

# Business crime and investigations in Switzerland.

by Professor Dr Andrew M Garbarski, *Bär & Karrer*

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A Q&A guide to business crime in Switzerland.

The Q&A gives a high level overview of matters relating to corporate manslaughter, environmental and health and safety offences. This Q&A is part of the global guide to financial and business crime law.

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## Corporate manslaughter

### Regulatory provisions and authorities

1. What is the main legislation relevant to corporate manslaughter?

Manslaughter or homicide by negligent conduct is governed by Article 117 of the Swiss Criminal Code (SCC). There is no specific provision on corporate manslaughter under Swiss law. However, criminal liability of a corporation for this (or other offences) may be triggered under Article 102 of the SCC (see [Question 2](#)).

This offence is also likely to require consideration of the relevant health and safety laws.

### Offences

2. What is the specific offence that can be used to prosecute corporate manslaughter?

### General requirements

The offence of negligent homicide requires the following elements:

- Death of a person.
- Negligent or reckless conduct of the perpetrator.
- Natural and adequate causal link between the two above conditions.

*(Article 117, SCC.)*

**Negligent or reckless conduct.** This condition implies that the perpetrator could and should have taken into account that they were endangering a person's life and exceeding the limits of an "admissible risk", but failed to do so, thereby breaching their duty of care and prudence. Where special standards or regulations require certain behaviour (for example, health and safety standards), the degree of care to be observed is primarily determined by such rules. The extent and nature of such duty is then defined based on the perpetrator's background, age, competence and experience (rather than by reference to the standard of a reasonable man).

**The causal relationship.** The scope of potential perpetrators is not limited solely to those directly involved (on-site) in a deadly accident but will also take into account the inadequacy of the measures taken at the top of the chain of command (*see below, Corporate liability and the employer's duty of care*). In that sense, several persons may share an overlapping duty of care (for example, be bound by the same standards) and therefore found liable for the same offence. In order to avoid that persons with a tenuous connection to the accident find themselves in the crosshairs of the criminal authorities, the causal link must also be adequate. In this context, the criminal authorities will therefore enquire as to whether the death was a predictable and preventable result attributable to the perpetrator's negligence or careless lack of foresight.

### **Corporate liability and the employer's duty of care**

**Corporate liability.** Corporate criminal liability for the manslaughter offence may be triggered if the:

- Offence was committed within the company.
- Offence was committed in the conduct of its business activities.
- Company has a deficient internal organisation.
- Deficient organisation was the cause of the criminal authorities' inability to identify the perpetrator(s) of the committed offence.

*(Paragraph 1, Article 102, SCC.)*

The company may therefore only be held liable if no individual perpetrator of the underlying offence can be identified due to a lack of organisational measures within such company.

**The employer's duty of care.** A company's criminal liability under paragraph 1 of Article 102 of the SCC will not in itself trigger that of its senior management. However, senior management and other persons with decision-making authority (for example, employers, board members, executive directors and managers) may be found to be in breach of their individual duty of care, if they fail to safeguard employees from accidents, namely through precautionary measures, checks and controls, continuous training, and so on. Such breach of duty may also trigger civil liability for acts or omissions of employees in relation to the employer's contracting partners or third parties.

According to the Swiss Federal Supreme Court, it is up to the criminal prosecution authorities to study the chain of command and causality within a company, as well as the scope of responsibilities and tasks of each implicated

person. They must then identify and show exactly which precautionary measures were deficient and demonstrate in which manner their absence triggered the damageable result.

## Defences

3. What defences or exemptions are available and who can qualify?

The following defences are available:

- **Organisational measures.** In the context of corporate criminal liability for a homicide case, a company may argue that its organisational measures were adequate. Alternatively, if the organisational measures were found to be deficient, it could be argued that such deficiency is not the cause of the impossibility to identify the perpetrator of the offence.
- **The concomitant fault of a third party.** The company or its management can further attempt to argue that the offence was committed by a third party (for example, a subcontractor or agent), who was responsible for a specific task or safety measure, and that the third party is therefore solely punishable for the result. However, given that several persons may share an overlapping duty of care and that Swiss criminal law does not provide for any set-off of faults, the fault of a third party (or of the victim) should be irrelevant in terms of criminal liability itself. As a result, if several individuals are prosecuted for the same offence, whether together or in parallel, they will instead be judged according and in proportion to their own individual conduct and *mens rea*.
- **Link of causality.** Liability can also be refuted where it can be shown that the death was either unforeseeable or would have occurred independently of the perpetrator's act or omission (that is, even if the latter had fulfilled their duty of care by taking all the necessary precautionary measures). This would be the case in the event of *force majeure* or where the victim acted in clear breach of the rules and training received for the purpose of their activities (for example, attempting to repair a machine while it was still operating).
- **The delegation of tasks.** The liability of individuals (for example, employers or managers) may be excluded if the perpetrator or persons bound by a duty of care had taken all the necessary measures to prevent the deadly accident (that is, a lack of negligence). The delegation of tasks with respect to such measures is lawful (and will be necessary depending on the structure of the company concerned). That being said, the person delegating remains responsible for the selection (*cura in eligendo*), instruction (*cura in instruendo*) and supervision (*cura in custodiendo*) of the delegee. Moreover, the delegation of security tasks relieves management of liability only to the extent that the tasks have been clearly defined and the necessary powers to issue instructions have been assigned under the Accident Prevention Ordinance (OPA). However, according to the Swiss Federal Supreme Court, there is no obligation to permanently supervise experienced personnel, as long as the selection, instruction and general supervision responsibilities are complied with.
- **Other standard defences.** Other standard defences under general criminal law are available to the accused, such as the state of necessity (*Article 18, Swiss Criminal Code (SCC)*) or legitimate defence (*Article 15, SCC*). The victim's consent is not one of the defences contemplated under Article 117 of the SCC, unless the victim's death was the result of the latter's wilful self-endangerment in the context of a dangerous activity.

