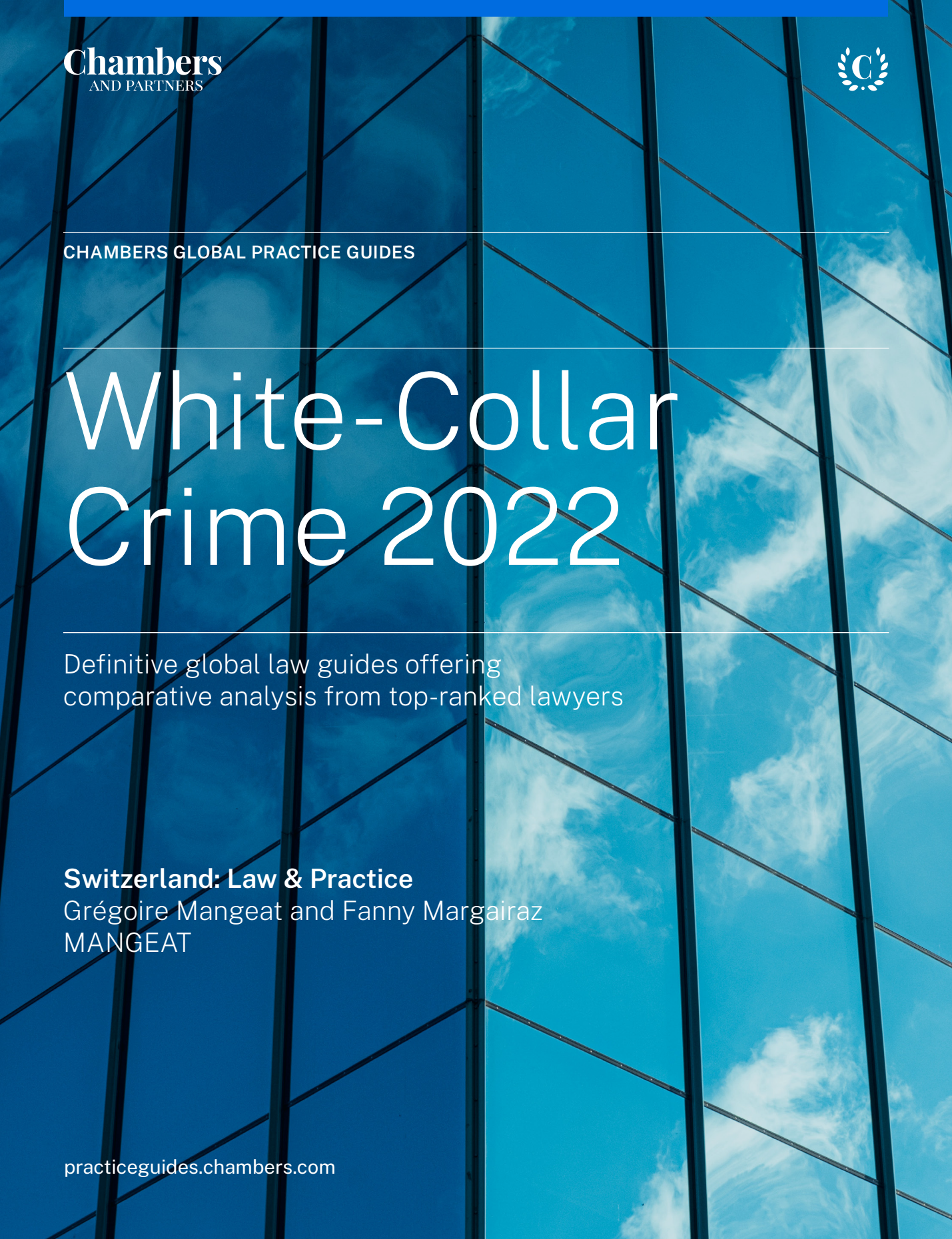

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White-Collar Crime 2022

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Switzerland: Law & Practice

Grégoire Mangeat and Fanny Margairaz
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Law and Practice

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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 (Articles 10 and 103 SCC).

