in the financial and business sectors.

Introduction

While the United States set the stage for the imposition of compliance monitorships to corporations by government authorities, this institution has become progressively more popular in other jurisdictions, such as the United Kingdom, Canada and – closer to Switzerland – France. However, the Swiss legal system is not equipped with a tool that provides for the ordering of compliance monitorships, which are often attached as a requirement of some orders or agreed terms in the ambit of criminal proceedings, such as deferred prosecution agreements (DPAs), non-prosecution agreements (NPAs) or plea agreements. Foreign-ordered monitorships nonetheless play an increasingly important role in practice, as Switzerland-based entities have been subject to a reporting obligation on enhancement of their corporate compliance programmes.

This chapter will touch upon various Swiss legal challenges that may arise when implementing monitorships imposed by foreign authorities. It will also outline some of the lessons learnt from the few known-about monitorships that gained an outreach on Swiss soil. Indeed, it is likely that various foreign monitorships were or are not publicly known, so they could not be mentioned here.

Finally, the authors will discuss the necessary enhancement of the Swiss legal toolbox that needs to occur in the near future in the realm of criminal out-of-court settlements should Switzerland wish to remain relevant in the fight against cross-border corporate crime. One of the beacons of this legal evolution will be to grant the government authorities the power to appoint independent monitors to oversee the proper implementation of enhanced compliance programmes imposed on corporations in the ambit of these settlements.

Context of monitorships in Switzerland

At the moment, there is no basis in Swiss criminal law for compliance monitorships in the way they are understood in the US system, such as monitorships that are part of an NPA or a DPA. However, independent authority-appointed monitors are not an institution that is completely alien to the Swiss legal system.

In fact, a similar mechanism to monitorships is available to the Swiss Financial Market Supervisory Authority (FINMA) as an administrative measure for investigating and supervising financial institutions. FINMA can assign so-called investigating agents to carry out fact-findings relevant to enforcement proceedings or to impose supervisory measures.[2] These independent agents will submit a report, upon which the financial institutions will be able to exercise their right to be heard and state their position on the fact-finding and on the proposed compliance measures. In addition to more stringent sanctions, FINMA is also entitled to impose measures aiming at restoring compliance with the law.[3] This general wording empowers, in particular, FINMA to issue a ruling ordering proportionate measures to address the problems identified by the investigation within the financial institution and to restore compliance. Such measures can be imposed even when no serious violations of supervisory law have occurred. For this reason, compared with foreign compliance monitors, the scope of the mandate of FINMA-appointed investigating agents is usually more narrowly defined in order, inter alia, to comply with the general rule of proportionality that prevails in the

ambit of these administrative proceedings. In practice, FINMA makes regular use of such monitorships at both authorised and unlicensed financial institutions, but the creativity of the measures it can impose and its concrete outreach are limited by its very own mandate, which is circumscribed to overseeing entities that are active within the Swiss financial markets.

Additionally, if FINMA's investigations or enforcement steps reveal possible signs of criminal activity, the authority will generally file, in parallel, a criminal complaint against the financial institution and the involved individuals with the competent prosecution authority. The case will therefore be handed over to the Swiss criminal authorities, which, as we have seen, have no possibility to order compliance remediation measures in the ambit of the criminal sanctions that might be imposed on the investigated corporation.

Besides the monitorships that are ordered in the area of administrative or regulatory proceedings, there are, within the Swiss jurisdiction, instances of compliance monitors that are appointed by foreign authorities and that have acted or are acting on Swiss soil. Switzerland-based companies or foreign companies with Swiss subsidiaries may be subject to the supervision of other countries, as they can fall under the scope of foreign governmental monitorships. Notable examples of foreign monitorships or reporting obligations imposed on Swiss entities are provided hereunder. From a Swiss business environment perspective, the importance of a properly designed and concretely applied corporate compliance culture is increasing gradually because of an equally increasing and multidirectional scrutiny coming from regulators and prosecutors but also from the public (e.g., media, workers' unions and whistle-blowers).

Foreign compliance monitors

Contrary to Switzerland, various other countries have already implemented in their legal framework the possibility to appoint compliance monitorships, and have made use of that tool quite extensively in past years. Interestingly enough, most of those jurisdictions entertain close business relationships with Switzerland, which increases the likelihood of ordered monitorships being implemented completely or partially on Swiss soil.

Following the United States, Canada and the United Kingdom introduced DPAs and, with them, monitorships. More notably, in the European Union, France appears to be the first state with a civil law tradition to introduce a DPA-like tool to tackle complex and large-scale corporate criminal cases. The Convention Judiciaire d'Intérêt Public (CJIP) may impose the monitorship of companies' compliance obligations in the ambit of the agreement negotiated with the investigated corporation. The task will be entrusted to the French Anti-corruption Agency, which is an administrative service that is part of the Ministry of Economy.

