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White-Collar Crime

Switzerland: Law & Practice

Mangeat LLC

2019

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Law and Practice

Contributed by Mangeat LLC

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Mangeat LLC is a young and innovative mid-size law firm based in Geneva. The six-lawyer litigation team has a focus on white-collar criminal proceedings, as well as a strong practice in the areas of mutual legal assistance and extradition, cross-border and multi-jurisdictional proceedings. Its extensive experience in these areas and regular dealings with the various Swiss criminal authorities allow it to offer not only sharp legal advice but also pragmatic solutions to clients. The firm's relevant recent work includes representing a relative of a former foreign leader accused to have received bribes in the context of a major international bribery scandal, following which CHF800 million deposited in Swiss banks was frozen; a member of a Swiss cantonal government in criminal proceedings opened against him for acceptance of an undue advantage; and a client accused of bribery of private persons in the context of the award of media rights related to major sport events.

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1. Legal Framework

1.1 Classification of Criminal Offences

The Swiss Criminal Code (SCC) provides for three categories of offences. A felony is an offence carrying a custodial sentence of more than three years, whereas a misdemeanour carries a custodial sentence not exceeding three years or a monetary penalty. Lastly, a contravention is an act that is punishable by a fine (Article 10 and 103 SCC).

Unless otherwise provided in the law, a monetary penalty may amount up to CHF1,080,000 (Article 34 SCC) and a fine up to CHF10,000 (Article 106 SCC).

In order for an offence to be punishable, intent – ie, knowledge and will – is necessary unless the law expressly provides otherwise. Intent is recognised as soon as the offender regards the realisation of the act as being possible and accepts this (Article 12 SCC).

A person may also be held liable for attempting to commit an offence, although the court may reduce the penalty in light of the circumstances (Article 22 SCC).

1.2 Statute of Limitations

The right to prosecute is subject to a time limit of (Article 97 SCC):

- thirty years if the offence carries a custodial sentence of life;
- fifteen years if the offence carries a custodial sentence of more than three years;
- ten years if the offence carries a custodial sentence of three years; or
- seven years if the offence carries a different penalty.

The limitation period begins (Article 98 SCC):

- on the day on which the offender committed the offence;
- on the day on which the final act was carried out if the offence consists of a series of acts carried out at different times; or
- on the day on which the criminal conduct ceases if the criminal conduct continues over a period of time.

The limitation period stops running if a judgment is issued by a Court of First Instance before its expiry.

1.3 Extraterritorial Reach

Swiss criminal authorities are primarily competent to prosecute an offence when the offence has been committed in Switzerland (principle of territoriality). An offence is considered to be committed both at the place where the person concerned commits it and at the place where the offence has taken effect (principle of ubiquity, Article 8 SCC).

The place of commission in cross-border white-collar offences is rather largely interpreted, resulting in a relatively broad interpretation of Swiss jurisdiction.

As an example, bribery offences are considered as being committed in Switzerland as long as:

- the briber or the bribed person is physically in Switzerland at the time when he offers, promises or gives the bribe, or respectively demands, secures the promise of or accepts the bribe;
- a Swiss bank account has been used either to pay the bribe, or to receive it; or
- the briber was expecting that the bribed person would act in his favour on Swiss soil.

In order to trigger Swiss jurisdiction, it is moreover sufficient that the act is only partially committed in Switzerland. Even an attempt is sufficient, although mere preparatory acts are not.

Swiss jurisdiction in the context of cross-border corporate criminal liability is also rather broadly admitted, and may cover situations where the actual offence committed by the individual within the company is not, itself, subject to Swiss jurisdiction. According to Swiss legal authors, the place of commission in relation to corporate criminal liability is both the place where the initial offence occurred, as well as the place where the lack of adequate compliance organisation in the company is located; ie, where the adequate measures to prevent the commission of the offence should have been taken.

Companies with their seat in Switzerland will thus always be subject to Swiss jurisdiction, irrespective of where the actual offence was committed. However, companies with their seat outside Switzerland will only be subject to Swiss jurisdiction if the offence is committed in Switzerland, or when the lack of adequate organisation may also be attributed to a department or a branch of the enterprise active in Switzerland.

Finally, Swiss criminal authorities also have extraterritorial jurisdiction in some specific cases, such as when:

- the offence is committed against the State or its national security (Article 4 SCC);
- Switzerland is obliged to prosecute the offence in terms of an international convention (Article 6 SCC); or
- under some conditions, when the offender or the victim is Swiss, if the offender is in Switzerland or is extradited to Switzerland due to the offence (Article 7 SCC).

1.4 Corporate Liability and Personal Liability

The SCC provides for two forms of corporate criminal liability.

The first form is a subsidiary liability (Article 102 §1 SCC): if a felony or misdemeanour is committed in a company in the exercise of commercial activities in accordance with the objects of the company and if it is not possible to attribute this act to any specific natural person due to the inadequate organisation of the company, then the felony or misdemeanour is attributed to the company. Inadequate organisation must be the reason why criminal authorities could not determine which natural person actually committed the offence. Therefore, as a subsidiary liability, companies may only be found guilty if no natural person may be prosecuted.

The second form, much more incisive, is a primary liability (Article 102 §2 SCC): for an exhaustive list of specific and serious offences listed below, a company may be held criminally liable irrespective of the criminal liability of any natural persons, provided it is responsible for failing to take the reasonable organisational measures required to prevent such an offence. If a specific individual can be identified as the offender, both the offender and the company may be held liable. This provision is limited to the following offences: criminal organisation, financing of terrorism, money laundering, bribery of Swiss public officials, granting an advantage, bribery of foreign public officials and private bribery.

In both cases, the company is liable to a fine of up to CHF5 million.