## Enforcement

4. Which authorities have the powers of prosecution, investigation and enforcement in cases of corporate manslaughter? What are the authorities' powers of prosecution, investigation and enforcement, and what are the consequences of non-compliance?

### Prosecution authorities

The Swiss criminal authorities have jurisdiction where the perpetrator's acts or the results thereof are deemed to have occurred on Swiss soil (*Articles 3 and 8, SCC*). This is in addition to homicides committed abroad, although strict conditions apply (relating to, most importantly, extradition and/or nationality requirements). The Swiss criminal authorities may further assist foreign authorities by way of mutual legal assistance, namely by executing certain coercive measures required in the course of a foreign criminal investigation.

Given Switzerland's federal structure, the cantonal or federal authorities may have jurisdiction to investigate depending on the type of offence. In the context of negligent homicide, unless the homicide was committed against federal public officials or other persons endowed with a special status by virtue of international law (in which case the federal authorities would be in charge of the prosecution), the competence to prosecute and sentence belongs to the cantonal criminal authorities.

As a rule, the criminal authorities at a company's seat are in charge of leading investigations against the company and the individuals acting on its behalf (*Article 36, Federal Code of Criminal Procedure (CCP)*).

### Prosecution powers

The prosecution powers inherent to the competent Public Prosecutor's Office (PPO) include (among others):

- Opening or discontinuing an investigation, thereby bringing or dropping charges against a suspect.
- Ordering coercive measures.
- Hearing the parties and gathering other evidence.
- Sentencing the accused by means of a summary penalty order, in certain limited situations (*see below*).
- Requesting the judgment of the accused by the criminal courts.

The criminal authorities have a limited number of lawful coercive measures at their disposal, which may only be ordered on reasonable grounds of suspicion and in accordance with the principle of proportionality (*Articles 196 et seq, CCP*).

Not all criminal authorities are equal with respect to the scope and powers at their disposal; for example, certain coercive measures cannot be ordered without judicial review and therefore require validation by the Coercive Measures Court. Moreover, the powers and autonomy of the police will generally be limited, insofar as it acts under the supervision of the PPO in the framework of an investigation.

### **Powers of interview**

The criminal authorities can:

- Interview the accused, witnesses or experts as well as persons providing information.
- Confront parties during hearings or, on the contrary, avoid confrontation through the implementation of protective measures in the interest of the victim or their family.
- Summon parties to a hearing and compel their attendance with the help of the police.
- Impose a fine in case of non-appearance or a refusal to testify without due cause.

*(Articles 142 et seq, CCP.)*

The appointment and examination of expert witnesses will be of crucial importance in complex construction, transport, medical or product liability-related homicide cases, where specialised expert opinion is often required to determine the extent of negligent conduct.

### **Powers of search/to compel disclosure**

The accused has an absolute right to remain silent and to refuse to co-operate with the criminal authorities (*Article 158, CCP*). Other parties may invoke their right of refusal to testify or to provide evidence (*Articles 168 et seq and 265, CCP*) in certain situations, for example, in order to avoid breaching a professional secrecy (such as legal privilege or medical secrecy) or self-incriminating from a criminal or civil standpoint.

However, such right does not completely neutralise the rather extensive coercive powers of the prosecution authorities, who are nevertheless entitled to:

- Punish with a fine those who refuse to answer or to produce documents without due cause.
- Order a search/raid or the seizure of evidence if the parties do not comply voluntarily with a production order.

A seizure or freezing order may be issued in order to:

- Safeguard means of evidence.
- Guarantee the payment of fines, monetary penalties or various procedural costs and indemnities.
- Ensure subsequent restitution of the assets to the harmed parties.
- Ensure subsequent confiscation/forfeiture or guarantee an equivalent compensatory claim.

Certain documents may, at the motion of the concerned parties, be sealed or excluded from the seizure (*Articles 248 and 264, CCP*), such as strictly personal records, correspondence with defence counsel or with other persons who are bound by professional privilege.

### **Powers to obtain evidence**

The criminal authorities have a wide range of measures available for gathering evidence. They may, for instance:

- Interview individuals.

- Request the production of documents.
- Seize documents or electronic data.
- Undertake inspections.
- Conduct secret surveillance.
- Intercept mail or telecommunications.
- Monitor banking relations.
- Order the production of reports or medical files.
- Conduct DNA analyses.
- Take writing and voice samples.

In certain cases, coercive measures will need to be directly ordered or validated by the competent Coercive Measures Court.

The prosecution authorities can further request access to files and information from other Swiss-based authorities (*Articles 43 et seq, CCP*), as well as foreign authorities via international mutual legal assistance (*Articles 54 and 55, CCP; Federal Act on International Mutual Assistance in Criminal Matters (IMAC)*).

#### **Power of arrest**

The criminal authorities have the powers to search for suspects, arrest them with or without a prior warrant and detain them in pre-trial custody and for the duration of the trial (*Articles 212 et seq, CCP*). The suspect has a right to be heard before the prosecution authorities on the suspicions against them and before the Coercive Measures Court regarding their detention. The detention must be validated by the Coercive Measures Court within 96 hours following the arrest.

Detention in custody can be ordered if the suspect presents risks of:

- Evasion.
- Tampering with evidence or collusion/conspiracy.
- Reiteration or danger to the safety of others.

The decision to detain and the duration of detention must be proportional to the circumstances at hand and may, where possible, be substituted with alternative measures such as:

- Bail.
- Handover of identity papers.
- Confinement to a specific location.
- Ban on contacts with certain individuals.
- Obligation to check-in regularly with authorities.
- Requirements of a steady employment or monitored medical treatment.

(*Articles 237 et seq, CCP*.)

An accused may therefore be released on bail from pre-trial custody. The security deposited may thereafter be confiscated to cover any monetary penalty, fine, procedural costs or damages allocated to a harmed party.

### **Court orders or injunctions**

The PPO (and once the matter is handed over for trial, the competent courts) may issue interim mandatory orders (*Articles 196 et seq, CCP*). The police can only do so when authorised under the law, particularly if the matter is urgent.

