THE INTERNATIONAL INVESTIGATIONS REVIEW

Thirteenth Edition

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THE LAWREVIEWS

Published in the United Kingdom
by Law Business Research Ltd
Holborn Gate, 330 High Holborn, London, WC1V 7QT, UK

www.thelawreviews.co.uk

ISBN 978-1-80449-186-7

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following for their assistance throughout the preparation of this book:

ALIXPARTNERS GMBH

ANAGNOSTOPOULOS

BAKER MCKENZIE

BDO LLP

DEBEVOISE & PLIMPTON LLP

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PREFACE

Over the past year, the Biden administration continued to demonstrate its prioritisation of white-collar prosecutions. This includes changes in policy and guidance, such as a renewed focus on individual accountability and voluntary self-disclosure. The administration has continued to redistribute existing resources to prosecutions of corporate crime and, for the second year in a row, announced its intentions to hire more white-collar prosecutors. Given the administration's stated focus on its corporate enforcement priorities, US and non-US corporations alike will continue to face increasing scrutiny by US authorities.

The trend towards more enforcement and harsher penalties has by no means been limited to the United States; while the US government continues to lead the movement to globalise the prosecution of corporations, a number of non-US authorities appear determined to adopt the US model. Parallel corporate investigations in several countries increasingly compound the problems for companies, as conflicting statutes, regulations, and rules of procedure and evidence make the path to compliance a treacherous one. What is more, government authorities forge their own prosecutorial alliances and share evidence or, conversely, have their own rivalries and block the export of evidence, further complicating a company's defence. These trends show no sign of abating.

As a result, corporate counsel around the world are increasingly called upon to advise their clients on the implications of criminal and regulatory investigations outside their own jurisdictions. This can be a daunting task, as the practice of criminal law – particularly corporate criminal law – is notorious for following unwritten rules and practices that cannot be gleaned from a simple review of a country's criminal code. Of course, nothing can replace the considered advice of an expert local practitioner, but a comprehensive review of corporate investigative practices around the world will find a wide and grateful readership.

The authors who have contributed to this volume are acknowledged experts in the field of corporate investigations and leaders of the Bars of their respective countries. We have attempted to distil their wisdom, experience and insight around the most common questions and concerns that corporate counsel face in guiding their clients through criminal or regulatory investigations. Under what circumstances can the corporate entity itself be charged with a crime? What are the possible penalties? Under what circumstances should a corporation voluntarily self-report potential misconduct on the part of its employees? Is it a realistic option for a corporation to defend itself at trial against a government agency? And how does a corporation manage the delicate interactions with employees whose conduct is at issue? The *International Investigations Review* answers these questions and many more, and will serve as an indispensable guide when your clients face criminal or regulatory scrutiny in a country other than your own. And while it will not qualify you to practise criminal law in a foreign country, it will highlight the major issues and critical characteristics of a given

country's legal system and will serve as an invaluable aid in engaging, advising and directing local counsel in that jurisdiction. We are proud that, in its 13th edition, this publication features three overviews and covers 14 jurisdictions.

This volume is the product of exceptional collaboration. I wish to commend and thank our publisher and all the contributors for their extraordinary gifts of time and thought. The subject matter is broad, and the issues raised are deep, and a concise synthesis of a country's legal framework and practice was challenging in each case.

Nicolas Bourtin
Sullivan & Cromwell LLP
New York
July 2023

Chapter 16

SWITZERLAND

Peter Burckhardt, George Ayoub, Nina L Paka and Mariam Oueslati[1]

I INTRODUCTION

In Switzerland there are no specific law enforcement authorities empowered to investigate and prosecute corporate conduct. Pursuant to the Swiss Criminal Procedure Code (SCPC), at a cantonal level, regional and cantonal prosecutors with the assistance of the police are responsible for the enforcement of criminal law. At the federal level, the Office of the Attorney General of Switzerland (OAG) is responsible for prosecuting offences that are subject to federal jurisdiction (e.g., money laundering, bribery and certain other white-collar crimes, in case they have been committed abroad or in two or more cantons with no single canton being the clear focus of the criminal conduct).

