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Corporate Criminal Liability Comes to Switzerland

Enterprises, such as corporations and other legal entities established under private or public law, became subject to criminal liability in Switzerland on 1 October 2003. The new Article 102 of the Swiss Criminal Code ("SCC") is a significant change in Swiss criminal law and it follows the international trend of holding such enterprises criminally responsible if they fail to adopt governance measures necessary to prevent criminal activity. Firms doing business in the financial or the export sectors in particular should assess the financial risks which the new provision – in combination with other recently enacted legislation on the subjects of bribery and money laundering – may bring.

Background

Criminal law has historically been concerned with the determination of guilt or responsibility for wrongdoing which society believes should be punished by the state through fines, imprisonment or a similar sanction. The classical criminal law position was that only a natural person, not a corporation or other legal entity, can be guilty of a criminal offence. The widespread use of large-scale business enterprises which often rely on decentralised decision making, however, has made this position difficult to maintain. Disasters like those that occurred in *Schweizerhalle* and *Seveso* are well-known instances in which the criminal law was unable to provide results which were seen as satisfactory because many believe the wrongdoers got away scot-free.

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It is precisely the difficulty in assigning blame to specific individuals within a corporation or other enterprises which led most industrialised countries in recent years to adopt laws imposing criminal liability on the enterprise. Thus, the introduction of corporate criminal liability into Swiss law through the new Article 102 SCC (or the equivalent Article 100^{quater} SCC during a transitional period) is, from an international perspective, nothing new.

Punishment for a Lack of Proper Governance Procedures

According to Article 102, paragraph 1 SCC, a corporation or other enterprise can be found guilty of a criminal offence if the wrongdoing (a) was committed by one or several individuals acting for the enterprise within the scope of its business purpose and in the course of conducting its business, and (b) cannot be traced back to one or more specific individuals because the enterprise's system of governance was inadequate to identify who was responsible for the wrongdoing. The enterprise can be punished with a fine of up to CHF 5 million.

Article 102, paragraph 2 SCC provides that the enterprise can be subject to criminal punishment – even if specific individuals can be held responsible for the crime – if the crime involves participation in a criminal organisation, money laundering or bribery *and* it can be proved that the enterprise did not take "all necessary and reasonable organisational measures" to prevent it.

The link between a criminal act and an enterprise's liability for it is therefore a lack of proper governance measures. It is important to notice, however, the difference between the two sections of Article 102.

Under paragraph 1, the enterprise can be found guilty only if the lack of adequate governance measures is the reason why prosecutors are unable to establish the criminal responsibility of an individual person within the enterprise. Paragraph 2, in contrast, imposes criminal liability on the enterprise even if specific individuals can be convicted of the crime involved, but only if the crime involves participation in a criminal organisation, money laundering or bribery. Under paragraph 2, the failure to take "all necessary and reasonable organisational measures" to prevent the crime gives rise to criminal liability for the enterprise.

What Will Be the Effect of Article 102 SCC?

Given the lack of objections during the process leading to the adoption of the law, some might predict the new provisions will not have a profound effect on the

business community. Indeed, some observers have remarked that Article 102, paragraph 1 SCC will be of limited practical importance because (a) it would require the investigating law enforcement agency to admit its own incompetence because it was unable to identify the responsible individuals or (b) the enterprise could offer an executive as a scapegoat in order to avoid its own criminal liability.

The first argument is dubious, if not insincere, because criminals often try to avoid the discovery of their involvement in a crime and it ignores the responsibility the law places on the enterprise to adopt governance measures which ensure that wrongdoers can be identified. The second argument is dubious because it ignores the reluctance of potential scapegoats to accept the role. Indeed the opposite result is more likely: the enterprise might claim that it lacked effective governance measures which permit the identification of the wrongdoers in an attempt to protect its executives – a risky strategy that, in certain circumstances, if unsuccessful could result in the conviction of both executives and the enterprise.

The effect of Article 102, paragraph 2 SCC may be different: if an employee has paid bribes or accepted money from a criminal source in the course of the enterprise's business, then the enterprise may have little chance to avoid conviction. Indeed, it must cooperate with the criminal investigation in order to avoid a finding that it had not taken "all necessary and reasonable organisational measures" to prevent the crime.

Although the only penalty provided in the new law is a fine of up to CHF 5 million, recent cases abroad have made it clear that the indirect costs of criminal proceedings – and in particular the damage to a firm's reputation – are often very detrimental. Clearly, if a prominent business becomes the subject of a criminal investigation, this is likely to be well-covered by the media. Moreover, the fact that a criminal investigation has been initiated against an enterprise may lead to civil lawsuits, increase the number of plaintiffs in existing litigation or place the enterprise under a cloud of adverse publicity which impairs its ability to defend against such litigation.

Protecting the Enterprise

The strategy of the new law is to require the enterprise to have procedures that either ensure the easy identification of culprits or show that all necessary and reasonable organisational measures to prevent a crime were taken. This means that the organisational structure of the enterprise and the decision making authority of each employee must be defined as clearly as possible.

A comprehensive review of supervision and internal audit practices should be performed in order to detect organisational risks. Article 102, paragraph 2 SCC does not define when an enterprise has taken "all necessary and reasonable organisational measures" to prevent a crime and many will be inclined to rely on the accepted standards and codes of conduct in the relevant business sector. Although there are many guidelines among businesses and trade organisations in the financial sector for the prevention of money laundering, comparable "rules of the road" are lacking in other industries. Most important, none of these will be legally binding on a judge determining whether there was compliance with Article 102 SCC.

Enterprises should develop a clear risk management strategy, adopt a best practice approach to the prevention of criminal activity and then supervise carefully the implementation of such measures and compliance with them. In the end, it will be the task of the enterprise to convince the authorities that the standard of the law – however open-ended in its requirements – was met.

NewsLetter

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