Unless otherwise provided in the law, a monetary penalty may amount to CHF540,000 (Article 34 SCC) and a fine of 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 already given if 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 this scenario (Article 22 SCC).

1.2 Statute of Limitations

According to Article 97 SCC, the right to prosecute is subject to a time limit of:

- 30 years if the offence carries a custodial sentence of life;
- 15 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.

According to Article 98 SCC, the limitation period begins:

- 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 (Article 97 Section 3 SCC).

1.3 Extraterritorial Reach

Swiss criminal justice authorities are primarily competent to prosecute offences that are committed in Switzerland (principle of territoriality).

An offence is considered to be committed both at the place where the offender carries out the punishable act and where the offence has taken effect (principle of ubiquity, Article 8 SCC).

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

As an example, bribery offences are considered to be committed in Switzerland if:

- the briber or the bribed person is physically in Switzerland at the time when they offer, promise or give the bribe, or respectively demand, secure the promise of or accept 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 their favour on Swiss soil.

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

Swiss jurisdiction in the context of cross-border corporate criminal liability is also 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 compliance measures taken by the company were inadequate – ie, where 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. On the other hand, companies with their seat outside Switzerland will only be subject to Swiss jurisdiction if the offence is committed in Switzerland, or if the lack of adequate compliance measures may be attributed to a department or a branch of the enterprise active in Switzerland.

Finally, Swiss criminal justice authorities also have extraterritorial jurisdiction in certain specific cases (see Articles 4, 6, and 7 SCC).

1.4 Corporate Liability and Personal Liability

The SCC provides for two forms of corporate criminal liability.

Subsidiary Liability (Article 102 Section 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 the criminal justice authorities are unable to determine which natural person actually committed the offence. Therefore, as a subsidiary liability, companies may only be found guilty when no natural person can be prosecuted.

Primary Liability (Article 102 Section 2 SCC)

A company may be held criminally liable irrespective of the criminal liability of any natural persons if the company is responsible for failing to take all the reasonable organisational measures required to prevent one of the following offences: criminal or terrorist organisation, financing terrorism, money laundering, bribery of Swiss public officials, granting an advantage, bribery of foreign public officials and bribery of private individuals. If a specific individual can be identified as the offender, both the offender and the company may be held liable.

In both subsidiary and primary liability, 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.

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 try the case.

Victims must have formally announced their claim before the end of the criminal investigation (Article 118 Section 3 Swiss Criminal Procedure Code, SCPC) and must quantify and justify it before the end of the trial (Article 123 Section 2 SCPC).

On the merits, compensation may be granted provided that:

- an unlawful act was committed;
- loss or damage was suffered by the victim;
- a causal relationship exists between the offence and the loss or damage; and
- the defendant acted wilfully or negligently.

If a full assessment of the civil claim would cause unreasonable expense and inconvenience, the criminal court may make a decision in principle on the civil claim but refer it to the civil court for the quantification (Article 126 SCPC).

Class actions to claim compensation are not available under Swiss law. The Swiss legislature was until recently considering draft legislation to create group settlement procedures, but the draft legislation caused so much controversy that its discussion in Parliament was postponed sine die.

1.6 Recent Case Law and Latest Developments

Recent Legislative Developments

On 1 July 2019, a modification of Article 53 SCC came into effect, limiting the possibilities for an offender to avoid prosecution or punishment by making a compensation payment (see **2.2 Initiating an Investigation**). This modification is the result of a process initiated in 2010 after certain cases raised concern about an apparent facility to escape punishment for those who could afford it.