To date, the vast majority of prosecutions initiated against companies have been carried out by the OAG. For the most part, proceedings have been concluded by way of a 'negotiated' summary penalty order issued by the OAG rather than a court verdict. The summary penalty order procedure is usually adopted when the prosecuting authority considers that there is enough evidence for a conviction and that the sentence to be imposed does not exceed six months of imprisonment, a monetary penalty of 180 daily penalty units or a fine. Unless a valid opposition is filed, the summary penalty order issued by the prosecuting authority becomes the final judgment. In practice, a negotiation of the contents of a summary penalty order will take place either in the course of abbreviated proceedings (opened on request if the accused admits the relevant facts) or informally. Subject to negotiation are the matters to be charged (charge bargain) and sanctions and penalties (sentence bargain).

Evidentiary standards for a conviction of a company are high (the underlying offence by an individual within the company and the latter's organisational deficiencies must be fully established). In addition, companies concerned have a strong interest in the proceedings conducted against them being settled in the quickest and most controlled way possible in order to avoid damage to their reputation. Therefore, the prosecuting authority and the company concerned often both have an interest in discussing a solution, which shortens the proceeding.

As part of a revision of the SCPC, the OAG requested the introduction of an instrument based on the Anglo-American model of the deferred prosecution agreement. This revision was, however, not accepted mainly due to the fact that such instrument would strengthen even more the already strong position of the prosecution authorities without any countervailing power or control mechanism.

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1 Peter Burckhardt and George Ayoub are partners and Nina L Paka and Mariam Oueslati are associates at Schellenberg Wittmer Ltd.

The prosecution authorities have a set 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; these include dawn raids, requesting the production of documents or electronic data from parties or third persons (e.g., banks), seizing assets or monitoring banking relationships (Article 196 et seq. SCPC).

Besides the standard investigations into corporate conducts that are run by the prosecution authorities, certain agencies are empowered with investigative measures for some specific areas of the law.

In the area of financial markets in Switzerland, the Swiss Financial Market Supervisory Authority (FINMA) is competent to investigate and prosecute misconduct and to enforce supervisory law through measures available under administrative law. In this respect, FINMA is competent to establish violations, withdraw licences or order the liquidation of a company. It can also impose bans on business activities and confiscate profits that have been earned through violations of supervisory law or even conduct reorganisation proceedings. Supervised persons or entities have a duty to provide FINMA with all of the information and documents it requires to carry out its tasks. FINMA is, however, not competent to conduct criminal proceedings or impose penalties and fines. If physical premises need to be searched to seize documents and evidence, FINMA must liaise with the ordinary criminal law enforcement authorities.

With respect to competition matters, the Swiss Competition Commission (ComCo) is competent to investigate merger transactions prior to their completion. Unlike FINMA, the Swiss Cartel Act includes the possibility for the ComCo to issue direct sanctions. Since 2003, the ComCo has also been able to authorise dawn raids.

Finally, the Federal Department of Finance (FDF) may prosecute and fine businesses that violate the criminal provisions of the financial market regulations.

II CONDUCT

i Self-reporting

Swiss criminal law guarantees the right against self-incrimination. There is no legal obligation made to companies in standard investigations into corporate conduct to report their internal wrongdoings to the prosecution authority.

In practice, cases of self-reporting of internal misconduct by companies are scarce to date. Often, companies will be more likely to take internal measures after having proceeded to an internal investigation.

In 2017, the OAG dealt with the first case of self-reporting of a case of corporate criminal liability by the banknote press manufacturer KBA-NotaSys. This company had self-reported after having uncovered evidence of bribery acts in Nigeria. The company was found guilty by the OAG under a summary penalty order of having failed to take all the reasonable organisational measures required to prevent the bribery of foreign public officials and was ordered to pay a symbolic fine of 1 Swiss franc due to, among other things, the self-reporting by the company and its full cooperation throughout the investigation.[2] As of today, this case is still the only known case of self-reporting in Switzerland.

2 Office of the Attorney General, Activity Report 2017, p. 21.

Some specific areas of the law provide for an obligation to report. For instance, the Anti-Money Laundering Act (AMLA) requires financial intermediaries to immediately file a report with the Money Laundering Reporting Office (MROS) in the event of a suspicion of money laundering. Violations of the duty to report may trigger criminal sanctions.

