

## Switzerland

Bär &amp; Karrer

## Corporate criminal liability

**C**riminal liability of corporations entered into force in Switzerland in October 2003.

Notwithstanding, subject to the Swiss Post matter and certain other isolated cases, so far only a small number of prosecutions have been conducted against corporations, let alone resulted in their condemnation. However, as evidenced by recent public announcements from the Office of the

Attorney General of Switzerland in connection with the so-called 1MDB scandal, the latest trend seems to be launching more systematically criminal investigations against corporations (such as financial institutions). This is particularly so in matters relating to money laundering or

corruption.

A Swiss or foreign corporation may be held criminally liable for any misdemeanor or crime that was committed within itself in the course of its commercial activities, if and provided that the offence cannot be imputed to a determined natural person due to the corporation's deficient organisation (article 102 I of the Swiss Criminal Code – SCC; so-called secondary liability).

Moreover, in connection with a limited number of offences (including money laundering, corruption in the public or private sector and terrorism financing), a corporation's criminal liability may also be engaged irrespective of the criminal liability of the natural persons, if its deficient organisation caused or failed to prevent the commission of the offence (article 102 II SCC; so-called primary liability). If found guilty, a corporation faces a monetary penalty of up to CHF 5 million (approximately \$5.1 million). The corporation may also have its assets confiscated if they are tainted.

One of the controversial questions is whether the prosecution authorities must prove the commission of an underlying offence by a natural person within the

corporation. According to some scholars, the criminal liability of corporations should also apply where the constitutive elements of the underlying offence are fulfilled but are split across a number of individuals involved in its commission.

This is the key issue that the Swiss Federal Supreme Court (SFSC) addressed in a milestone decision of October 11 2016.

### Case summary

In early February 2005, an account opened by a company with Swiss Post was used to receive €5 million (approximately \$5.5 million), which stemmed from a fraudulent scheme. Shortly after, the company director withdrew CHF 4.6 million in cash.

According to his explanations (which were later found to be untrue), he needed this for the purchase of a gemstone. In the framework of the criminal investigation that followed, Swiss Post was accused pursuant to article 102 II SCC of having failed to take the necessary steps and implement an appropriate organisation which would have prevented acts of money laundering.

However, the proceedings relating to suspicions of money laundering engaged against the employees, who were involved in the preparation of the CHF4.6 million that were handed over in cash to the fraudster, were discontinued in the course of the investigation, for lack of intention. Moreover, the prosecution authorities never extended the investigation to the Swiss Post compliance officer who had been contacted by the chief cashier and who approved the transaction before the amount was paid out.

Swiss Post was found guilty of money laundering by the court of first instance of Solothurn in April 2011 and sentenced to a fine of CHF 250, 000. However, this verdict was eventually overturned and Swiss Post was fully acquitted by the Court of Appeal in November 2015.

Ultimately, this acquittal was challenged by the Public Prosecutor of Solothurn before the SFSC on the grounds that the alleged criminal liability of a corporation based on article 102 II SCC should also apply where the objective and subjective elements of an underlying offence (in the case of money laundering) cannot be imputed to a determined individual but to the corporation as such.

### The SFSC's reasoning

The SFSC dismissed the appeal and affirmed the approach of the Court of Appeal. It ruled that a corporation's crimi-

nal liability under Swiss law requires actual proof that all the objective and subjective constitutive elements of an offence committed by at least one individual within the corporation are fulfilled.

This applies not only in the context of article 102 I SCC, where the corporation's deficient organisation makes it impossible to impute the underlying offence to a determined person, but also in relation to article 102 II SCC, where this deficient organisation caused the commission of the offence. The fact that a corporation's criminal liability may be engaged under article 102 II SCC irrespective of the criminal liability of the natural persons only means that the prosecution or conviction of such persons is not required for this provision to apply.

Hence, according to the SFSC, there is no room for a causal liability and the corporation shall be acquitted (or, as the case may be, the investigation against it discontinued) if the prosecution authorities fail to prove the fulfillment of the underlying offence. It goes without saying that the authorities also have to prove that the corporation's organisation was defective.

### Practical impact

The SFSC's decision is well-founded from a legal perspective and should be welcomed. It sets a clear threshold that must be reached before a corporation's criminal liability can be engaged under Swiss law.

As a downside, however, the SFSC's decision could:

- force prosecution authorities to investigate more thoroughly the actions and omissions of the individuals (for example, officers and employees) potentially involved in the underlying offence, thereby increasing their personal exposure;
- prompt prosecutors to adopt a more cautious approach before discontinuing criminal proceedings against individuals within the corporation, to the extent that such discontinuation could be deemed an admission that no underlying offence was committed.

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