According to the amended version of Article 53 SCC, the criminal justice authority shall refrain from prosecuting offenders, bringing them to court or punishing them if they have made reparation for the loss, damage or injury, or made every reasonable effort to right the wrong that they have caused, and a suspended custodial sentence not exceeding one year is suitable as a penalty (versus two years in the old version), the interest in prosecution is negligible and the offender has admitted the offence (a condition that did not exist before).

Recent Case Law

In a decision issued in June 2021 within the context of the Brazilian corruption scandal PETROBRAS, the Swiss Federal Supreme Court provided some welcome clarifications regarding the conditions under which and the extent to which proceeds resulting from a corrupt contract may be forfeited.

According to this decision, the proceeds of such a transaction (ie, one involving bribery) are in principle subject to forfeiture, irrespective of the objective legality of the service that is its subject.

The judge must establish that, without the bribes, the parties would not have concluded

the contract. Forfeiture is thus excluded if it can be assumed that the contract would have been concluded in its present form even without the payment of the bribe.

The amount of forfeiture is determined according to the net profit principle – ie, less deductible costs and expenses. However, the mere fact that bribery has influenced the assessment of an official does not allow for the forfeiture of the entire net profit: the amount to be forfeited must be assessed on the basis of all the circumstances, in accordance with the principle of proportionality.

In another landmark decision issued in May 2022, the first instance chamber of the Federal Criminal Court condemned CREDIT SUISSE to a CHF2 million fine for having failed to take the reasonable organisational measures necessary to prevent cocaine dealers laundering money through its accounts.

The judgement – not definitive, all parties having filed an appeal – was much anticipated as it was the first time a major Swiss bank had been tried for corporate criminal liability since the adoption of Article 102 Section 2 SCC in 2003 (see **1.4 Corporate Liability and Personal Liability**).

2. Enforcement

2.1 Enforcement Authorities

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

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

However, for a limited list of financial offences – ie, criminal or terrorist organisation, financing terrorism, money laundering, insufficient diligence in financial transactions, and bribery – the jurisdiction lies with the OAG if:

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

Furthermore, when a 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 may fall under the regulatory and administrative jurisdiction of the Swiss Financial Market Supervisory Authority (FINMA).

The FINMA has a specific enforcement division competent to investigate suspected violations of supervisory law and, if necessary, initiate enforcement proceedings. When such violations fall under criminal law, the FINMA may file a complaint with the competent criminal justice 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 may be initiated by the police or by the public prosecutor's office (Article 300 SCPC).

The police may initiate enquiries based on a complaint, instructions from the public prosecutor's office 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's office formally opens an investigation if there is reasonable suspicion that an offence has been committed based on information and reports from the police, a criminal complaint filed directly with it or its own findings. The investigation is formally opened with a non-contestable written ruling. An investigation can also be opened materially by ordering compulsory measures (Article 309 SCPC).

The public prosecutor's office 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 offenders have made reparation for the loss, damage or injury, or made every reasonable effort to right the wrong that they have caused, 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 their 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's office. Under the Anti-Money Laundering Act (AMLA), financial institutions have an obligation to report suspicious activities in connection with money laundering, financing of terrorism, money of criminal origin or criminal organisations to the MROS. Failure to comply with this obligation is a criminal offence. The MROS analyses the reports and, if it considers that there are reasonable grounds to suspect that an offence has been committed, communicates them to the public prosecutor's office 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's office, the court 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.

- A summons for hearing, if necessary under the threat of a fine or enforced by 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 handed over to the public prosecutor's office within 24 hours. If considered, pre-trial detention must be requested from a court within 96 hours following the arrest.
- The search of records and recordings, including all information recorded on paper, audio, and video. This measure requires the suspicion that they contain information that is liable to seizure (Article 246 et seq SCPC).
- The search of premises. This measure requires the suspicion that there are wanted persons, there is forensic evidence or property or assets to be seized, or that offences are being committed 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. This measure requires the expectation 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).
- An 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 generally from the same defence rights as a natural person, including the privilege against self-incrimination. The company may therefore 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 the Swiss Federal Supreme Court, the assertion of this privilege must not be a means to circumvent the criminal justice authorities' legal right to access documents that those financial institutions are obliged to establish and store under anti-money laundering legislation.