Such orders include:

- Summons to appear.
- Search warrants.
- Seizure or freezing orders.
- Orders for the production of documents or the disclosure of information.

To limit the risk of collusion/conspiracy, the authorities may also issue injunctions banning parties, under the threat of criminal sanctions, from entering into contact with or informing specific individuals of certain facts, for example:

- A witness banned from disclosing the subject of his/her hearing.
- A bank banned from informing an account holder of a freezing over his/her assets.

Seizure and freezing orders may be challenged before the court of appeals within ten days of their service. The lifting of such measures may also be requested at any given time thereafter.

5. Which authority makes the decision to charge and on what basis is that decision made? Are there any alternative methods of disposal and what are the conditions of such disposal?

The PPO is in charge of opening and directing investigations against the perpetrators in the preliminary phase of the proceedings. To a certain extent, the investigation may be delegated to the police. It is the PPO who notifies the actual charges to a suspect.

On completion of the investigation, the PPO may send the accused to trial by means of a written accusation act. Such accusation act must comply with the legal requirements under Article 325 of the CCP and may be returned to the prosecution authorities by the court in the event that the act or the investigation file is deemed insufficient or irregular.

There are several means of disposing of the case.

### **Summary penalty orders**

A summary penalty order (*Articles 352 et seq, CCP*) can be issued under the following conditions:

- The facts have been admitted by the accused or have been reasonably established.
- The sanction sought by the PPO is either:
  - a fine;
  - a monetary penalty not exceeding 180 daily penalty units;
  - community service not exceeding 720 hours, and/or a custodial sentence of no more than six months.

If unchallenged within a ten-day period, the summary penalty order becomes akin to a final and binding judgment.

### **Accelerated proceedings**

Accelerated proceedings (*Articles 358 et seq, CCP*) can be initiated if:

- They are launched on the motion of the accused (and the accused only).
- They are launched before the matter is sent to trial.
- The accused has admitted all the relevant facts and the civil claims against them (if any).
- The sanction sought by the PPO does not exceed five years of custodial sentence.

Accelerated proceedings, which are the Swiss equivalent of a plea bargain, require the accused to retain a lawyer, failing which one will be appointed *ex officio*.

### **Discontinuation or closing of proceedings**

The proceedings can be discontinued by the PPO at any given time up to the point where the matter is sent to trial. Thereafter, the proceedings can be closed by means of judgment (acquittal or conviction), or exceptionally discontinued in the event of insurmountable procedural obstacles (for example an expired statute of limitations, or the death of the accused).

### **Reparations**

The PPO can refrain from investigating or discontinue the investigation in exchange for reparations if:

- The likely sentence is a fine or a custodial sentence not exceeding two years.
- Past convictions (if any) do not raise concerns about any potentially negative future behaviour of the accused.
- There is no overriding public or private interest that speaks against discontinuing the matter.

(*Article 53, SCC.*)

If the parties agree on a reparation after the matter is sent to trial, the court can no longer discontinue the proceedings but only issue a guilty verdict that carries no sanction (unless, obviously, the accused is acquitted). While reparations are widely accepted on a cantonal level, even in white-collar crime cases (see, in Geneva, the HSBC case (press release of 4 June 2015, available at: <http://ge.ch/justice/classement-de-la-procedure-contre-hsbc-la-banque-accepte-de-payer-40-millions-de-francs>) and the Addax case (press release of 5 July

2017, available at: <http://ge.ch/justice/procedure-contre-addax-reparation-hauteur-de-31-millions-de-francs-et-classement-de-la-procedure>), this is not the case on the federal level, before the Office of the Attorney General of Switzerland. Moreover, a pending political initiative aims at restricting the use of Article 53 of the SCC.

## Conviction and sanctions

6. What are the penalties for corporate manslaughter?

### Criminal sanctions

Companies convicted for manslaughter may only be punished with a fine not exceeding CHF5 million (*paragraph 1, Article 102, SCC*). The amount will be determined by several factors, such as the:

- Gravity of the offence.
- Extent of the organisational deficiency.
- Company's financial state.

However, assuming that an individual perpetrator was identified and may be held criminally liable for the offence (in which case the corporate's liability is excluded (*see Question 2*)), they may be sentenced to a (*Article 34, SCC*):

- Custodial sentence not exceeding three years.
- Monetary penalty not exceeding CHF540,000 (that is, 180 daily penalty units not exceeding CHF3,000 per day).

The sanction will depend on the perpetrator's:

- Culpability and fault.
- Criminal record.
- Personal situation.
- Potential to be impacted by the inflicted penalty in the future.

There are also various other elements that can warrant a reduction of the sentence (for example, reparations and sincere apologies).

Under certain conditions, if a person has committed a crime or misdemeanour in the course of a professional activity, a criminal court may order a total or partial ban on exercising the relevant or comparable activities for a period of six months to five years. This will mainly be the case if there is a risk that the activity will be misused in order to commit a further crime or misdemeanour.

### **Confiscation and similar measures**

The criminal authority can further order:

- The confiscation/forfeiture of the proceeds of the relevant offence that are held by the convicted company, individual perpetrator or a third party.
- An equivalent compensatory claim, assuming that such proceeds are no longer available.
- The allocation or restitution of assets to the harmed party, where appropriate.

### **Civil claims**

In homicide cases, civil claims can be brought forward by the victim's relatives as private civil claimants in the context of criminal proceedings before the criminal courts. This is so long as the claims are brought prior to the filing of the accusation act (that is, in the preliminary phase of the investigations before the PPO) and directly by the relatives on their own behalf (*Article 122 et seq, CCP*). Under certain conditions, the claimant may be invited to file their claim separately before the civil courts (for example, if the criminal authorities deem that the civil courts are better equipped to adjudicate the claims).

## **Safeguards**

7. Are there any measures in place to safeguard the conduct of investigations? Is there a process of appeal? Is there a process of judicial review?