Furthermore, managers and directors of an enterprise might be held personally liable for the offences committed within the enterprise if:

- they participated in person in the commission of the offence; or
- they were in a position of guarantor vis-à-vis their subordinates and failed to prevent the commission of the offence, in breach of their duty to monitor the activities carried out within the enterprise.

The transmission of criminal liability to the new entity in the case of merger or acquisition is not regulated by law and is the subject of doctrinal controversy.

1.5 Damages and Compensation

Victims of a white-collar offence may claim compensation for their loss under Article 41 of the Swiss Code of Obligations before the criminal court competent to hear the case.

Such a claim must be filed together with the criminal claim. Compensation might be granted provided that:

- an illicit act was committed;
- a loss or damage was suffered;
- a causal relationship exists between the offence and the loss or damage; and
- the defendant was faulty.

Under certain conditions, such as in the event that the civil claim would cause unreasonable expense and inconvenience, the criminal court may make a decision in principle on the civil claim and refer it to the civil court (Article 126 Swiss Criminal Procedure Code, or SCPC).

Class actions to claim compensations are currently not available under Swiss law. The Swiss legislator views it as a gap in the legal system and is considering a draft law to create group transaction procedures.

1.6 Recent Case Law and Latest Developments

Recent legislative developments in white-collar offences in Switzerland include the amendment to Swiss law in 2016 with regards to measures against money laundering and against the financing of terrorism as well as amendments to corruption legislation. These adjustments arise from the implementation of soft law recommendations, such as those of the Financial Action Task Force (FATF) aiming to "set standards and promote effective implementation of legal, regulatory and operational measures for combating money laundering, terrorist financing and other related threats to the integrity of the international financial system." Such recommendations concerned the laundering of tax fraud proceeds, the scope of the Anti-Money Laundering Act (AMLA), clarification regarding the requirement of identity of the beneficial owner and the prohibition of private corruption, in particular as a consequence of the Fifa corruption case that was widely covered in the media.

Moreover, the Federal Council recently suggested the addition of a new disposition in the SCC, which would cover terrorist organisations. Individuals participating or supporting an organisation pursuing the goal to commit acts of violence in order to intimidate a population would be facing up to ten years of custodial sentences or a monetary penalty. The introduction of such a disposition in the SCC would greatly impact anti-money laundering legislation, as participation in such an organisation would constitute a case of qualified money laundering and as due diligence obligations under the AMLA would be extended to assets suspected of belonging to a terrorist organisation.

2. Enforcement

2.1 Enforcement Authorities

The public prosecutor is responsible for the uniform exercise of the state's right to punish criminal conduct. It conducts investigations, pursues offences within the scope of the investigation, and, where applicable, brings charges before the Tribunal and acts as prosecutor during the trial (Article 16 SCPC).

In principle, this competence lies with the public prosecutor's office of the canton where the offence was committed.

However, for a limited list of financial offences – ie, participation in or support for a criminal organisation, financing of terrorism, money laundering, insufficient diligence in financial transactions and bribery – the material competence lies with the Federal Office of the Attorney General (OAG) if:

- the offence was committed abroad to a substantial extent; or
- it has been committed in two or more cantons with no single canton being the clear focus of the criminal activity (Article 24 SCPC).

Furthermore, when the white-collar offence is committed within a regulated financial institution (ie, banks, insurance companies, exchanges, securities dealers, collective investment schemes, and their asset managers and fund management companies, distributors and insurance intermediaries), it might fall under the regulatory and administrative jurisdiction of the Swiss Financial Market Supervisory Authority (FINMA).

FINMA has a specific enforcement division competent to investigate suspected violations of supervisory law and, if necessary, initiates enforcement proceedings. When those violations fall under criminal law, FINMA may file a complaint with the competent criminal authorities (the Federal Department of Finance, the OAG or the cantonal public prosecutors' office) and exchange information with them.

2.2 Initiating an Investigation

Criminal investigations are initiated by police enquiries or the opening of a formal investigation by the competent public prosecutor (Article 300 SCPC).

The police might initiate enquiries based on a complaint filed with them, instructions from the public prosecutor or their own findings (Article 306 SCPC). Such initiation does not require a formal decision, but the SCPC provisions, in particular the usual procedural rights of defence, apply from the outset of the police enquiries.

The public prosecutor opens a formal investigation if there is a reasonable suspicion that an offence has been commit-

ted based on the information and reports from the police, a criminal complaint filed directly with it or its own findings, or if it intends to order coercive measures. The investigation is formally opened with a written ruling that is non-contestable (Article 309 SCPC).

The public prosecutor is in principle obliged to commence and conduct proceedings that fall within its jurisdiction where it is aware of or has grounds for suspecting that an offence has been committed (Article 7 SCPC). It may, however, renounce to open an investigation and immediately issue a no-proceedings order if the offence's constituent elements are clearly not fulfilled, if there are procedural impediments (eg, lack of jurisdiction, time-barred offence), or if:

- the level of culpability and consequences of the offence are negligible (Article 52 SCC);
- the offender has repaired the loss, damage or injury, or made all reasonable efforts to compensate for the damage caused by him, provided that a limited penalty is suitable, the interest in prosecution is negligible and the offender has admitted the offence (Article 53 SCC); or
- the offender is so seriously affected by the immediate consequences of his act that a penalty would be inappropriate (Article 54 SCC).

In white-collar crime matters, the opening of an investigation is often triggered by a denunciation received from the Money Laundering Reporting Office Switzerland (MROS). The MROS functions as a relay and filtration point between financial intermediaries, such as banks, and the competent public prosecutor. Under the AMLA, financial institutions have an obligation to report to the MROS suspicious activities in connection with money laundering, financing of terrorism, money of criminal origin or criminal organisations. Failure to comply with this obligation is a criminal offence. The MROS analyses these reports and if it should consider that there are reasonable grounds to suspect that an offence has been committed, communicates them to the public prosecutor for follow-up action.