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 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 must not obstruct it.

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

This is particularly the case for documents and records that:

- are covered by legal privilege (communications exchanged between the company and its external lawyers);
- are purely private and do not contain relevant information for the investigation;
- do not fall within the scope of the search warrant; and
- contain commercial secrets (under certain conditions).

If no agreement can be reached with the officials, the owner can request the sealing of the documents (Article 248 Section 1 SCPC). However, the officials may still proceed with a summary examination (eg, reading 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 it still wants to use the sealed documents, the public prosecutor's office must file a request for the removal of the seals within 20 days before the competent court. Failing that, the sealed records and property shall be returned to their owner (Article 248 Section 2 SCPC).

Questioning of persons

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

The rights and obligations of the questioned 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 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). They are subject to the provisions on hearings with the accused (mutatis mutandis) and thus have the right to refuse to collaborate in the criminal proceedings (Article 180 Section 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 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 employees who have had direct interactions with them over a long period of time, such as 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 Section 2 SCPC). They may only refuse to testify in limited circumstances – ie, if they are closely related to the accused, if their testimony 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 Section 2 SCPC).

2.4 Internal Investigations

Swiss law contains neither rules directly obliging companies to conduct internal investigations nor specific rules on how to conduct them.

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 reasonable 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 reasonable organisational measures are, the implementation of efficient internal investigation processes is usually considered to be part of it.

Furthermore, regulated financial intermediaries are subject to investigation and reporting duties under the AMLA. The duty to report suspicious activities to the MROS (Article 9 AMLA) requires a company to conduct the necessary investigations to be able to report any suspicions immediately. Failure to comply with this duty is sanctioned by a fine (Article 37 AMLA).

Obligations to the FINMA

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

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

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

Applicable Treaties

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

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

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

The Federal Office of Justice is competent to receive requests from foreign authorities. If the request meets the formal requirements, it will be forwarded to the appropriate executing authority – ie, either the cantonal public prosecutor's office or the OAG.

Mutual Assistance Measures

These include the questioning of witnesses and suspects, the seizure and handover of evidence and documents as well as objects and assets, the search of premises, and the arrest of persons for the purpose of extradition. Coercive measures may only be ordered if the offence prosecuted abroad is also punishable in Switzerland (principle of double criminality).

Mutual legal assistance will notably be refused if:

- 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

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 may be granted for white-collar offences provided 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). However, Swiss nationals cannot be extradited without their written consent (Article 7 IMAC).

2.6 Prosecution

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

Unless the conditions of either Article 52, 53 or 54 SCC are met (see **2.2 Initiating an Investigation**), the public prosecutor's office 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 the conditions of a 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 guilt (in dubio pro duriore).

2.7 Deferred Prosecution

Deferred prosecution agreements (DPAs) do not currently exist under Swiss law and their introduction in Switzerland in the near future seems unlikely.

In the past, Swiss criminal justice 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**). Such exemption calls for strict conditions:

- reparation for the loss, damage or injury (or at least reasonable effort to right the wrong caused);
- admission to the offence;
- suitability of a limited penalty; and
- negligible interest in prosecution.

Provided that these conditions are met, the competent authority shall refrain from prosecuting

the offender, bringing them to court or punishing them.

For example, the Geneva public prosecutor's office opened an investigation into the bank HSBC for aggravated money laundering in 2015. As the bank quickly agreed to pay a specified amount to fix the unlawful acts, prosecution was dropped pursuant to Article 53 SCC, in exchange for the payment of CHF40 million in favour of the canton of Geneva.