### **Right to legal advice and privilege**

The suspect can, in principle, freely choose whether or not to be assisted by an attorney (or several attorneys, as long as the proceedings are not unduly delayed). However, in some cases a defence counsel is mandatory, for example:

- When the detention period exceeds ten days.
- If the accused risks a custodial sentence exceeding one year and/or expulsion from Switzerland).

(*Article 130, CCP*.)

The criminal prosecution authorities must inform the suspect, as of their first hearing and in a language that they understand, of their right to a defence counsel.

If prosecuted, a company, in its capacity as the accused, has the right to a defence counsel as described above. Additionally, companies must designate a representative for the purposes of the criminal proceedings, who enjoys unfettered powers to bind the company in civil matters; failing such appointment, the criminal authorities may designate a representative for the company.

All communications between the accused and their defence counsel are privileged. The criminal authorities are prohibited from reading such correspondence and must, on the motion of the concerned party or counsel, seal and/or exclude it from the file if it has been seized during a search or otherwise provided by a third party to the authority.

### **Right to exclude unlawfully obtained evidence**

The criminal authorities are not bound by limitations with regards to the means of evidence. However, the manner in which evidence is collected is strictly governed by the CCP and restricted by the parties' rights enshrined in the Swiss Federal Constitution and the European Convention on Human Rights (ECHR).

The CCP distinguishes between two types of unlawful evidence:

- Certain methods of evidence that have been gathered in the course of the proceedings result in that evidence being absolutely unusable. For example, the use of physical violence and coercion using threats, promises, lies and deceit is absolutely prohibited, meaning that the resulting evidence must in all circumstances be excluded from the file of the proceedings (*Article 140, CCP*).
- This contrasts with "relatively useable" evidence, obtained through illegal means in breach of certain other CCP provisions, which will be left on file if there is an overwhelming public interest in exploiting the relevant evidence.

### **Provision of written rights**

The CCP has codified a number of criminal defence rights and procedural guarantees, such as:

- The right to a fair and speedy trial (*Articles 3 and 5, CCP*).
- The right to be heard and to participate in the gathering of evidence (*Article 147, CCP*).
- The presumption of innocence and the principle of *in dubio pro reo* (*Article 10, CCP*).
- Others as derived from the Swiss Federal Constitution and the ECHR.

In any event, all the procedural defence rights derived from the ECHR are fully applicable and may be invoked by any suspect or accused in Switzerland.

### **Relevant process for judicial review**

As a matter of principle, the decisions rendered by the PPO in the course of its investigation are subject to appeal, with several exceptions (for example, refusals of requests for evidence gathering, unless urgency prevails). The right to appeal against so-called incidental decisions (that is, decisions taken in the course of the proceedings) until the Swiss Federal Supreme Court depends in principle on the existence of a damage that is difficult to repair. This is the case, for instance, regarding the sealing of evidence, where the appellant claims privilege over documents or data that the PPO wishes to install to the file.

Moreover, judicial review is mandatory for certain coercive measures (*see Question 4*), and the Coercive Measures Court must intervene notably in matters of detention and secret surveillance.

Final judgments (acquittals or convictions and sentencing) may, in principle, be brought before the cantonal appeals authority and then before the Swiss Federal Supreme Court, either by the accused, the public prosecutor or the claimant, insofar as they can claim a legitimate interest in appealing.

## Health and safety offences

### Regulatory provisions and authorities

8. What are the main regulatory provisions and legislation relevant to health and safety offences?

The relevant provisions concerning health and safety offences are spread across a wide selection of laws and underlying ordinances. These laws and regulations set the standards for health and security measures, which are essential in determining the degree and extent of care (*see also Question 2*). These rules are contained in the following acts:

- Federal Act on Labour in Industry, Crafts and Commerce (Labour Act) and its underlying ordinances (OLTs).
- Federal Act on Accident Insurance (AIA), the Federal Law on the General Part of Social Insurance Law (GPSIA) and the Accident Prevention Ordinance.
- Federal Product Safety Act.
- SCC.
- Swiss Federal Code of Obligations (SCO).
- Other various ordinances and directives.

Moreover, the Federal Coordination Commission for Occupational Safety (FCOS) and the Swiss National Accident Insurance Fund (SUVA) issue a number of guidelines and standards in the field of safety and health. These guidelines do not enjoy the same legal status as the above legal provisions, although if the guidance provided is followed, it is presumed that the relevant security and health requirements will have been complied with. Additionally, analogous rules of private or semi-private associations may be of relevance, provided they are generally recognised in the field of activity concerned.

### Offences

9. What are the specific offences relating to health and safety?

#### Criminal offences under the SCC

The following safety and health violations are provided for under the SCC:

- **Negligent manslaughter.** See [Question 2](#).
- **Negligent body lesions/assault.** The conditions of negligent body lesions/assault (*Article 125, SCC*) are:
  - bodily harm;
  - negligence;
  - a causal link.

The offence will be prosecuted *ex officio* only if the harm is serious.

- **Endangering the life or health of another.** The offence of endangering the life or health of another requires (*Article 129, SCC*):
  - dangerous conduct;
  - imminent danger to life;
  - causal link;
  - wilful intent;
  - lack of scrupulousness.
- **Negligent arson.** The conditions of negligent arson are (*Article 222, SCC*):
  - setting a fire;
  - harming another person or creating a collective hazard;
  - a causal link;
  - negligence.
- **Causing an explosion.** The offence of causing an explosion requires (*Article 223, SCC*):
  - occasioning an explosion with an explosive substance;
  - endangering the life or bodily integrity of persons or the property of others;
  - a causal link;
  - negligence.
- **Causing a flood, collapse or landslide.** The offence of causing a flood, collapse or landslide requires (*Article 227, SCC*):
  - occasioning a flood, collapse or landslide;
  - a causal link between the perpetrator's conduct and the results;
  - endangering the life or bodily integrity of persons or the property of others;
  - wilful conduct or negligence.
- **Breach of construction regulations.** A breach of construction regulations requires (*Article 229, SCC*):
  - a breach of good engineering practice) while managing or executing a construction or demolition project;

- endangering the life or bodily integrity of persons;
  - a causal link;
  - wilful conduct or negligence.
- **Removal or non-installation of safety devices.** The offence of removing or non-installing safety devices requires (*Article 230, SCC*):
    - omitting or damaging a protective installation or device;
    - endangering the life or bodily integrity of persons;
    - a causal relationship;
    - wilful conduct or negligence.
  - **Various offences against public health.** Examples include offences under *Articles 230 bis et seq* of the SCC, such as the transmission of human or epizootic diseases.