Cartel regulation provides a strong incentive for self-reporting by companies through special leniency programmes. ComCo may grant total or partial immunity from any sanctions if companies disclose competition restrictions or cooperate in order to eliminate them. Total immunity from the sanction shall be granted to the first company to disclose its participation in a restriction of competition and provide information that allows the opening of an investigation ('opening cooperation') or provide evidence that enables the ComCo to establish the infringement ('establishing cooperation'). The 'opening cooperation' is possible as long as the ComCo does not itself have sufficient information to open an investigation. If total immunity has already been granted, other companies can still achieve a reduction of up to 50 per cent of the sanction. The amount of reduction is calculated based, among other things, on the point in time and the importance of the submitted information and evidence to the success of the proceedings.

ii Internal investigations

Even though there are no specific provisions or guidelines under Swiss law, internal investigations have become common practice over the years for companies that wish to clarify possible misconduct.

The starting point of an internal investigation can take place in various scenarios. It can take place prior to the opening of a criminal investigation, when a company discovers facts that could lead to the opening of such proceedings and thus anticipate or avoid them. It can also take place simultaneously to criminal proceedings already opened, to clarify the facts investigated in order to adopt the best defence strategy.

Due to the lack of codification, there is no strict procedure for conducting an internal investigation and the type of investigative acts that will be carried out depend mainly on the mandate given. Such mandate will be based on the facts that need to be elucidated and the goals that it aims to reach (e.g., informing the board about the background to and the circumstances of a particular event, clarifying concerns about the conduct of one or more employees, enabling a firm to comply with its regulatory obligations).

Nevertheless, such investigations are often structured in a similar way, that is, in two main steps.[3] The first step includes the search for and safeguarding of documents related to the facts under investigation, whether physical or electronic. The challenge for the investigators during the first phase is to process the collected data in compliance with the rules on data protection and the personality of employees. In addition, they must always comply with the principle of proportionality. The invasion of an employee's private domain (e.g., secretly searching the employee's private desk or office) normally constitutes a violation of the employee's rights but may exceptionally be justified by an overriding private or public interest, for example if the employee is suspected of having engaged in a criminal act.

The second step usually consists in conducting interviews with employees, the preparation of which will usually be based on the documents gathered in the first stage. In general, a written record of the employee's interview is kept in the form of interview notes or

3 David Raedler and Benoît Chappuis, 'Les enquêtes internes et le secret professionnel de l'avocat: la fin d'une époque?', in *Droit de l'avocat*, p. 297 ss, p. 298.

minutes. The Federal Supreme Court (FSC) enshrined certain criteria with regard to written records, compliance with which increases the evidentiary value of the employee's declaration should they be used in criminal proceedings subsequently. These criteria include, among others, the signatures of the persons interviewed on the minutes or notes or an indication that the person interviewed has been informed of their rights.[4]

Finally, the internal investigation is often concluded by the establishment of a final report. If the internal investigation was conducted by external counsel, particular attention must be paid to the method applied to draft the report to ensure that it is covered by professional secrecy. In a recent decision, the FSC specified for the first time that factual findings collected for the purpose of seeking legal advice can be covered by attorney–client privilege, and not only the legal advice itself.[5]

iii Whistle-blowers

In Switzerland, the legal framework does not currently provide for any specific whistle-blower protection. It is, however, not from lack of trying to codify such protection. In 2013, a partial revision of the Swiss Code of Obligations (SCO) was proposed in order to regulate the conditions under which the reporting of irregularities by an employee would be considered justified and therefore lawful. The proposed legislation aimed to introduce a three-step reporting system ('cascade principle'): (1) the report of misconduct to the employer; (2) if the reporting to the employer proves to be ineffective, the reporting to the competent authority; and (3) as an *ultima ratio* the possibility to bring the disputed facts to the attention of the public, for example to the media. This revision was rejected in 2020, partly because the FSC had already enshrined the cascade system in recent case law.

As a consequence, whistle-blowing must still be assessed against the general requirements imposed by Swiss criminal, civil or unfair-competition law. Under civil law, the protection of employees who blow the whistle externally on internal wrongdoing that they have observed or become aware of in the discharge of their duty is rather limited. This is mainly caused by the duty of loyalty to the employer that is provided for in employment law, which compels the employee, within the framework of their employment contract, to faithfully safeguard the legitimate interests of their employer. This duty can only be overridden in the presence of a preponderant interest (e.g., if the employer's activity causes or risks causing unlawful damages to others) and always must be assessed in accordance with the principle of proportionality.