2.8 Plea Agreements

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

Accelerated Proceedings (Article 358 et seq SCPC)

At any time prior to indictment, the accused may request the public prosecutor's office to conduct accelerated proceedings provided the following conditions are met:

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

If it accepts accelerated proceedings, the public prosecutor's office will discuss the verdict, the sentence and the civil compensation with the parties.

If all parties reach an agreement, the public prosecutor's office will draft the indictment and send it to the criminal court 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 court does not conduct any investigations (Article 361 SCPC). It either confirms the indictment or sends it back to the public prosecutor's office to start an ordinary procedure (Article 362 SCPC).

Summary Penalty Order

The public prosecutor's office might issue a summary penalty order if:

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

Unless it is challenged by one of the parties 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 procedure is not supposed to be a negotiated one, criminal justice authorities tend to use it as such as it allows flexibility. Companies also tend to 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 be committed in a corporate context.

Fraud (Article 146 SCC)

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

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

Criminal Mismanagement (Article 158 SCC)

Article 158 SCC criminalises 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 their duties causes or permits that other person to sustain financial loss.

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

The offender faces a custodial sentence of up to three years – five if they acted with the intention of unlawfully enriching themselves or another – or a monetary penalty.

Misappropriation (Article 138 SCC)

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

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

Forgery of a Document (Article 251 SCC)

Article 251 SCC criminalises 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 themselves 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 a fact of legal significance to be falsely certified, 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 a monetary penalty.

3.2 Bribery, Influence Peddling and Related Offences

Active and Passive Bribery of Swiss Public Officials

Swiss criminal law criminalises 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 the official's 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 an official activity that is contrary to their duty or dependent on their 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 equally 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 criminalisation 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 sanctions correspond to those of the bribery of Swiss public officials.

Active and Passive Bribery in the Private Sector

Active and passive bribery in the private sector are also punishable under Swiss law (Articles 322octies and 322novies SCC). Bribery of private individuals requires 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 their professional or commercial activities, in breach of their duties of trust and loyalty to their employer, principal or partner. The prohibition of bribery of private individuals aims to protect trust and loyalty in business relationships by sanctioning the breach of private-law duties.

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

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

Swiss law makes a distinction between "bribery" on one hand and "granting/acceptance of an advantage" on the other hand. Regarding the latter category, both active and passive behaviour are criminalised (Articles 322quinquies and 322sexies SCC).

In contrast to bribery, in the latter offences the undue advantage is not connected to a specific act or omission of a bribed public official, but is rather given or accepted in order for the public official to carry out their official duties. While the payment of bribes implies an exchange of favours, the offences of granting/acceptance of an advantage cover unjustified favours given or accepted without any concrete consideration in return. They include facilitation payments and undue advantages given with a general view to establishing a positive climate for the future execution of official duties.

Unlike bribery offences, the offences of granting/acceptance of an undue advantage are prosecuted neither with regard to foreign officials nor in the context of the private sector.

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 specific obligations to prevent bribery or to maintain a compliance programme. However, since Article 102 Section 2 SCC criminalises companies that fail to take all reasonable organisational measures to prevent bribery, 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 criminalises the exploitation of insider information to gain a pecuniary advantage for oneself or 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 another; 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 information:

- primary insiders who have legitimate access to 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 staff in the offices of an issuer) face a fine.

Market Manipulation (Article 155 FMIA)
Article 155 FMIA criminalises 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 oneself or for another by:

- disseminating false or misleading information against one's 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 a 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 CHF1,08 million and is a criminal offence, subject to the competence of the criminal justice authorities.

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

Since 1 January 2016, on the other hand, qualified tax evasion may be a predicate offence to money laundering if:

- the evasion qualifies as tax fraud under Swiss tax law; and
- the evaded tax exceeds the sum of CHF300,000 per tax period (Article 305bis Section 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 which financial intermediaries have investigation and reporting duties when they suspect that assets involved in the business relationship are the proceeds of aggravated tax fraud. Non-compliance is punishable by a fine not exceeding CHF500,000, or CHF150,000 in case of mere negligence (Article 37 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. Financial records must be kept for ten years.