For offences set out in the SCC, secondary corporate liability under paragraph 1, Article 102 of the SCC is applicable (see [Question 2](#)). This means that a company may be prosecuted and potentially held liable only if, due to a lack of organisational measures, no individual perpetrator can be identified.

### Criminal offences in administrative laws

Moreover, the AIA and the Labour Act punish whoever, namely in the capacity of employer or employee, breaches the regulations on the prevention of occupational accidents and diseases (*Article 112, AIA; Article 59 et seq, Labour Act*).

Infringements of the criminal provisions in the AIA and the Labour Act trigger the application of Article 6 of the Federal Act on Administrative Criminal Law (ACLA), which provides for the following rules of prosecution:

- Where an offence is committed in the frame of a company, the applicable criminal provisions apply to the individuals who committed the act (*paragraph 1, Article 6, ACLA*).
- The manager, employer or principal (and its bodies or organs, if it's a legal entity) who, intentionally or negligently and in breach of a legal obligation, fails to prevent an offence committed by the subordinate, agent or representative or to eliminate its effects, will be subject to the criminal provisions applicable to the perpetrator who acted wilfully or negligently (*paragraphs 2 and 3, Article 6, ACLA*). This is if a position of a so-called "guarantor" can be established (that is, the existence of a specific legal obligation or duty of care to prevent the conduct in question (for example, by exercising supervision, giving instructions and intervening as necessary)) can be established.

### Defences

10. What defences or exemptions are available and who can qualify?

See [Question 3](#).

## Enforcement

11. Which authorities have the powers of prosecution, investigation and enforcement in cases of health and safety offences? What are the authorities powers of prosecution, investigation and enforcement, and what are the consequences of non-compliance?

### Prosecution authorities

**Administrative measures.** The executive authorities (that is, the Swiss National Accident Insurance Fund (SUVA) and the cantonal labour inspectorates) are responsible for monitoring the application of occupational safety and health protection regulations within companies and, where necessary, imposing measures against such companies. Infringements revealed by on-site inspections or denunciations may warrant the granting of a reasonable deadline to remedy the situation, in which case a warning in writing will be issued in the framework of formal proceedings; urgent measures may be taken if necessary. Decisions issued by the administrative authorities may be subject to a challenge before the same authority, where applicable, or an appeal with judicial review before a higher instance, depending on the applicable provisions.

**Criminal prosecution.** Criminal prosecution falls under the jurisdiction of the territorially competent cantonal authorities as provided in Articles 31 and seq of the CCP with respect to the:

- Offences under the SCC (see [Question 9](#)).
- Criminal offences contained in administrative acts (*Article 79, General Part of Social Insurance Law (GPSIA); Article 62, Labour Act*).

For more information on the prosecuting authority, see box: [The regulatory authorities](#).

### Prosecution powers

For crimes and misdemeanours, see [Question 4](#).

For offences punishable with a fine, the authorities enjoy certain powers to lead an investigation and collect evidence. They can, among other things:

- Accept criminal complaints.
- Open an investigation.
- Undertake hearings of persons and order the personal appearance of persons in view of such hearings.
- Order seizure and freezing over evidence and assets.

- Record data to identify the suspect.

However, certain coercive measures are not available for the purpose of prosecuting offences punishable by a fine, such as:

- Detention in custody.
- Tracing of wanted persons.
- DNA testing.
- Undercover enquiries.

#### **Powers of interview**

See [Question 4](#).

#### **Powers of search/to compel disclosure**

See [Question 4](#).

#### **Powers to obtain evidence**

See [Question 4](#).

#### **Power of arrest**

For crimes and misdemeanours, see [Question 4](#).

For offences punishable with a fine, an arrest will only be possible in the following events:

- The suspect refuses to provide their personal details.
- The suspect does not live in Switzerland and fails to immediately provide security for payment of the anticipated fine.
- The arrest is necessary to prevent the person from committing further offences. Post-arrest detention will be limited to three hours unless otherwise ordered by a competent authority.

#### **Court orders or injunctions**

See [Question 4](#).

12. Which authority makes the decision to charge and on what basis is that decision made? Are there any alternative methods of disposal and what are the conditions of such disposal?

See [Question 5](#).

## Conviction and sanctions

13. What are the sanctions for health and safety offences?

There are several sanctions for health and safety offences under the SCC.

For negligent manslaughter, see [Question 6](#).

The following are punishable with a custodial sentence not exceeding three years and/or a monetary penalty.

- Negligent body lesions/assault (*Article 125, SCC*).
- Negligent arson (*Article 222, SCC*).
- Breach of construction regulations (*Article 229, SCC*).
- Removal or non-installation of safety devices (*Article 230, SCC*).

Endangering the life or health of another (*Article 129, SCC*) is punishable with a custodial sentence not exceeding five years or a monetary penalty.

Causing an explosion (*Article 223, SCC*), or a flood, collapse or landslide (*Article 227, SCC*) is punishable with either a:

- Custodial sentence not exceeding three years.
- Monetary penalty if the damage is limited or in the case of negligent conduct (a custodial sentence of at least one year will be imposed in the event of wilful conduct).

The sanctions imposed by the AIA and the Labour Act are a monetary penalty of up to 180 daily penalty units or a fine not exceeding CHF10,000. The AIA caps the monetary penalty at CHF5,000 in the event of negligent conduct (*Article 112, AIA*).