If a company considers that an employee breached their contractual duties by reporting internal misconduct, it may decide to dismiss them with immediate effect. In such a case, the only protective provisions available to the employee are those related to protection against unfair dismissal and unjustified immediate dismissal, which do not provide for reinstatement but, at best, the payment of compensation.[6] Under criminal law, the employee may face criminal proceedings for breaching their duty of secrecy (e.g., professional secrecy, manufacturing or trade secrecy, industrial espionage or bank secrecy).

4 Decision of the FSC of 26 May 2020 (6B_48/2020).

5 Decision of the FSC of 2 March 2023 (1B_509/2022).

6 Bettex Christian, 'Le cadre légal des enquêtes internes dans les banques et autres grandes entreprises en droit du travail', SJ 2013 II p. 157 ss, p. 161.

It should be noted that, in 2017, the Swiss Federal Audit Office created a secure internet platform (www.whistleblowing.admin.ch) that allows private individuals and employees of the federal government to anonymously report malpractice, including possible acts of corruption in the federal administration and related organisations.

However, although the importance of whistle-blowing has been recognised by Swiss authorities, notably with respect to corruption, it remains, overall, a limited practice in Switzerland.

III ENFORCEMENT

i Corporate liability

Companies are subject to criminal liability under Swiss law pursuant to Article 102 of the Swiss Criminal Code (SCC). This provision does not define any criminal conduct per se, but is considered as a general provision of Swiss criminal law attributing, if certain requirements are met, liability to a company for the criminal conduct of an individual acting within the company.

Article 102 SCC institutes two models of liability: 'subsidiary' liability and 'primary' liability.

A company may face subsidiary liability for felonies or misdemeanours committed by individuals within the company in the exercise of commercial activities in accordance with the company's purpose if the person responsible cannot be identified due to a lack of organisation of the company.

Primary liability enables – irrespective of the criminal liability of any individual acting within the company – the attribution of certain serious offences exhaustively listed in Article 102(2) SCC (e.g., money laundering, bribery or financing of terrorism) committed by individuals within the company in the exercise of commercial activities in accordance with the company's purpose, provided that the latter can be held to have failed to take all reasonable and necessary organisational measures to prevent such an offence. Primary liability institutes a model of cumulative liability, which means that both the company and the individual offender(s) acting within the company may be prosecuted for the same offence.

In the case of criminal proceedings conducted against both individual offenders acting with the company and the company itself, it is advisable that employees and company each appoint their own external independent counsel. This mitigates the risks of conflict of interest, which is prohibited by the Swiss provisions regulating the legal profession.

In practice, proceedings against the company and the employee suspected of misconduct are often conducted separately, which has a significant impact on rights of participation and access to the case files for the company and its employee, respectively.

ii Penalties

In cases of liability under criminal law, the company may be sentenced with a fine not exceeding 5 million Swiss francs. The amount is based on several cumulative criteria, including the severity of the offence, the seriousness of the lack of organisational measures, the scope of the damage and the overall financial situation of the company.

In addition to the fine, Swiss law provides further measures, some of which are mandatory. In particular, it is mandatory to order the forfeiture of assets derived from or

used for the crime. In contrast to fines, which are capped by law at 5 million Swiss francs, forfeiture claims are not limited by a maximum amount. In financial terms, forfeiture claims often carry significantly more weight than the actual fine.

An analysis of the summary penalty orders issued by the OAG under Article 102(2) SCC shows that the fines imposed ranged from 1 Swiss franc (for the self-reporting company KBA-NotaSys) to 4.5 million Swiss francs. Whereas forfeiture claims have amounted to 112 million Swiss francs to date.

iii Compliance programmes

Under Swiss law, the deficient organisation of the company is a necessary requirement for corporate criminal liability. A company may face liability if the person responsible cannot be identified due to the company's lack of organisation (subsidiary liability) or if it has failed to take all reasonable and necessary organisational measures to prevent the commission of certain serious offences (primary liability).

The existence of an effective compliance programme will prove a certain degree of organisation within the company and can thus serve to mitigate the risk of criminal charges. An analysis of previous summary penalty orders issued by the OAG and two recent first-instance rulings of the Federal Criminal Court (FCC) shows that in assessing the element of organisational fault, it is generally paid particular attention to whether the company had set up an effective compliance programme, including an independent and autonomous as well as adequately staffed and qualified (*cura in eligendo*) compliance department, and whether existing compliance programmes and policies were actually monitored (*cura in custodiendo*) and enforced.