Singapore adopted DPAs in 2018, which included monitorships of proper implementation of a compliance programme. Monitorships are also emerging in South East Asia but so far without a proper legal basis for DPAs or NPAs. In Latin America, monitorships are still uncommon tools, except for Brazil, where enforcement agencies may impose monitors on companies as part of settlement agreements.

Notable monitorships implemented in Switzerland

To the authors' knowledge, to date, monitors have been appointed to Switzerland-based companies by foreign authorities, but in the great majority by the United States through its Department of Justice (DOJ) and the New York State Department of Financial Services (NYDFS).

As part of the most notable examples, in 2014, the NYDFS appointed monitors to two banks active in the Swiss financial market because of their involvement in assisting US clients to evade taxes. The NYDFS required the Switzerland-based banks to engage an independent monitor to investigate, among other things, employees' involvement, corporate governance issues and the effectiveness of remediation efforts. Based on its findings, the monitor had to recommend additional remedial measures.

In the same year, the NYDFS issued another order against subsidiaries of a foreign bank, requiring an independent monitor to conduct a comprehensive review of the compliance programmes, policies and procedures. The monitor also had to investigate, on Swiss soil, the Switzerland-based subsidiary of this bank.

In 2022, a Switzerland-based multinational trading company entered guilty pleas with the DOJ for allegations of foreign bribery and market manipulation schemes. As part of the plea agreement, the company retained an independent compliance monitor to assess and review its compliance with the agreements and to evaluate the effectiveness of its compliance programme and internal controls.

In the ambit of the Swiss bank programme conducted by the Tax Division of the DOJ started in 2013, the authorities implemented a toll similar to monitorships as referred to in a narrow sense. The programme was meant for Swiss banks that, at the time, were not the target of a criminal investigation in the United States. As part of their self-reporting process, the banks were required by the Tax Division to appoint an 'independent examiner' who would, among other things, conduct an independent review of the bank's internal process to verify that it was compliant with the requirements set out in the programme. The independent examiner would then draft and present an investigation report based on these findings. The banks were required to cooperate fully with the independent examiner in order to obtain full protection offered under the programme.

Other Switzerland-based companies were involved with the US authorities in high-profile cases that eventually did not give rise to the appointment of a compliance monitor. This notwithstanding, the agreements entered into included commitments from the company to comply with specific obligations, such as the enhancing of their corporate compliance programmes, usually coupled

with periodic reporting obligations to the DOJ throughout the process. In 2010, a Switzerland-based group of companies concluded such an agreement with the US Securities and Exchange Commission for violations of the Foreign Corrupt Practice Act (FCPA) in relation to a large-scale cross-border corruption scheme.

More recently, in 2022, a Switzerland-based global technology company entered into a DPA with the DOJ for violations of the FCPA stemming from the bribery of a high-ranking South African official. This case was concluded in coordination with both the Swiss and the South African authorities, resulting in a global resolution of the matter. Because the Swiss legal system does not yet have tailor-made out-of-court settlement tools for corporate criminal cases, the technology company had to agree, in Switzerland, on a conviction for bribery of foreign public officials by the Office of the Attorney General of Switzerland (OAG) and was imposed with penalties and disgorgement of profits adjusted to what the United States and South Africa had also imposed in parallel. The whole part of the case dealing with the enhancement of the company's corporate governance and compliance with higher standards related thereto in order to prevent recurrence of misconduct had, unfortunately, to be left in the hands of the US authorities, even though the company is a Switzerland-based entity.

In addition to monitorships ordered by government authorities in the ambit of criminal proceedings, intergovernmental organisations such as the World Bank also include appointment of monitors in their sanctions regimes. These monitors assess whether companies excluded from World Bank-financed projects due to misconduct are complying with the conditions for re-participation in these projects. Said conditions include, inter alia, implementing appropriate corporate compliance programmes that would meet the standards of the World Bank Integrity Compliance Guidelines. In the Swiss context, a Swiss subsidiary of a French multinational rolling stock manufacturer set up an independent compliance monitor in 2012 following a settlement with the World Bank after allegations of corrupt practices in a World Bank-financed project.

Lessons learnt

The plea agreements entered into by the above-mentioned trading company with the DOJ in 2022 have certainly set a precedent beyond the financial sector in Switzerland for foreign compliance monitorships. The first non-financial company to face a DOJ-appointed monitorship signals an interesting development for monitorships within Switzerland. This new case occurring outside the Swiss financial sector could potentially provide useful information and understanding to various industries within Switzerland on the expectations and standards – especially in the United States – for corporate compliance programmes.