## Safeguards

14. Are there any measures in place to safeguard the conduct of investigations? Is there a process of appeal? Is there a process of judicial review?

For crimes and misdemeanours, see [Question 7](#).

For offences punishable with a fine, the prosecution authorities may:

- Open investigations or refuse to do so.
- Drop the proceedings in the course of the investigation.
- Complete the investigation and render a "summary penalty order", which can be contested (and annulled) by the accused, in which case the matter will be sent to trial before the court.

For the right to legal advice and privilege and the unlawfulness of certain categories of evidence, see [Question 7](#).

## Environmental offences

### Regulatory provisions and authorities

15. What are the main regulatory provisions and authorities responsible for investigating environmental offences?

### Legislation

Swiss environmental legislation is spread over numerous laws and ordinances. The following are the most relevant:

- Federal Environmental Protection Act (EPA).
- Federal Act on the Protection of Waters (WPA) and the Federal Fishing Act (FFA).
- Federal Act on the Protection of Nature and Cultural Heritage (NCHA).
- Federal Forest Act (ForA).
- Federal Agriculture Act (AgricA).
- Federal Act on Non-Human Gene Technology (GTA).
- SCC.
- Swiss Civil Code.

Most of these laws are derived from Articles 73 et seq of the Swiss Federal Constitution, which aim at protecting the environment and promoting the principle of sustainable development. Switzerland is also a party to numerous international environmental agreements, for example the:

- Kyoto Protocol to the United Nations Framework Convention on Climate Change.
- Paris Protocol to the United Nations Framework Convention on Climate Change 2015 (Paris Agreement).

### **Regulatory authorities**

Unless a legal provision provides for federal jurisdiction, cantonal authorities are responsible for implementing the federal laws and ordinances through the enacting of corresponding cantonal acts. The above-cited federal laws provide for the setting-up of cantonal environmental protection agencies to carry out such a task. Federal authorities are in charge of supervision and enforcement of a particular list of specific provisions (for example, Articles 41 of the EPA and Article 48 of the WPA).

At the federal level, see box: [The regulatory authorities](#).

### **Offences**

16. What are the specific offences relating to the environment?

Several federal laws provide for criminal sanctions for intentional or negligent infringement of environment-related duties.

### **Water pollution**

Under Articles 70 et seq of the Federal Act on the Protection of Waters (WPA) and its Ordinance on the Protection of Waters (WPO) the following is prohibited:

- Direct or indirect discharge or drainage of polluting substances.
- The altering of watercourses.
- The extraction of gravel/sand.
- Omissions in relation to installations, structures and equipment that incur risks of pollution.

The above offences are subject to valid exceptions or permits granted by the cantonal authorities.

Article 234 of the SCC provides for custodial sentences or monetary penalties in the case of wilful or negligent contamination of drinking water.

### **Deforestation**

Article 42 et seq of the Federal Agriculture Act (AgricA) prohibits unauthorised deforestation and the misuse of forestry installations or non-compliance with other relevant regulations.

### **Air pollution**

Article 60 et seq of the EPA and the Ordinance on Air Pollution Control (OAPC) prohibit, among others, the operation of installations that cause emissions exceeding the threshold limits defined in the OAPC and provides for both administrative (refitting or shutting-down orders) and criminal sanctions.

### **Waste management and disposal**

Article 60 et seq of the EPA prohibits, among others, infringements of waste-related regulations and the unlawful construction of landfills. Waste-related regulations, including further criminal sanctions, can be found in the Ordinance on the Avoidance and Disposal of Waste and the Ordinance on the Movement of Waste and the Ordinance on the Return, Take-Back and Disposal of Electrical and Electronic Equipment.

### **Use of prohibited substances or organisms**

Articles 60 et seq of the EPA and the Ordinance on the Reduction of Risks relating to the Use of Certain Particularly Dangerous Substances, Preparations and Articles (ORRChem) prohibit, among others, the use, circulation or handling of certain harmful substances or organisms, such as asbestos, mercury, ethoxylates and others. Any person who wilfully puts substances into circulation which he/she knows or assumes may present a danger to the environment (or indirectly endanger people when used in a certain manner) is liable under the criminal provisions of the EPA and the above-mentioned ordinance. Similarly, Article 35 et seq of the Federal Act on Non-Human Gene Technology (GTA) prohibits unauthorised handling circulation or handling of certain genetically modified organisms. Furthermore, Articles 230 bis et seq of the SCC provide for heavy custodial sentences for wilfully causing danger by means of genetically modified or pathogenic organisms.

### **Soil pollution and/or contamination**

The EPA and the Ordinance on the Remediation of Polluted Sites (Contaminated Sites Ordinance (CSO)) govern the cleaning-up, surveillance and prosecution with regard to the pollution and/or contamination of soil, and prohibit the infringement of contamination levels and non-compliance with remediation orders.

### **Other criminal provisions**

The EPA further contains criminal provisions for omissions with respect to information-related or labelling duties, safety measures and production methods, as well as wilful or negligent obstruction of tax collection or failure to pay environment-related taxes.

Both individuals and legal entities can be prosecuted for such infringements. As a rule, infringements of the criminal provisions contained in the EPA, WPA and AgricA trigger the application of Articles 6 and 7 of the ACLA, which provides for the following rules of prosecution:

- Where an offence is committed within a company, the applicable criminal provisions apply to the individuals who committed the act (*paragraph 1, Article 6, ACLA*).
- The manager, employer or principal (and its bodies or organs, if it's a legal entity) who, intentionally or negligently and in breach of a legal obligation, fails to prevent an offence committed by the subordinate, agent or representative or to eliminate its effects, will be subject to the criminal provisions applicable to the perpetrator who acted wilfully or negligently (*paragraph 2 and 3, Article 6, ACLA*), if a position of a so-called "guarantor" can be established, that is, the existence of a specific legal obligation or duty of care to prevent the conduct in question by exercising supervision, giving instructions and intervening as necessary, can be established.