The main offences related thereto are:

- failure to keep proper accounts in the context of bankruptcy is subject to a custodial sentence not exceeding three years or a monetary penalty (Article 166 SCC);
- failure to comply with accounting regulations is subject to a fine (Article 325 SCC);
- infringement of the regulations on reporting payments to state bodies (Article 325bis SCC) or infringement of other reporting obligations (Article 325ter SCC) are both subject to a fine; and
- forgery of documents if the financial records are inaccurate is subject to a custodial sentence not exceeding five years – three in particularly minor cases – or 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) – ie, agreements that eliminate effective competition or that significantly restrict competition in a market for specific goods or services and that are not justified on the grounds of economic efficiency; and
- unlawful practices by dominant companies or companies with relative market power (Article 7 CartA).

Offenders can be charged a fine of up to 10% of the turnover achieved by the company in Switzerland in the preceding three years (Article 49a Section 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 the 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), discrimination in distance selling (Article 3a), inducement to breach or termination of contract (Article 4 UCA), exploitation of others' achievements (Article 5 UCA), violation of manufacturing or trade secrets (Article 6 UCA),

non-compliance with working conditions (Article 7 UCA) and use of abusive general terms and conditions (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 criminalises the following computer-related offences.

- 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.
- 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 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. Offenders face a custodial sentence of up to three years or a monetary penalty.
- Damage to data (Article 144bis), including its unauthorised modification or destruction (eg, via ransomware) as well as the release of programs intended to be used to commit such offence. 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 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.
- Breach and exploitation of manufacturing or trade secrets (Article 162 SCC) that the offender is under statutory or contractual duty not to reveal. The sanction for such an act 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, which serve to secure compliance with international law, and in particular respect for human rights.

A "simple" breach of EmbA provisions is punishable by a custodial sentence of up to one year or a fine of up to CHF500,000. A "qualified" breach is punishable by a custodial sentence of up to five years, which may be combined with a fine of up to CHF1 million. In the case of negligence, a fine of up to CHF100,000 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 a custodial sentence or a fine of up to CHF1 million, and in severe cases, to a custodial sentence of up to ten years and a fine of up to CHF5 million. In the case of negligence, a fine of up to CHF100,000 may be issued.

3.11 Concealment

Article 160 SCC criminalises 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 they know or must assume have been acquired by way of an offence against property. The predicate offence may be any offence that has the effect of removing a good from the ownership to which it belonged.

Unlike in the case of money laundering, the author of the predicate offence cannot be held liable for both the predicate offence and the subsequent concealment.

If the predicate offence is prosecuted only on complaint, concealment is prosecuted only if such 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

Swiss law provides for two forms of accessory participation in an offence: incitement (Article 24 SCC) and complicity (Article 25 SCC). They are both liable to punishment.

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

The wilful assistance of another to commit a felony or a misdemeanour ("complicity") is, on the other hand, subject to a reduced penalty (Article 25 SCC).

3.13 Money Laundering

Money Laundering (Article 305bis SCC)

Money laundering is an act aimed 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. The 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 (ie, 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. This requirement is interpreted broadly: any asset movement that does not amount to a 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 that are 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 or terrorist 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 an aggravated case – or to a monetary penalty.

Insufficient Diligence in Financial Transactions (Article 305ter SCC)
Article 305ter SCC provides for a legal duty for professionals working in the financial sector to identify the beneficial owner of the assets held by them and criminalises their failure to do so.

Any person who, as part of their 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 a 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 the MROS is punishable by a fine not exceeding CHF500,000, or CHF150,000 if the failure is due to negligence (Article 37 AMLA).