2.3 Powers of Investigation

General Principles

Investigative authorities may use all legal means of evidence that are relevant and appropriate to establish the truth. The use of coercion, violence, threats, promises, deception and methods that may compromise the ability of the person concerned to think or decide freely are prohibited when taking evidence, even if the person concerned consents to their use (Article 140 SCPC).

Coercive Measures

When necessary, the public prosecutor, the Tribunal and in some cases the police may order coercive measures. These must be necessary and proportionate, and there must be a reasonable suspicion that an offence has been committed (Article 197 SCPC).

Coercive measures include the following.

- The summoning for hearing, if necessary under the threat of a fine or with the help of the police (Article 201 et seq SCPC).
- The search, arrest and pre-trial detention of an accused (Article 210, 212 et seq SCPC). A person arrested by the police must be freed or brought before the public prosecutor within 24 hours. If considered, pre-trial detention must be requested and validated by a Tribunal within 96 hours from the arrest.
- The search of records and recordings, including all information recorded on paper, audio and video as well as electronic recordings, provided there are factual indications that they contain information that may be seized (Article 246 et seq SCPC).
- The search of premises, provided it is suspected that forensic evidence or property or assets liable to seizure are on the premises (Article 244 et seq SCPC). Searches for indeterminate information (fishing expeditions) are prohibited under Swiss law.
- The seizure of items and assets belonging to an accused or to a third party, provided it is expected that they will be used as evidence, will have to be forfeited or used for the purpose of a claim for compensation (Article 263 et seq SCPC).
- The order addressed to the holder of items or assets that should be seized to hand them over, under threat of a fine (Article 265 et seq SCPC).

Obtaining Documents and Information from a Company under Investigation

Request to produce documents

The competent authority may request the company to produce specific documents.

In principle, it may not accompany this request with any threat of penalty. As an accused, the company benefits indeed in principle from the same defence rights as a natural person, including the privilege against self-incrimination. It may thus not be compelled to incriminate itself and is entitled to refuse to co-operate in the criminal proceedings (Article 113 SCPC).

The application of the privilege against self-incrimination to companies has been limited by case law in relation to companies that are regulated financial institutions, and thus subject to certain record-keeping obligations under supervisory law. According to Switzerland's Supreme Court, the assertion of this privilege must not be a means to circumvent the criminal authorities' legal right to access documents that those financial institutions are obliged to establish and store under the legislation on money laundering.

Search and seizure of company documents
Irrespective of its privilege against self-incrimination, the company must submit to the coercive measures provided for by the law (Article 113 SCPC). If it refuses to collaborate, the competent authority may order the above-mentioned coercive measures, including, in particular, the search and seizure of the companies' records and recordings.

Searches must be authorised by written warrant. In cases of urgency, they may be authorised orally, but must be confirmed subsequently in writing (Article 241 SCPC).

Companies have an obligation to tolerate the search and cannot obstruct it.

When the search concerns documents or other records, including electronic data, their owners – ie, the company managers and the concerned employees – have the right, before the search, to express their views on their content and to indicate to the officials what documents and records cannot be searched or seized.

This is in particular the case for the following documents and records:

- documents and records covered by legal privilege (communications exchanged between the company and its external lawyers);
- purely private documents and records that do not contain important information for the investigation;
- documents and records that do not fall within the scope of their legitimation (search warrant); and
- documents containing commercial secrets (under some conditions).

If no agreement can be reached with the officials, their owner can request their sealing (Article 248 §1 SCPC). In such a case, the officials are not allowed to examine them. They might still proceed with a summary examination (limited, for instance, to the reading of the title of the documents) in order to determine whether they want to seize them.

The seals must be requested immediately, or, at the latest, at the end of the search.

If they still want to use the sealed documents, criminal authorities must file a request before a Tribunal for the removal of the seals within 20 days. Failing that, the sealed records and property shall be returned to their owner (Article 248 §2 SCPC).

Questioning of persons
Criminal authorities may question any person as long as their questioning is relevant and appropriate to establish the truth.

The rights and obligations of these persons will depend on their status.

- Employees or third parties suspected to have committed the offence are heard as accused (Article 111 SCPC) and benefit from all procedural rights attached to this status, including, in particular, the right to refuse to collaborate in the criminal proceedings.
- Employees or third parties who are not accused but who cannot be excluded as having committed or participated in the offence are heard as persons providing information (Article 178 letter d SCPC). Persons providing information are subject to the provisions on hearings with the accused and thus have the right to refuse to collaborate in the criminal proceedings (Article 180 §1 SCPC).
- Employees who have been or could be designated as the representative of the company in the criminal proceedings against it, as well as their close employees, are heard as persons providing information with the rights attached to this status (Article 178 letter g SCPC). This covers the company's managers and the employees who have had direct interactions with them over a long period of time, such as the managers' assistants.
- Other employees or third parties who can make a statement that may assist in the investigation are heard as witnesses (Article 162 SCPC). Witnesses are obliged to make a statement and tell the truth (Article 163 §2 SCPC). They may only refuse to testify in limited circumstances; ie, if they are closely related to the accused, if their testifying could incriminate themselves or a closely related person, or if they are subject to official or professional secrecy (Article 168 et seq SCPC).
- Claimants are heard as persons providing information (Article 178 letter a SCPC), but have the same obligation to testify as witnesses (Article 180 §2 SCPC).

2.4 Internal Investigations

Swiss law contains neither rules obliging companies to conduct internal investigations nor specific rules on the matter.

Companies are, however, subject to obligations stemming from various legal sources that indirectly require them to conduct such investigations.