Swiss law does not contain a definition of what is meant by necessary and reasonable organisational measures or what 'compliance model' companies must follow to meet the standard set by Article 102 SCC. Rather, the measures that are required depend, inter alia, on the size of the company and the business sector, market area and geographical region in which the company is active.

Concrete guidance on what an effective compliance programme should contain may be found in legal provisions outside criminal law (e.g., regulatory legislation regarding companies under the supervision of the FINMA, such as the Federal Act on Banks and Savings Bank and the related Ordinance or the Federal Act on Combating Money Laundering and Terrorist Financing and the FINMA Anti-Money Laundering Ordinance), as well as guidelines and best practices issued by national and international organisations or relevant industry association. In the past, the OAG referred to guidelines issued by the Swiss State Secretariat for Economic Affairs (SECO), the OECD, the International Chamber of Commerce (ICC) or the ISO Standard 19600 on compliance management systems as accepted industry standards. The FCC referred to the Swiss Code of Best Practice for Corporate Governance, which, pursuant to the FCC, applies not only to listed companies but *mutatis mutandis* to non-listed banking institutions organised in the form of a company limited by shares.

Furthermore, the existence of a compliance programme may also lead to a mitigation of the penalty. When assessing the fine the competent authorities must consider, among other things, the seriousness of the organisational inadequacies. In addition, the company's conduct after detecting the offence is a relevant factor for the determination of the fine (Articles 47(1) and 48(d), (e) SCC). Positive 'post-crime' behaviour, such as credible efforts

to reach organisational improvements by implementing a compliance programme or improve an already existing compliance programme, have regularly led to a reduction of the fine in the past.

iv Prosecution of individuals

Since corporate liability under Swiss law requires the commission of an underlying offence by an individual within the company, the prosecution of employees in a corporate crime context is common. However, the formal conviction of the individual responsible for the underlying offence is not a prerequisite for establishing either subsidiary or primary corporate criminal liability. In a recent first instance ruling, the FCC convicted a bank for having failed to take all the organisational measures that were reasonable and required to prevent the commission of aggravated money-laundering by a de facto corporate body member, although the latter was subject to separate proceedings and had not yet been tried.

In situations where an employee is the subject of a criminal investigation the question arises whether the company has a duty to terminate its contractual relationships with the employee. An ordinary dismissal is possible at any time without specific grounds. By contrast, immediate dismissals require a material ground (i.e., all circumstances on the basis of which the continuance of the employment relationship cannot be reasonably expected). By law, there is no formal obligation for a company to dismiss employees implicated in or suspected of misconduct. However, companies should bear in mind that prompt and appropriate employee remediation measures are part of a sound compliance framework and, if properly executed, may support a finding that the necessary organisational requirements have been met. Additionally, appropriate disciplinary action against responsible employees is likely to be considered as positive 'post-crime' conduct that may thus lead to a reduction of the sentence.

In practice, companies tend to release employees from their day-to-day duties and place them on garden leave while an investigation regarding their potential misconduct is being carried out. Employees will often be reminded that they remain subject to loyalty and confidentiality duties, and that they might be asked to cooperate in an internal investigation as part of their employment obligations.

Regarding possible cooperation between the employee's counsel and the company, there is, in principle, no restriction in this respect unless a specific injunction ordering parties, under the threat of criminal sanctions, to maintain secrecy over the proceedings is issued by the prosecuting authority to limit the risk of collusion or conspiracy (Articles 73(2) and 165 SCPC). Any requirement to maintain secrecy over the proceedings, however, must be time-limited. Further, in cooperating with the employee's counsel, companies must be careful not to violate Article 305 SCC, under which it is prohibited to assist an offender in order to evade prosecution.

In terms of legal fees, companies will usually pay the costs and fees incurred by employees in the course of their defences.

IV INTERNATIONAL

i Extraterritorial jurisdiction

The application of criminal law follows the territoriality principle and is, therefore, limited to offences committed in Switzerland (Article 3 SCC). An offence is deemed to have been committed both at the place where the offender acted (or should have acted) and the place

where the results actually occurred (Article 8 SCC). Consequently, a person may be held criminally liable for conduct performed outside Switzerland if the outcome of such conduct has an impact within the Swiss territory.