- Where a fine does not exceed CHF5,000 and the investigative measures necessary to prosecute the individual perpetrators appear disproportionate in view of the penalty incurred, the prosecution authority may fine the company instead (*Article 7, ACLA*).

For offences set out in the SCC, secondary corporate liability is applicable (see [Question 2](#)). This means that a company may be prosecuted and potentially sentenced only if no individual perpetrator can be identified due to a lack of organisational measures.

## Defences

17. What defences or exemptions are available and who can qualify?

Environment-related laws subject certain activities to prior authorisation and allow for the granting of licences/permits and exceptions under strict legal conditions. However, prior authorisations or licences/permits will not reduce criminal liability for breaches of regulatory provisions falling outside the restricted scope of such licence/permit.

For infringements of the SCC, standard criminal law defences apply (see [Question 3](#)).

## Enforcement

18. Which authorities have the powers of prosecution, investigation and enforcement in cases of environmental offences? What are the authorities powers of prosecution, investigation and enforcement, and what are the consequences of non-compliance?

### Prosecution authorities

**Administrative measures.** The cantonal environmental protection agencies in charge of implementing federal laws are designated in the underlying cantonal legislation and have jurisdiction to open administrative proceedings and order measures against perpetrators (*see Question 20*).

**Criminal prosecution.** Criminal prosecution of crimes and misdemeanours falls under the jurisdiction of the territorially-competent cantonal PPO (*Articles 31 et seq, CCP*).

With respect to offences punishable with a fine only, cantonal legislation usually determines whether their prosecution falls under the competence of a PPO or an administrative authority. Therefore, depending on the canton:

- Cantonal administrative authorities in charge of implementing the federal laws will have jurisdiction to prosecute offences punishable with a fine. For this purpose, the administrative authority becomes a prosecution authority within the meaning of Article 12 of the CCP with a (limited) range of coercive powers at its disposal.
- The PPO will be in charge of opening the investigation concerning offences punishable with a fine; the cantonal administrative authorities can report the relevant offences to the criminal authorities for prosecution purposes.

In any event, where the perpetrator is concurrently accused of an offence punishable with a fine as well as a crime and/or a misdemeanour (for example, offences to safety requirements with bodily harm or property damage). The PPO and the criminal courts will have an overriding jurisdiction over all the offences (*Articles 17 and 357, CCP; Article 49, SCC*).

Unless otherwise stated in the law, a fine must not exceed CHF10,000 (*Article 106, SCC*).

For more information on the prosecuting authority, see box: [The regulatory authorities](#).

#### **Prosecution powers**

See [Question 4](#) and [Question 11](#).

#### **Powers of interview**

See [Question 4](#) and [Question 11](#).

#### **Powers of search/to compel disclosure**

See [Question 4](#) and [Question 11](#).

#### **Powers to obtain evidence**

See [Question 4](#) and [Question 11](#).

In the field of environmental regulations in particular, the authorities in charge of prosecuting offences can request all the necessary information from regulatory authorities and can also rely on the information compiled in the course of compliance monitoring.

#### **Power of arrest**

See [Question 4](#) and [Question 11](#).

#### **Court orders or injunctions**

See [Question 4](#) and [Question 11](#).

#### **Prosecution authorities**



19. Which authority makes the decision to charge and on what basis is that decision made? Are there any alternative methods of disposal and what are the conditions of such disposal?

See [Question 5](#).

## Conviction and sanctions

20. What are the penalties for environmental offences?

Under the EPA) and the WPA, wilful conduct triggers a custodial sentence of up to three years or a monetary penalty not exceeding CHF540,000 (that is, 180 daily penalty units). Negligent conduct is punishable only by a monetary penalty.

"Lesser" violations under Article 61 of the EPA and Article 71 of the WPA are punishable by a fine not exceeding CHF20,000. Cantonal laws enacted to implement the federal laws provide for further fines where applicable.

A company liable for offences contained in the SCC (for example, *Articles 234 or 230 bis et seq, SCC*) can be sentenced to a fine not exceeding CHF5 million (*paragraph 1, Article 102, SCC*).

Individual perpetrators are punishable by a custodial sentence ranging from three years (for example, water contamination by negligent conduct; or five years, if wilful) up to ten years for certain other offences (for example, wilful use of prohibited organisms), or monetary penalties not exceeding CHF540,000 (that is, 180 daily penalty units not exceeding CHF3,000 each).

Administrative measures in relation to certain environmental-related offences may include:

- Prohibitions to construct.
- Restoration and remediation measures.
- Demolition or other bans.
- Withdrawal of licences.
- Investigations and other protective measures.

For other developments relating to sentencing and ancillary orders, see [Question 6](#).

## Safeguards

21. Are there any measures in place to safeguard the conduct of investigations? Is there a process of appeal? Is there a process of judicial review?

See [Question 14](#).

*\*The author would like to warmly thank Marianna Nerushay and Samira Studer, trainees at Bär & Karrer, for their outstanding help and commitment in the preparation of this Q&A.*

### The regulatory authorities

#### **Federal Office of Justice (FOJ)**

**Main activities.** The FOJ is in charge of drafting bills relating to the main areas of law, including private law, criminal law, debt collection and bankruptcy law, international private law and public and administrative law. The FOJ also advises the other agencies of the Federal Administration on all legislative matters, it is responsible for the supervision of various registers and represent Switzerland internationally before a number of bodies and organisations and deals with international mutual legal assistance requests, in particular in connection with the US.

**W** [www.bj.admin.ch/bj/en/home.html](http://www.bj.admin.ch/bj/en/home.html)

#### **Federal Office of Public Health (FOPH)**

**Main activities.** As part of the Federal Department of Home Affairs, the FOPH is responsible for public health in Switzerland; it develops Switzerland's health policy and works to ensure that the country has an efficient and affordable healthcare system in the long term.