In particular, companies may be held criminally liable when they have failed to take the adequate organisational measures allowing them to identify the author of an offence or to prevent the commission of offences within their entity (Article 102 SCC). While Swiss law does not specify what those adequate organisational measures are, the implementation of efficient internal investigations processes is usually considered to be part of it.

Furthermore, regulated financial intermediaries are subject to investigation and reporting duties under the Anti-Money Laundering Act. The duty to report suspicious activities to

MROS (Article 9 AMLA) in particular requires the company to conduct the necessary investigations to be able to report any arising suspicions immediately. Failure to comply with this duty is sanctioned with a fine (Article 37 AMLA).

Besides, regulated financial intermediaries have a duty to provide FINMA with all the information and documents that it requires to carry out its supervisory tasks (Article 29 §1 Financial Market Supervision Act, or FINMASA). They must also immediately report to FINMA any incident that is of substantial importance to the supervision (Article 29 §2 FINMASA). The wilful provision of false information to FINMA is sanctioned by a custodial sentence of up to three years or a monetary penalty, respectively by a fine of up to CHF250,000 in the case of negligence (Article 45 FINMASA). The mere failure to comply with the duty to co-operate is not in itself punishable, but it may lead FINMA to open an enforcement investigation and appoint an independent investigative agent to conduct an internal investigation within the company. If the violations of supervisory law are confirmed, FINMA may apply serious sanctions.

Financial intermediaries are thus indirectly obliged to conduct the necessary internal investigations to be able to provide FINMA with correct information, prevent intrusive investigative measures and avoid sanctions.

2.5 Mutual Legal Assistance Treaties and Cross-Border Co-operation

Active and passive international mutual legal assistance is governed, in the first place, by the applicable international or bilateral treaty existing between Switzerland and the requesting or requested state.

Switzerland is a party to numerous international treaties, including, in particular, the European Convention of 20 April 1959 on Mutual Assistance in Criminal Matters (ECMA) and the European Convention of 3 December 1957 on Extradition (CEExtr). It has also concluded numerous bilateral mutual assistance treaties with foreign states such as the USA, Australia and Canada.

In the absence of such a treaty, the conditions under which mutual assistance may be granted are set out in the Act on International Mutual Assistance in Criminal Matters (IMAC). In such a case, a foreign request will generally be granted by Switzerland only if the requesting state guarantees reciprocity (Article 8 IMAC).

The Federal Office of Justice is competent to receive requests from foreign authorities. After a summary examination of the request as to whether it meets the formal requirements, it will forward it to the appropriate executing authority; ie, either the cantonal public prosecutor's office or the OAG.

Mutual assistance measures include the interviewing of witnesses and suspects, the seizure and handing over of evidence and documents as well as objects and assets, the search of premises and the seizure of property as well as arrest of persons for the purpose of an extradition. Coercive measures may only be ordered if the offence prosecuted abroad is also punishable in Switzerland (principle of dual criminality).

Mutual legal assistance will notably be refused in the following cases:

- the foreign proceedings have serious procedural defects (Article 2 IMAC); or
- the foreign proceedings concern a political offence, a violation of the obligation to perform military services or a fiscal offence, unless the case would constitute tax fraud under Swiss law (Article 3 IMAC).

Extradition requests from foreign states are governed by the applicable international or bilateral convention, and, in particular, the above-mentioned CEExtr and/or the IMAC, which contain similar provisions. According to them, extradition might be granted for white-collar offences provided, notably, that the relevant offence is punishable by deprivation of liberty for a maximum period of at least one year both under the law of Switzerland and under the law of the requesting state, and is not subject to Swiss jurisdiction (Article 2 CEExtr).

2.6 Prosecution

If, at the end of its investigation, the public prosecutor regards the grounds for suspicion as sufficient, it shall bring charges before the competent criminal Tribunal of first instance. The indictment is non-contestable (Article 324 SCPC).

Unless the conditions under Articles 52, 53 or 54 SCC are met (see **2.2 Initiating an Investigation**), the public prosecutor is in principle obliged to bring charges. The abandonment of proceedings is only possible if the impunity of the accused's acts is clear or if conditions of the criminal action are obviously lacking. The principle in dubio pro reo does not apply at this stage: if the legal or factual situation is not clear, it is for the trial judge to decide on the accused's culpability (in dubio pro duriore).

2.7 Deferred Prosecution

Deferred prosecution agreements do not currently exist under Swiss law. This could be remedied in the future as the OAG recently suggested the introduction of such a mechanism for companies in the SCPC.

Swiss criminal authorities have used the discretion offered by Article 53 SCC as an alternative mechanism to resolve a criminal investigation without a trial (see **2.2 Initiating an Investigation**). As an example of such application, the Geneva public prosecutor opened in 2015 an investigation against

the bank HSBC for aggravated money laundering. The bank quickly accepted to pay a certain amount to repair the illicit acts committed by the bank. Eventually, the Geneva public prosecutor accepted the abandonment of the proceedings against HSBC pursuant to Article 53 SCC, in exchange for the payment of CHF40 million in favour of the Geneva state.

2.8 Plea Agreements

Swiss law provides for two procedures that allow a certain level of negotiations between the public prosecutor, the claimant and the accused.

Accelerated Proceedings

At any time prior to bringing charges, the accused may request the public prosecutor to conduct Accelerated Proceedings, provided the following conditions are met:

- the accused admits the matters essential to the legal appraisal of the case;
- he recognises, if only in principle, the civil claims; and
- the public prosecutor requests a custodial sentence of less than five years (Article 358 §1 SCPC).

If he accepts Accelerated Proceedings, the public prosecutor discusses with the parties the verdict, the sentence and the civil compensation.