For instance, with respect to bribery offences, Swiss courts have repeatedly affirmed a sufficient link to Switzerland if bribes were transferred from or to Swiss bank accounts. Similarly, in cases of fraud committed abroad, the same applies if the fraudulently obtained funds were credited to Swiss bank accounts.

Foreign and domestic companies are thus subject to Swiss law on corporate criminal liability if the underlying offence was committed in Switzerland. However, pursuant to Swiss legal doctrine and the OAG, foreign and domestic companies may be subject to Swiss jurisdiction for underlying offences committed abroad, provided that the lack of organisation materialised (at least in part) in Switzerland. To date, there is no court precedent on this question; in the two cases that were adjudicated by the FCC thus far, the underlying offence (aggravated money laundering) had been committed in Switzerland.

ii International cooperation

Swiss authorities may cooperate and coordinate with foreign law enforcement authorities through international mutual legal assistance. Mutual legal assistance is important for Switzerland's reputation, particularly in view of its significance as a financial centre. Switzerland is highly solicited by other countries for assistance in economic matters, and has proved extensively cooperative with other jurisdictions over international mutual assistance in criminal or administrative matters.

Assistance in administrative matters consists of cooperation between administrative authorities. For instance, FINMA may exchange information and documents with foreign authorities responsible for financial market supervision and, under certain circumstances, allow them to carry out direct audits of supervised person and entities. Another example is MROS, which may exchange information (including data on individuals such the identity of the beneficial owner of a bank account) with foreign financial intelligence units.

International mutual assistance in criminal matters is governed by the Federal Act on International Mutual Assistance in Criminal Matters (IMAC). Possible mutual assistance measures include the service of documents, the search of private or business premises, the conduct of hearings of witnesses or accused persons and the seizure and handing over of documents (e.g., business records or bank statements), as well as of objects and assets for forfeiture or restitution to the entitled person. In addition, it is possible to extradite persons who are the subject of criminal prosecution or have been convicted. However, Switzerland refuses to extradite its own nationals, without their written consent.

The IMAC also provides a basis for police cooperation. It covers measures that can be undertaken without the use of compulsory procedures, including police questioning of those involved in the proceedings, or the restitution of assets without recourse to compulsory procedures. By contrast, the handing over of criminal judgments or criminal records is expressly excluded.

Switzerland has also adhered to a wide range of bilateral and multilateral treaties in matters of mutual legal assistance in criminal matters. On the European level, the most important instrument is the European Convention of 20 April 1959 on Mutual Assistance in Criminal Matters. Treaty law trumps domestic law and the IMAC is thus only applicable to issues not specifically covered by bilateral or multilateral treaties.

iii Local law considerations

The typical challenge in cross-border investigations relates to the ability of Swiss-based individuals or entities to comply with requests addressed directly to them by foreign authorities, because of several Swiss law constraints, inter alia, the prohibitions of unlawful activities on behalf of a foreign state or the sharing of Swiss industrial or commercial secrets with a foreign recipient. Additionally, Swiss banking secrecy and data protection may prevent the disclosure of data to foreign authorities outside the available mutual legal assistance channels.

Article 271 SCC is known as 'blocking statute' as it forbids the performance of 'official acts' on behalf of a foreign authority on Swiss territory, in the absence of special permission. This provision can have the effect of blocking the collection of Swiss-based evidentiary material or the conducting of interviews in Switzerland if such evidence or interview results are for use in foreign proceedings. Pursuant to case law, it is irrelevant whether the acts are performed on a voluntary or a compelled basis and whether the same information would also be available in a third country and could be produced from there. In general, Swiss-based entities and individuals are thus required to obtain authorisation from the competent administrative body if they intend to disclose personal data to foreign authorities. As an alternative, they may seek a confirmation letter from the Federal Police and Justice Department (FPJD) or another competent government authority declaring that the intended actions do not fall within the scope of the blocking statute. Pursuant to Article 273 SCC, the sharing of Swiss industrial or commercial secrets with a foreign recipient is forbidden. The term 'industrial or commercial secret' is broadly interpreted and includes – irrespective of any contractual or other legal confidentiality obligations – any information of an economic nature which is not evident or publicly available.