Latest monitorships reflect the ongoing shift in the global regulatory environment towards more transparency and increased accountability. Cross-border regulation and enforcement proceedings in the particular areas of tax evasion, corruption and money laundering are a clearly observed trend. In this regard, the continued practice of the Swiss government to grant authorisations to foreign compliance monitors to operate within the Swiss jurisdiction indicates a common dedication to maintaining ethical business conduct on a global scale.

When it comes to the involvement of foreign states on Swiss soil, it is crucial to carefully balance the interests at stake. When deciding to grant an exception permission under the Swiss blocking statute (see hereunder for more details), the Swiss authorities have to weigh the Swiss state's interest in protecting its sovereignty and legal order against various public or private interests. Those include the interests of the state that ordered the monitorship but also those of the entity that is being monitored. In past cases, the Swiss authorities have taken the position that cooperation between law enforcement entities and fighting crime are fundamental public interests of Switzerland. Based thereupon, Switzerland allowed foreign compliance monitors to be active within its territory. However, this still remains a case-by-case assessment.

As an illustration of the increasing global coordination efforts, it is worth noting that, in the most recent case mentioned above, the DOJ itself applied in advance to the Swiss authorities to obtain an authorisation for its appointed monitor to undertake investigation steps on Swiss soil. The DOJ's mindfulness of the requirements attached to the Swiss blocking statute and its proactivity show the willingness for the US authority to act 'by the books' and comply with the Swiss legal framework despite a real clash of cultures when it comes to approaching this kind of compliance monitorship. The end goal remains to push for better coordination between jurisdictions.

Following on from those observations, Swiss authorities, on their side, seem to have embraced a practice of including in their decision to grant exception permission to said monitor the involvement of a Swiss lawyer to serve as a liaison and adviser on Swiss legal matters to the foreign-appointed monitor.

Legal challenges faced in implementing foreign monitorships in Switzerland

From a legal point of view, the challenges encountered with the deployment in Switzerland of cross-border monitors are multiple, the main ones being:

- the Swiss blocking statute;
- compliance with data protection law;
- compliance with aspects of employment law; and
- the respect of some statutory secrecy obligations.

Such legal questions arise generally in the ambit of the fact-finding phase of the monitor's activity, particularly in the context of interviews conducted with Swiss employees. They are also relevant when it comes to the transfer of the monitor's work-products abroad. To ensure that they benefit from an independent adviser on those Swiss law issues, it is now standard practice that foreign monitors retain Swiss counsel in this context.

Swiss blocking statute

The Swiss blocking statute of Article 271 of the Swiss Criminal Code stipulates criminal consequences for carrying out procedural or investigation steps on behalf of a foreign state – which are reserved for a Swiss authority – on Swiss territory without lawful authorisation.[4] However, the Swiss government can, upon request, grant permission that excludes criminal liability.

In the context of a foreign monitorship carried out on Swiss soil, it is thus of essence to assess at an early stage whether permission must be obtained from the Swiss government. The blocking statute becomes relevant whenever a monitorship is implemented on behalf of or in the interest of a foreign government respectively if the findings from the monitorship are intended for a foreign government or foreign proceedings. Whether the monitorship and, consequently, the procedural or investigation steps are conducted by a private person or a foreign official is deemed irrelevant.

In its willingness to allow better international cooperation in the conducting of litigation proceedings and investigations, the Swiss government has recently proposed an amendment to Swiss declaration on the 1970 Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters (the Hague Evidence Convention)[5] and to the Federal Act on Private International Law.[6] The proposed amendment, if enacted, will allow foreign authorities (or the litigating parties as court-appointed commissioners) to depose or interrogate witnesses or experts situated in Switzerland via telephone or videoconference without prior authorisation. The project has just passed the consultation phase and has been submitted to the Swiss Parliament. If accepted, this amendment would be a welcoming step towards more legal certainty around the application of Article 271 of the Swiss Criminal Code and one less hurdle for the intervention of foreign authorities on Swiss soil.

This will not change the need for a fully fledged monitorship to ask for an authorisation.

Data protection

When operating in Switzerland, foreign monitors need to comply with Swiss data protection law, namely the Federal Data Protection Act (FDPA), while collecting personal data.