If all parties reach an agreement, the public prosecutor drafts the indictment and sends it to the criminal Tribunal of first instance (Article 360 SCPC).

The latter's role is then limited to verifying whether the conditions of the Accelerated Proceedings are met: the Tribunal does not conduct any investigations (Article 361 SCPC). It either confirms the indictment or sends it back to the public prosecutor to start an ordinary procedure (Article 362 SCPC).

Summary Penalty Order

The public prosecutor might issue a Summary Penalty Order if:

- the accused pleads guilty or if his guilt has otherwise been satisfactorily established; and
- the sanction decided on by the public prosecutor is limited (a fine, a monetary penalty up to CHF540,000 or a custodial sentence of no more than six months) (Article 352 SCPC).

Unless it is challenged by a party within ten days, the Summary Penalty Order becomes a final judgment and the case does not reach the trial phase.

Although the Summary Penalty Order is not supposed to be a negotiated procedure, criminal authorities tend to use it as such as it allows flexibility. Companies also favour this instrument to settle their case as this permits them to avoid a public hearing.

3. White-Collar Offences

3.1 Criminal Company Law and Corporate Fraud

Swiss law does not specifically deal with criminal company law and corporate fraud offences, but the following general offences may, in particular, be committed in a corporate context.

Fraud (Article 146 SCC)

Article 146 SCC punishes any person who, with a view to securing an unlawful gain for himself or another, maliciously induces an erroneous belief in another person by false pretences or concealment of the truth, or reinforces an erroneous belief, and thus causes that person to act to the prejudice of his or another's financial interests.

The offender faces a custodial sentence of up to five years – ten if he acted for commercial gain – or a monetary penalty.

Criminal Mismanagement (Article 158 SCC)

Article 158 punishes any person who has been entrusted with the management of the property of another or the supervision of such management, and in the course of and in breach of his duties causes that other person to sustain financial loss.

The person acting in the same manner in his capacity as the manager of a business but without specific instructions is liable to the same penalty.

The offender faces a custodial sentence up to three years – five if he acted for commercial gain – or a monetary penalty.

Misappropriation (Article 138 SCC)

Article 138 SCC punishes any person who, for his own or for another's unlawful gain, appropriates moveable property belonging to another but entrusted to him, or unlawfully uses financial assets entrusted to him.

The offender is liable to a custodial sentence of up to five years or to a monetary penalty.

Forgery of Documents (Article 251 SCC)

Article 251 SCC punishes any person who, with a view to causing financial loss or damage to the rights of another or in order to obtain an unlawful advantage for himself or another, produces a false document, falsifies a genuine document, uses the genuine signature or mark of another to produce a false document, falsely certifies or causes to be falsely certified a fact of legal significance, or makes use of a false or falsified document in order to deceive.

The offender is liable to a custodial sentence of up to five years or to a monetary penalty.

3.2 Bribery, Influence Peddling and Related Offences

Active and Passive Bribery of Swiss Public Officials

Swiss criminal law prohibits in the first place the active bribery of Swiss public officials, which is the act by which a person offers, promises or gives a public official an undue advantage, for his own benefit or for the benefit of any third party, in order to cause that public official to carry out or to fail to carry out an act in connection with his official activity that is contrary to his duty or dependent on his discretion (Article 322ter SCC).

Passive bribery – the act by which the public official demands, secures the promise of or accepts such an undue advantage within the same circumstances – is similarly punishable (Article 322quater SCC).

Offenders face a custodial sentence of up to five years or a monetary penalty.

Active and Passive Bribery of Foreign Public Officials

Switzerland extended the prohibition of bribery to foreign public officials by introducing the offence of active bribery of foreign public officials in 2000, and passive bribery of public foreign officials in 2006 (Article 322septies SCC).

The material conditions and the sanctions are the same as for the offences of bribery of Swiss public officials.

Granting and Acceptance of an Advantage (only for Swiss Public Officials)

Swiss law makes a distinction between "bribery" in the narrow sense and "granting of an advantage". Both the active and passive behaviour are prosecuted (Article 322quinquies and 322sexies SCC).

Unlike bribery, the undue advantage is not connected to a specific act or omission of the bribed public official, but is rather given or accepted in order for the public official to carry out his official duties. While the payment of bribes is in a relationship of exchange with the undue advantage, the granting of an advantage refers to unjustified favours given or accepted without any concrete consideration in return. It includes facilitation payments or undue advantage given with a general view to establish a positive climate for the future execution of official duties.

Unlike the offence of bribery, the offence of granting an undue advantage is not prosecuted with regard to foreign officials.

Offenders face a custodial sentence of up to three years or a monetary penalty.

Active and Passive Bribery in the Private Sector

Active and passive bribery in the private sector is also punished under Swiss law (Article 322octies and 322novies SCC). Bribery of private persons presupposes a tripartite relationship in which one person connected to another by a relationship of trust and loyalty – such as an employee, an agent or a partner – receives an undue advantage from a third party in order to act or fail to act, within the context of his professional or commercial activities, in breach of his trust and loyalty duties to his employer, principal or partner. The prohibition of private bribery aims at protecting trust and loyalty in business relationships by sanctioning the breach of private-law duties.

The mere "granting of an advantage" is not punishable between private parties, which means that only undue advantages that are connected to an actual breach of the recipient's trust and loyalty duties may be punishable. As a result, undue advantages given or accepted with a general view to create, maintain or improve business relations between two private parties are not punishable under Swiss law.

Offenders face a custodial sentence of up to three years or a monetary penalty.

3.3 Anti-bribery Regulation

Swiss law does not provide for a specific obligation to prevent bribery, nor to maintain a compliance programme. Since Article 102 §2 SCC sanctions companies that failed to take all reasonable organisational measures to prevent bribery and corruption offences, companies often implement anti-bribery programmes to mitigate the risk of criminal liability.