Bank–client confidentiality (bank secrecy; Article 47 of the Federal Act on Banks and Savings Banks) strictly limits disclosure of any information about current or former clients of a Swiss bank to third parties. Accordingly, information protected by bank secrecy cannot be produced to a foreign authority on a voluntary basis and outside official channels but might be available on the basis of a request for administrative or mutual legal assistance.

The Federal Act on Data Protection (FDPA), which is currently under revision to align with the EU General Data Protection Regulation, also imposes relevant restrictions for cross-border data transfer that need to be taken into consideration in any given case if personal data is at issue. Under the revised FDPA, which will enter into force on 1 September 2023, personal data (data relating to legal entities are no longer included) may only be disclosed abroad if the Federal Council (the Swiss government) has determined that the legislation of the state concerned or the international body guarantees an adequate level of protection. In the absence of an adequate level of protection, cross-border disclosure of personal data may still be permitted if data protection can be guaranteed in another way (e.g., by standard data protection clauses that the Federal Data Protection and Information Commissioner has previously approved, established or recognised) or if one of the exceptions provided for by law applies (e.g., the data subject has given their express consent or the disclosure is necessary for the establishment, exercise or enforcement of legal claims before a court or another competent foreign authority). Otherwise, the redaction of sensitive information (e.g., concerning third parties such as employees) might be required prior to the delivery to a foreign addressee.

Under Swiss law, attorneys, including their respective auxiliary personnel, are prohibited from disclosing information obtained in the course of their professional activity (Article 321 SCC and Article 13 of the Federal Act on the Freedom of Movement for Attorneys). Attorney–client privilege applies irrespective of the location of a legal document or information, and,

accordingly, attorneys as well as their clients or, in certain cases, even third parties cannot be compelled to produce privileged material. However, pursuant to the SCPC and a recent decision by the Swiss Federal Court,[7] non-Swiss, EU, EFTA or UK attorneys cannot invoke attorney–client privilege, unless their client is the target of a criminal investigation. In addition, Swiss attorney–client privilege is subject to the following limitations. First, it applies only to activities considered as 'typical' of a lawyer's work – such as providing legal advice, drafting legal documents and assisting and representing clients in proceedings before judicial and administrative authorities, as opposed to 'atypical' activities, where the commercial element predominates, such as acting as a member of a board of directors, an asset manager or a financial intermediary. In a recent decision, the FSC found that the examination and investigation, respectively, of the facts of a case, and the determination of possible legal consequences in this context are, in principle, considered to fall within the scope of the typical activities of a lawyer.[8] Second, the attorney–client privilege currently applies only to external counsel; in-house counsel cannot avail themselves of this privilege.

V YEAR IN REVIEW

The Swiss justice system has recently been dealing with two important cases in the field of corporate criminal law. In December 2021, a company was found guilty under Article 102 SCC by a Swiss court for the very first time. The company concerned, a Swiss bank that has since been dissolved, was found guilty in a first-instance ruling by the Swiss Federal Criminal Court (FCC) of having failed to take all necessary and reasonable organisational measures to prevent aggravated money laundering by a de facto corporate body member. The FCC held that the bank had failed to guarantee an independent compliance department, to provide effective independent monitoring of high-risk business relationships and to avoid conflicts of interest. The bank was ordered to pay a fine of 3.5 million Swiss francs and a compensation claim of 7.2 million Swiss francs. The bank has appealed the first instance decision, and the appeal hearing will be held this summer. Further, in June 2022 a major Swiss bank was found guilty in a first instance ruling by the FCC for failing to take all necessary and reasonable organisational measures to prevent aggravated money laundering offences in connection with a Bulgarian drug cartel by a former relationship manager. The FCC found that during the relevant period, the bank had a deficient organisation, both in terms of managing customer relationships with the drug cartel and monitoring the implementation of anti-money laundering rules by the hierarchy, legal department and compliance department. The bank was sentenced to a fine of 2 million Swiss francs and ordered to pay a compensation claim of 19 million Swiss francs. The written judgment in this case has not yet been published. The FCC's decision has been appealed by the bank.