The Swiss legislature recently approved a revision of the AMLA. In the run-up, it was discussed whether lawyers, notaries, and fiduciaries should – like financial intermediaries – be subject to the obligations of the AMLA. The Swiss legislature finally decided not to extend the scope of the AMLA in this manner. Thus, lawyers, notaries and fiduciaries who set up offshore companies will continue to be exempt from the obligation to identify those companies' beneficial owners.

4. Defences/Exceptions

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

The standard defence is therefore to argue that the constituent elements of the concerned offence have not been 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 took 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 not met.

4.2 Exceptions

With regard to offences against property, the offender is punishable only on complaint and the maximum penalty 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 under public employment law or contractually approved by a third party or when they are negligible advantages that are common social practice (Article 322decies SCC). Small gifts may thus be regarded as lawful, as long as such a social practice may be proved 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 shall not prosecute an offender if the level 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 may under certain circumstances be considered as grounds 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 the charges, in whole or in part, if the accused company co-operates in the discovery and elimination of the restraint of competition (Article 49a Section 2 CartA); and
- in tax matters, the tax authority might renounce charging a taxpayer who spontaneously self-reports a first tax evasion provided that:
  - (a) no tax authority knew about the evasion;
  - (b) the taxpayer fully co-operates with the tax authority to determine the amount of evaded tax; and
  - (c) the taxpayer strives to reimburse the evaded tax (Article 175 of the Federal Act on the Direct Tax).

4.4 Whistle-Blower Protection

Specific measures regarding whistle-blowers were introduced in the Federal Personnel Act in 2011 with regard 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. Each case is therefore judged in accordance with the general labour provisions contained in the Swiss Code of Obligations. According to the latter, the right of an employee to report suspected wrongdoings at work outside their workplace must be weighed against the different interests at stake. In any case, the employee must at first talk to their employer, then to the competent authority, and only as a

last resort – if said authority does not act – to the public. The dismissal of an employee whose report of wrongdoings was lawful is abusive. In such a case, the dismissal remains valid – the employee cannot reclaim their employment – but the employer may be condemned to pay to the employee an indemnity of at most six months' salary, the usual sanction for an abusive dismissal.

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

Likewise, labour law obliges an employer to take all the necessary and feasible measures to protect its employees. The Swiss Federal Supreme Court has confirmed that the appointment of a person of trust – within or outside the company – to whom 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

Any defendant in a criminal trial is presumed to be innocent until they have been found guilty in a judgment that is final and legally binding. The court freely assesses the evidence and bases its decision on inner convictions formed over the entire proceedings. Where there is insurmountable doubt as to whether the factual requirements of an alleged offence have been fulfilled, the court 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 circumstances relevant to the assessment of the criminal act and the accused. Incriminating and exculpating circumstances must be investigated with equal care (Article 6 SCPC).

In the trial phase, the burden of proof lies with the public prosecutor's office, which has to prove the relevant facts beyond a 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. Thus, the usual principles apply.

In application of said principles, the court determines the sentence according to the culpability of the offender. It takes the previous conduct and personal circumstances of the offender into account, as well as the effect that the sentence will have on them. 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 light 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 regard to white-collar offences committed by companies, the financial standing of the company as well as the organisational measures taken by it are elements that are taken into account by the court.

MANGEAT is a growing and innovative law firm based in Geneva. Its financial crime and investigations team has a focus on white-collar criminal proceedings, as well as a strong practice in the areas of mutual legal assistance and extradition, and cross-border and multi-jurisdictional proceedings. Its extensive experience in these areas and regular dealings with the various Swiss criminal justice authorities allow it to offer not only high-quality legal advice but also pragmatic solutions to clients. The firm's relevant experiences include the representation of a relative of a former foreign leader accused of having received bribes in the context of a major international bribery scandal, leading to the freeze of CHF800 million deposited in Swiss banks; a member of a Swiss cantonal government in criminal proceedings for acceptance of an undue advantage; and a client accused of bribing a private individual in relation to the award of broadcasting rights in major sports events.

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