3.4 Insider Dealing, Market Abuse and Criminal Banking Law

Insider dealing and market abuse are governed by the Financial Market Infrastructure Act (FMIA) and subject to federal jurisdiction (Article 156 FMIA).

Exploitation of Insider Information (Article 154 FMIA)

Article 154 FMIA sanctions the exploitation of insider information to gain a pecuniary advantage for itself or for a third party by:

- exploiting it to acquire or dispose of securities admitted to trading on a trading venue in Switzerland or to use derivatives relating to such securities;
- disclosing it to a third party; or
- exploiting it to recommend to another to acquire or dispose of securities admitted to trading on a trading venue in Switzerland or to use derivatives relating to such securities.

The sentence depends on the way the insider obtained the insider information:

- primary insiders who have had legitimate access to the insider information within the context of their activities (eg, board members of an issuer) face a custodial sentence of up to three years – five if the pecuniary advantage exceeds CHF1 million – or a monetary penalty;
- secondary insiders who either obtained insider information from a primary insider or acquired it through a felony or misdemeanour face a custodial sentence of up to one year or a monetary penalty; and
- accidental insiders who might have obtained the insider information by accident (eg, cleaning person in the offices of an issuer) face a fine.

Market Manipulation (Article 155 FMIA)

Article 155 FMIA sanctions the substantial influence of the price of securities admitted to trading on a trading venue in Switzerland with the intention of gaining a pecuniary advantage for itself or for another by:

- disseminating false or misleading information against their better knowledge; or
- effecting acquisitions and sales of such securities directly or indirectly for the benefit of the same person or persons connected for this purpose ("wash sales" or "matched orders").

Market manipulation is subject to a custodial sentence of up to three years – five if the pecuniary advantage exceeds CHF1 million – or a monetary penalty.

3.5 Tax Fraud

Swiss tax law distinguishes between tax evasion and tax fraud.

Tax evasion is the intentional or negligent reduction of the tax claim to the detriment of the State; eg, by not declaring tax-relevant facts or filing incomplete declarations. It is subject to a fine and is an administrative infringement, subject to the competence of the tax authorities.

Tax fraud is a qualified form of tax evasion implying the use of falsified documents. It is sanctioned with a custodial sentence of up to three years or a monetary penalty of up to CHF1,080,000 and is a criminal offence subject to the competence of the criminal authorities.

Swiss law does not provide for a specific obligation to prevent tax evasion.

Since 1 January 2016, however, qualified tax evasion may be a predicate offence to money laundering if (i) the evasion qualifies as tax fraud under Swiss tax law and (ii) the evaded tax exceeds the sum of CHF300,000 per tax period (Article 305ter § 1bis SCC).

As a result, an obligation to prevent tax fraud indirectly ensues from Article 102 SCC, as the company failing to take the reasonable organisational measures required to prevent money laundering may be held criminally liable.

A similar indirect obligation ensues from Article 9 AMLA. According to that provision, financial intermediaries have investigation and reporting duties when they suspect that assets involved in the business relationship are the proceeds of an aggravated tax fraud. Non-compliance is punishable by a fine not exceeding CHF500,000, respectively CHF150,000 francs if the failure is due to negligence (Article 37 §2 AMLA).

3.6 Financial Record Keeping

Companies must keep and preserve records of their accounts in order to reflect their financial standing. The exact requirements vary depending on the size of the company. In principle, financial records must be kept for ten years.

The main offences related thereto are:

- failure to keep proper accounts in the context of bankruptcy, subject to a custodial sentence not exceeding three years or to a monetary penalty (Article 166 SCC);
- failure to comply with accounting regulations, subject to a fine (Article 325 SCC); and
- forgery of documents if the financial records are inaccurate, subject to a custodial sentence not exceeding five years – three in minor cases – or to a monetary penalty (Article 251 SCC).

3.7 Cartels and Criminal Competition Law

Cartels are governed by the Federal Act on Cartels and other Restraints of Competition (CartA).

The CartA provides for the following offences:

- unlawful agreements affecting competition (Article 5 CartA) – that is, agreements that significantly restrict competition in a market for specific goods or services and are not justified on grounds of economic efficiency, as well as all agreements that eliminate effective competition are unlawful; and
- unlawful practices by dominant companies (Article 7 CartA) – that is, the abuse by a dominant company of its position in the market.

Offenders shall be charged with a fine of up to 10% of the turnover achieved by the company in Switzerland in the preceding three years (Article 49a § 1 CartA).

The CartA is enforced by the Swiss Competition Commission (ComCo), which is competent to impose administrative sanctions on companies. No charge may be brought against individuals under CartA.

Unfair competition is governed by the Unfair Competition Act (UCA), which contains criminal law provisions.

According to Article 23 UCA, intentional unfair competition may be sanctioned with a custodial sentence of up to three years or a monetary penalty. The provision covers various behaviours, such as unfair advertising and sales methods (Article 3 UCA), inducement to breach or termination of contract (Article 4 UCA), exploitation of the achievements of others (Article 5 UCA), violation of manufacturing or trading secrets (Article 6 UCA), non-compliance with working conditions (Article 7 UCA) and use of abusive Conditions of Business (Article 8 UCA).

3.8 Consumer Criminal Law

There is no proper consumer law in Switzerland. Provisions related to the protection of consumers are scattered in numerous acts, such as the Act on Consumer Information, the Act on Product Liability, the Act on Product Safety and the Act on Consumer Credits.

Each of these acts provides for administrative and criminal sanctions in the event of non-compliance.

3.9 Cybercrimes, Computer Fraud and Protection of Company Secrets

The SCC sanctions the following computer-related offences.