**W** [www.bag.admin.ch/bag/en/home.html](http://www.bag.admin.ch/bag/en/home.html)

#### **State Secretariat for Economic Affairs (SECO)**

**Main activities.** The SECO is the federal government's centre of expertise for all core issues relating to economic policy. Its aim is to ensure sustainable economic growth by putting in place the necessary regulatory and economic policy conditions.

W [www.seco.admin.ch/seco/en/home/Arbeit.html](http://www.seco.admin.ch/seco/en/home/Arbeit.html)

### **Federal Social Insurance Office (FSIO)**

**Main activities.** The (FSIO) is the national centre of expertise on policies related to old-age, invalidity and the family. It plans, manages and monitors the corresponding social insurance systems to ensure that they function effectively. The FSIO also initiates and co-ordinates reciprocal social security agreements with other countries. The Swiss Confederation spends about one third of its budget on social welfare. In recent years this amounted to about CHF20 billion.

W [www.bsv.admin.ch/bsv/en/home.html](http://www.bsv.admin.ch/bsv/en/home.html)

### **Federal Coordination Commission for Occupational Safety (FCOS)**

**Main activities.** The FCOS is the central information and co-ordination office for safety and health at work. It co-ordinates the preventive measures, the tasks in the execution and the uniform application of the rules. Their decisions are binding.

W [www.ekas.admin.ch/index-en.php?frameset=1](http://www.ekas.admin.ch/index-en.php?frameset=1)

### **Federal Office for the Environment (FOEN)**

**Main activities.** The FOEN's mission is to ensure the sustainable use of natural resources including soil, water, air, quietness and forests. It is responsible for the protection against natural hazards, safeguarding the environment and human health against excessive impacts, and conserving biodiversity and landscape quality. It is also responsible for international environmental policy.

W [www.bafu.admin.ch/bafu/en/home.html](http://www.bafu.admin.ch/bafu/en/home.html)

### **Federal Office of Energy (SFOE)**

**Main activities.** The SFOE is the country's competence centre for issues relating to energy supply and energy use. It creates the prerequisites for a sufficient, crisis-proof, broad-based, economic and sustainable energy supply; ensures the maintenance of high safety standards in the production, transport and energy use; creates the necessary conditions for efficient electricity and gas markets and an adapted infrastructure; actively promotes efficient energy use, an increase in the share of renewable energy and a reduction in CO<sub>2</sub> emissions; finally, it promotes and co-ordinates national energy research and supports the development of new markets for sustainable energy use and supply.

W [www.bfe.admin.ch/index.html?lang=en](http://www.bfe.admin.ch/index.html?lang=en)

## Online resources

### Swiss Federal Law

**W** [www.admin.ch/bundesrecht/00566/index.html?tang=de](http://www.admin.ch/bundesrecht/00566/index.html?tang=de)

**Description.** Compilation of the Swiss laws and ordinances maintained by the Federal Authorities of the Swiss Confederation. The full compilation is available in German, French and Italian.

### Swiss Federal Law (English Translations)

**W** [www.admin.ch/bundesrecht/00566/index.html?tang=en](http://www.admin.ch/bundesrecht/00566/index.html?tang=en)

**Description.** Classified compilation of English translations of certain Swiss laws and ordinances maintained by the Federal Authorities of the Swiss Confederation. The translations are provided for information purposes only and have no legal force.

### Swiss Federal Supreme Court (SFSC)

**W** [www.bger.ch/fr/index.htm](http://www.bger.ch/fr/index.htm)

**Description.** The SFSC is the highest judicial authority in Switzerland. It rules as the final instance on all appeals against decisions of the highest cantonal courts, as well as, in some cases, the Federal Criminal Court, the Federal Administrative Court and the Federal Patent Court. The court ensures that Swiss federal law is correctly applied in individual cases and that the rights of citizens enshrined in the Constitution are protected.

### Swiss Federal Criminal Court (SFCC)

**W** [www.bstger.ch/en/index.html](http://www.bstger.ch/en/index.html)

**Description.** The SFCC hears, among other things, criminal cases involving offences against federal interests, explosives offences, international cases of white-collar crime, cases relating to organised crime, corruption and money laundering, and offences related to civil aviation or war material.

### Swiss Administrative Federal Court (FAC)

**W** [www.bvger.ch/bvger/en/home.html](http://www.bvger.ch/bvger/en/home.html)

**Description.** The FAC adjudicates appeals against decisions rendered by Swiss federal authorities as well as, in certain matters, some cantonal authorities. In individual cases, it may issue judgments in complaints proceedings. Where the FAC is the lower instance court, its judgments may be appealed to the Federal Supreme Court.

## Contributor profiles

**Professor Dr Andrew M Garbarski, Partner**

### **Bär & Karrer**

**T** + 41(0)58 261 57 00

**F** + 41(0)58 263 57 22

**E** [andrew.garbarski@baerkarrer.ch](mailto:andrew.garbarski@baerkarrer.ch)

**W** [www.baerkarrer.ch](http://www.baerkarrer.ch)

**Professional qualifications.** Switzerland, Attorney-at-law (admitted to all Swiss Courts), Dr iur (University of Lausanne, 2005), Professor (University of Lausanne, 2018)

**Areas of practice.** White collar crime; administrative criminal law; international judicial and administrative assistance; financial and commercial litigation and insolvency.

### **Recent transactions**

- Acting for an ultra-high net worth individual in a high-stake civil litigation regarding company directors' liability.
- Acting for the CEO of a fund management company in Madoff-related criminal proceedings.
- Acting for an ex-minister of an Arab Spring country in criminal proceedings relating to bribery of public officials and money laundering.
- Acting for the CEO of an oil trading company in criminal proceedings relating to bribery of public officials.

**Languages.** French, English, German

**Professional associations/memberships.** Swiss Bar Association (SAV/FSA); Geneva Bar Association (Oda); Geneva Business Law Association (AGDA); Specialised forum for criminal law (Oda); Centre for Business Law (CEDIDAC).

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