According to this Act, monitors need to ensure – for instance during interviews or documents review (emails and HR files, etc.) – that the person's data is processed lawfully, proportionally and only for a specific purpose that is recognisable for the data subject; data may only be processed in a way that is compatible with this purpose.[7] Further, the affected person needs to be informed appropriately about the processing of the data when collected.[8] If a company stipulates in terms and conditions, an employee handbook or agreement or in a policy that data might be processed for investigative purposes and has made the affected person aware of these rules, the requirements stemming from the FDPA would generally be fulfilled. Each case should, however, be assessed separately, and a proper analysis under the FDPA must be carried out to avoid exposing the monitor and the company to criminal liability.[9]

Employment law

As part of a foreign monitorship, current employees can be obliged to participate in interviews – even with external interviewers such as monitors. This stems from the employees' duty of loyalty and care for the employer, from which derives a more specific obligation to disclose any facts or information that has come to the employees' knowledge in the course of their employment.[10] However, the employer needs to provide certain information and warnings before an interview as part of its duty of care.[11] Contrarily, former employees cannot be forced to participate in interviews in connection with a foreign monitorship.[12]

In a recent decision, the Swiss Federal Supreme Court ruled that employees interviewed in the ambit of internal investigations cannot claim the benefits of the Swiss criminal procedural guarantees (in particular the right against self-incrimination).[13] Nevertheless it is advisable, from a monitor's point of view, to make sure that these guarantees are actually complied with in order to minimise the risk of inadmissibility of the gathered evidence, if it is assumed that they could be used in later criminal proceedings.

Secrecy obligations

Where foreign monitorships are deployed in Switzerland, it needs to be kept in mind that various statutory secrecy obligations may conflict with the monitor's activity. These include manufacturing or trade secrecy, industrial espionage and banking secrecy.[14]

Monitorships – what is next for Switzerland?

While experiencing the growing trend of cross-border corporate compliance programmes and given that foreign compliance monitors are already operating within the Swiss jurisdiction, one question comes to mind: should Switzerland introduce, in its legal toolbox, a mechanism for appointing Swiss independent compliance monitors?

Switzerland is not the only state where this question arises. However, given its important financial and business sectors, its central position within the European trade market and its close relationship with the United States, Switzerland surely cannot afford to avoid tackling this issue seriously if it wants to keep up with the times.

Interestingly, the OAG proposed in 2018, in the ambit of a consultation for the revision of the Swiss Criminal Procedure Code, the incorporation of a Swiss-style DPA that included the possibility of appointing monitors to oversee corporate compliance remediation measures. Unfortunately, the OAG's proposal – which was mainly drafted from the public prosecution point of view – was not sufficiently balanced and entrusted the prosecuting authorities with too much power in comparison with the accused party. The Swiss Federal Council noted, for instance, that no judicial control was foreseen within the process of concluding a DPA; the treatment of the potential plaintiffs' claims was not included; and entire discretion was entrusted with the prosecutors to implement, define and even cancel such DPAs, not withstanding the fact that whatever the defendant said and whatever documents were produced during the negotiation phase with the prosecutor's office would be usable against the defendant in subsequent criminal proceedings that would be engaged after the failing of the negotiation for a DPA.

Although this proposal was ultimately not included by the Federal Council in the revision of the Code that entered into force in January 2024, the possibility of revisiting this proposal remains and is indeed called for by various members of the Swiss legal community. The OAG itself keeps advocating for the implementation of such a tool no later than early 2024 in an international legal industry conference.

Addressing the points of friction identified by the Federal Council may be a major step towards a possible landmark legal evolution in the fight against large-scale cross-border corporate crime. When looking at France's track record, eight years after introducing the CJIP (the French government has claimed to have recovered approximately US$4 billion in fines and disgorgement of profits to date and, most importantly, to have been able to deal with such cases that were historically years-long in record time), Switzerland should probably not hesitate to take the plunge.

In addition to providing a legal basis that would facilitate the international coordination in cross-border disputes and the conclusion of global settlements attached thereto, negotiated settlement tools would also introduce Swiss compliance monitorships. This might convince foreign authorities that Switzerland is efficiently overseeing any identified issues. In addition, it would increase trust in the Swiss legal system and its dedication to maintaining high compliance standards and may result in fewer monitors being assigned by foreign authorities to Switzerland-based entities.

Endnotes

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[2] Federal Act on the Swiss Financial Market Supervisory Authority (FINMASA), Article 36.

[3] FINMASA, Article 31.

[4] Swiss Criminal Code, Article 271, Paragraph 1.

[5] Convention on the Taking of Evidence Abroad in Civil or Commercial Matters of 18 March 1970.

[6] Federal Act on Private International Law (PILA) of 18 December 1987.

[7] FDPA, Article 6, Paragraphs 1–3. If the foreign monitor interviews employees, Article 328b of the Swiss Code of Obligations (CO) applies, which limits data processing for data that concerns the employee's suitability for his or her job or is necessary for the performance of the employment contract.

[8] FDPA, Article 19, Paragraph 1.

[9] FDPA, Article 60 ff.

[10] CO, Article 321a, Paragraph 1, and Article 321d.

[11] CO, Article 328.

[12] Unless it has been specifically agreed upon by an agreement concluded with the former officer or employee upon termination.

[13] Federal Supreme Court (FSC) Decision No. 4A_368/2023, dated 19 January 2024.

[14] Criminal Code, Articles 162 and 273; Banking Act, Article 47.

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