- The unauthorised obtaining of data (Article 143 SCC), in relation to electronic data specially secured against unauthorised access. Offenders face a custodial sentence of up to five years or a monetary penalty.
- The unauthorised obtaining of personal data (Article 179novies SCC), in relation to personal data or personality profiles that are particularly sensitive and not freely accessible. Offenders face a custodial sentence of up to three years or a monetary penalty.
- Unauthorised access to a data processing system (Article 143bis §1 SCC), which implies the use of data transmission equipment (hacking), as well as the release of accessible passwords, programs or other data intended to be used to commit such offence (Article 143bis §2 SCC). Offenders face a custodial sentence of up to three years or a monetary penalty.
- Damage to data (Article 144bis §1 SCC), including its unauthorised modification or destruction (eg, via a ransomware) as well as the release of programs intended to be used to commit such offence (Article 144bis §2 SCC). Offenders face a custodial sentence of up to three years – five in the case of major damage or if the offender acted for commercial gain – or a monetary penalty.
- Computer fraud (Article 147 SCC), which implies a transfer of financial assets obtained by way of influencing an electronic processing or transmission of data (eg, skimming). Offenders face a custodial sentence of up to five years – ten if the offender acted for commercial gain – or a monetary penalty.
- Production and marketing of equipment for the unauthorised decoding of encoded services (Article 150bis SCC). The sanction is a fine.

Lastly, Article 162 SCC sanctions the breach and exploitation of manufacturing or trade secrecy that the offender is under statutory or contractual duty not to reveal. The sanction for such an offence is a custodial sentence of up to three years or a monetary penalty.

3.10 Financial/Trade/Customs Sanctions

The Federal Act on the Implementation of International Sanctions (Embargo Act, EmbA) governs coercive measures enacted by Switzerland to implement sanctions ordered by the United Nations, by the Organization for Security and Co-operation in Europe or by Switzerland's most significant trading partners and that serve to secure compliance with international law, and in particular the respect of human rights.

A "simple" breach of EmbA provisions is punishable by a custodial sentence of up to a year or a monetary penalty of up to CHF540,000. A "qualified" breach is punishable by either a custodial sentence of up to five years or a monetary penalty of up to CHF540,000. In the case of negligence, a monetary penalty of up to CHF270,000 may be issued.

Moreover, the Federal Act on the Control of Dual-Use Goods, Specific Military Goods and Strategic Goods (Goods Control Act, GCA) sets forth provisions relating to export restrictions. Breaches of these provisions can lead to custodial sentencing of up to three years or a fine of up to CHF1,000,000, and in severe cases a custodial sentence of up to ten years and a fine of up to CHF5 million.

3.11 Concealment

Article 160 SCC sanctions any person who takes possession of, accepts as a gift or as the subject of a pledge, conceals, or assists in the disposal of goods that he knows or must assume have been acquired by way of an offence against property. Intent is required. The concealment predicate offence may be any offence that has the effect of removing a good from the estate to which it belonged.

Unlike what is applicable with money laundering, the author of the predicate offence may not be held liable for both the predicate offence and the concealment.

If the predicate offence is prosecuted only on complaint, concealment is prosecuted only if a complaint was filed in respect of the predicate offence.

Concealment is sanctioned with a custodial sentence of up to five years – ten if the offender acted for commercial

gain – or a monetary penalty. If the sentence applicable to the predicate offence is lighter, that sentence is applicable to concealment too.

3.12 Aiding and Abetting

Aiding and abetting are also liable to prosecution.

The wilful abetting of another to commit a felony or a misdemeanour, provided the offence is committed, is subject to the same sentence as the commission of the offence. The attempt to abet someone to commit an offence is only punishable if the offence is a felony – ie, if it carries a custodial sentence of more than three years – and is subject to the same offence as the attempt to commit that felony (Article 24 SCC).

The wilful aiding of another to commit a felony or a misdemeanour is subject to a reduced penalty (Article 25 SCC).

3.13 Money Laundering

Money Laundering (Article 305bis SCC)

Money laundering is the act aiming at frustrating the identification of the origin, the tracing or the forfeiture of assets that one knows or must assume originate from a felony or aggravated tax misdemeanour (Article 305bis SCC). Constituent elements of money laundering are thus the following.

- The existence of assets stemming from a felony or a qualified tax fraud. The assets must directly or indirectly stem from a felony, that is an offence carrying a custodial sentence of more than three years, or a qualified tax offence; ie, a tax fraud under Swiss law where the tax evaded in any tax period exceeds CHF300,000.
- An act aimed at frustrating the forfeiture of these assets. The notion is broadly interpreted: any asset movement that does not amount to the mere payment into a bank account allowing the paper trail to be traced is sufficient to qualify as such. Money laundering may also be committed by omission when the author has a legal duty to act. This is the case with regulated financial institutions and their employees subject to investigation and report duties under the AMLA.
- The knowledge or assumption that the assets originated from said predicate offence.

The offence is aggravated, in particular, where the offender:

- acts as a member of a criminal organisation;
- acts as a member of a group that has been formed for the purpose of the continued conduct of money laundering activities; or
- achieves a large turnover or substantial profit through commercial money laundering. An annual gross turnover of CHF100,000 has been considered to be "large".

Money laundering is subject to a custodial sentence of up to three years – five in the aggravated case – or to a monetary penalty.

Insufficient Diligence in Financial Transactions (Article 305ter SCC)

Article 305ter SCC introduces for professionals working in the financial sector a legal duty to identify the beneficial owner and sanctions the failure to do so.

Any person who, as part of his profession, accepts, holds on deposit, or assists in investing or transferring outside assets and fails to ascertain the identity of the beneficial owner of the assets with the care that is required in the circumstances is liable to a custodial sentence of up to one year or to a monetary penalty (Article 305ter SCC).