Furthermore, in April 2023, the OAG convicted a Swiss company that produces security inks for currencies and sensitive documents for failing to take adequate and reasonable organisational measures to prevent employees from bribing foreign public officials. The conviction was by way of a summary penalty order which the company concerned did not challenge and therefore the matter was not taken to trial. Upon explicit request of the company concerned, the OAG issued a letter along with the summary penalty order confirming that: (1) the responsibility under Article 102 SCC does not mean that the company concerned

7 Decision by the FSC of 22 June 2021 (1B_333/2020).

8 Decision by the FSC of 2 March 2023 (1B_509/2022).

itself committed the underlying offences, nor that it wanted or accepted them and that the company concerned has since voluntarily and fully remedied the organisational deficiency; (2) the company concerned fully cooperated with the OAG and all criminal investigations are closed; (3) Switzerland lacks the possibility of resolving corporate criminal cases through deferred prosecution agreements or similar instrument that avoid (or defer) a criminal conviction and that, therefore, the issuing of a summary penalty order is the most appropriate form of procedural settlement resolution under Swiss criminal procedural law of a case against a company found guilty of a violation of Article 102 SCC; and (4) the summary penalty order does not imply any admission of guilt on the part of the company concerned, and no judgment has been rendered by a court on the facts alleged against the company concerned. The issuance of the side letter is an important new development, since such a letter may help to minimise potential collateral damages resulting from a criminal conviction.

In view of Russia's ongoing military aggression in Ukraine, Switzerland has since late February 2022 gradually adopted the sanctions imposed by the EU against Russia and Belarus. For the most part, Switzerland has adopted the entirety of the EU packages of sanctions. Furthermore, in March 2022, the Federal Office of Justice, in its capacity as supervisory authority, took the decision to suspend mutual legal assistance with Russia for the time being. Accordingly, the FCC issued several decisions in which it decided to reject pending and future Russian requests for mutual legal assistance. Subsequently, the FSC clarified that in the case of assets seized in execution of Russian requests for mutual legal assistance made before 24 February 2022, the seizures must be maintained, but the corresponding mutual legal assistance proceedings must be suspended. In addition, the Federal Council decided in September 2022 to suspend all forms of tax-related exchange of information with Russia for the time being based on the public policy (*ordre public*) reservation of the Convention on Mutual Administrative Assistance in Tax Matters. Finally, the OAG set up an internal task force in connection with the situation in Ukraine whose primary aim is to investigate possible criminal conduct in the field of international criminal and sanctions law, but may, however, also analyse white-collar crime offences in this regard. According to the SECO, 29 administrative penalty proceedings have been initiated so far due to possible violations concerning the sanctions against Russia in the context of the situation in Ukraine and against Belarus, and Switzerland has frozen 7.5 billion Swiss francs in this context.

VI CONCLUSIONS AND OUTLOOK

Corporate criminal law has gained considerable significance in Switzerland and investigations into Swiss and foreign companies, in particular for money laundering and bribery, are on the rise. While proceedings have so far generally been concluded by way of 'negotiated' summary penalty orders issued by the OAG, Swiss Courts, for the first time since the introduction of corporate criminal liability in Swiss Criminal law in 2003, handed down convictions in major white-collar crime cases in 2021 and 2022. However, even if these decisions (*nota bene*: so far, the written verdict has been published only in one of the two court cases) clarify some of the outstanding issues, there remain still major unresolved legal questions in corporate criminal law. Also, it remains to be seen whether these two cases will lead to an increase in corporate criminal cases being brought to trial before courts in the future, or whether prosecution authorities will hold on to what seems to be their preferred mechanism to settle investigations against companies, which consists of a combination of summary penalty order and abbreviated proceedings.

In its annual report of 2022, the OAG pointed out that Swiss criminal law lacks the possibility of out-of court settlements in which the prosecutor refrains from filing an indictment provided the company concerned fulfils certain obligations. In the OAG's view, current Swiss legislation would therefore not provide an incentive for companies to cooperate with law enforcement authorities because of the high risk of a criminal conviction, which can cause significant damage to a company's reputation and lead to substantial collateral damage, including the loss of regulatory licences granted by foreign authorities. This risk, in practice, would discourage many companies from cooperating or making a voluntary self-disclosure. The OAG thus called on the Swiss parliament to introduce a general framework for cooperating in criminal proceedings through the introduction of deferred prosecution agreements as known in Anglo-Saxon systems. Finally, the revised Swiss Criminal Procedure Code is expected to come into force in January 2024, which includes, among other things, amendments with regard to the sealing procedure.