Further Obligations to Prevent Money Laundering under Supervisory Law

As seen above, regulated financial intermediaries are subject to investigation and reporting duties under the AMLA when they know or have reasonable grounds to suspect that assets involved in the business relationship are the proceeds of a felony or an aggravated tax fraud or are subject to the power of disposal of a criminal organisation (Article 9 AMLA).

Failure to comply with the duty to report suspicious activities to MROS is punishable by a fine not exceeding CHF500,000, respectively CHF150,000 if the failure is due to negligence (Article 37 AMLA).

4. Defences/Exceptions

4.1 Defences

There are no specific defences for white-collar offences in Switzerland.

The standard defence will thus be to argue that the constituent elements of the concerned offence are not fulfilled.

In this regard, the existence of an effective compliance programme may be an efficient defence in the context of corporate criminal liability, as it proves a certain degree of organisation within the company's structure. It may thus support the company's affirmation that it did take all the reasonable organisational measures required to prevent such an offence, so that one of the constituent elements of Article 102 SCC – ie, the lack of an adequate organisation – is lacking.

4.2 Exceptions

With regards to offences against property, the offender is liable only on complaint and the maximum sanction is a fine when the offence relates only to an asset of minor value or where only a minor loss is incurred (Article 172ter SCC). Case law has set the limit of a "minor value" at CHF300.

Similarly, in cases of bribery, advantages are not regarded as undue when they are permitted under the regulations on the conduct of official duties or when they are negligible advantages that are common social practice (Article 322octies § 2 SCC). Small gifts may thus be regarded as lawful, as long as such a social practice may be proven in the context. The notion of "negligible" is debated but it is generally admitted that it may not exceed CHF300.

More generally, Article 52 SCC provides that Swiss authorities may decide not to prosecute an offender if the degree of culpability and the consequences of the offence are negligible.

4.3 Co-operation, Self-Disclosure and Leniency

Self-disclosure and full co-operation with the criminal proceedings might under some circumstances be considered as a ground for exemption from punishment under Article 53 SCC (see **2.2 Initiating an Investigation**) or a mitigating factor under Article 48 letter d SCC justifying the reduction of the sentence.

Further specific leniency programmes exist in various matters, such as:

- in cartel matters – the competent authority may waive in whole or in part the charges if the accused company co-operates in the discovery and elimination of a restraint of competition (Article 49 § 2 CartA); and
- in tax matters – the tax authority might renounce to charge a taxpayer who spontaneously self-reports a first tax evasion provided that (i) no tax authority knew about the evasion, (ii) the taxpayer fully co-operates with the tax authority to determine the amount of the evaded tax and (iii) the taxpayer strives to reimburse the evaded tax (Article 175 et seq of the Swiss federal law on direct tax).

4.4 Whistle-blowers' Protection

Specific measures regarding whistle-blowers have been introduced in the Federal Personnel Act in 2011 with regards to employees of the Confederation. The Act provides for specific channels to disclose suspected wrongdoings at work, depending on the seriousness of the matter.

Swiss law does not, however, set forth specific provisions protecting whistle-blowers in the private sector. As the latter are bound by an employment contract, whistle-blowing can result in the breach of said contract. Each case is judged in accordance with the general labour provisions contained in the Swiss Code of Obligations. According to the latter, the right for an employee to report suspected wrongdoings at work outside his workplace must be weighed against the different interests at stake. The dismissal of an employee whose report of wrongdoings was licit is abusive. In such case, the dismissal remains valid – the employee cannot, in particular, reclaim his employment – but the employer may be condemned to pay to him an indemnity of maximum six months' salary, the usual sanction for an abusive dismissal.

With regards to business organisation, Swiss company law does not provide for an obligation to set up an internal reporting procedure. Such an obligation may indirectly ensue from other provisions, such as Article 102 § 2 SCC and the necessity to avoid criminal liability.

Likewise, labour law obliges the employer to take all the necessary and feasible measures to protect the employee's personality rights. The Swiss Supreme Court has confirmed that the appointment of a person of trust, within or outside the company, to which employees can report potential abuses could be imposed on a company on this legal basis.

5. Burden of Proof and Assessment of Penalties

5.1 Burden of Proof

Every person is presumed to be innocent until he has been convicted in a judgment that is final and legally binding. The tribunal freely assesses the evidence based on its inner conviction formed over the entire proceedings. Where there is insurmountable doubt as to whether the factual requirements of an alleged offence are fulfilled, the tribunal shall proceed on the assumption that the circumstances more favourable to the accused occurred (in dubio pro reo) (Article 10 SCPC).

During the investigative phase, the criminal justice authorities investigate ex officio all relevant circumstances to the assessment of the criminal act and the accused. They shall investigate incriminating and exculpating circumstances with equal care (Article 6 SCPC).

In the trial phase, the burden of proof lies with the public prosecutor, which has to prove the relevant facts beyond reasonable doubt to obtain the conviction of the accused.

5.2 Assessment of Penalties

There are no specific rules governing the assessment of penalties in white-collar crime and the usual principles apply.

According to those, the Tribunal determines the sentence according to the culpability of the offender. It takes account of the previous conduct and the personal circumstances of the offender as well as the effect that the sentence will have on his life. Culpability is assessed according to the seriousness of the damage or danger to the legal interest concerned, the reprehensibility of the conduct, the offender's motives and aims, and the extent to which the offender, in view of the personal and external circumstances, could have avoided causing the danger or damage (Article 47 SCC).

Full co-operation of the offender may qualify as a mitigating circumstance justifying the reduction of the sentence (Article 48 letter d SCC).

With regards to the white-collar offences committed by companies, the financial standing of the company as well as organisational measures taken by the company are elements that will be taken into consideration by the Tribunal.

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