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Editor
Nicolas Bourtin

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Editor
Nicolas Bourtin

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PREFACE

Observers perceived a deprioritisation of white-collar criminal prosecutions in the United States during the Trump administration and the adoption of policies that were arguably more favourable to corporate defendants: (1) a May 2018 'anti-piling on' policy, (2) an October 2018 policy concerning the selection of monitors, (3) an October 2019 'inability to pay' policy, and (4) a February 2017 policy for the evaluation of corporate compliance programmes, which was further revised in April 2019 and June 2020. These policies, however, while arguably providing transparency, did not mark a foundational change in the US approach to resolving corporate investigations. For example, the US Department of Justice (DOJ) continued its focus on individual culpability in corporate prosecutions – which was formally announced in the September 2015 'Yates Memorandum'. In November 2018, revisions to the Yates Memorandum relaxed the requirements to receive cooperation credit, allowing partial credit for good-faith efforts by a company to identify individuals 'substantially involved', even if the company is unable to identify 'all relevant facts' about individual misconduct.

As the United States emerges from the covid-19 pandemic, the new Biden administration faces a freshly awakened and potentially permanently changed economy. The Biden administration is widely anticipated to reprioritise white-collar criminal prosecutions and usher in a period of increased enforcement and harsher penalties for foreign corruption, healthcare, consumer and environmental fraud, tax evasion and price-fixing, export controls and other trade sanctions, economic espionage, and cybercrime. US and non-US corporations alike will continue to face increasing scrutiny by US authorities. And while many corporate criminal investigations have been resolved through deferred or non-prosecution agreements, the DOJ has increasingly sought and obtained guilty pleas from corporate defendants, often in conjunction with such agreements.

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 11th edition, this publication covers 20 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 2021

Chapter 19

SWITZERLAND

Bernhard Lötscher and Aline Wey Speirs[1]

I INTRODUCTION

Owing to Switzerland's political structure as a confederation of – in many respects – sovereign states (cantons), the competence to investigate and prosecute criminal conduct in general, including unlawful corporate conduct, may lie with cantonal or with federal authorities, depending on the specific circumstances of the case.

The Criminal Procedure Code (CPC)[2] stipulates that the cantonal criminal justice authorities shall prosecute and judge offences under federal law, unless a statutory exception applies.[3] The exceptions to this rule, however, are many. The federal authorities typically have jurisdiction in matters concerning the interests of the confederation, such as:

a offences committed against persons protected by international law;
b offences committed against federal magistrates;[4]
c acts infringing Switzerland's sovereignty, neutrality or economic interests;
d offences that pose a severe threat to the public;[5] or
e offences that threaten the proper functioning of the federal political system.[6]

Of greater practical significance, however, is the reservation of jurisdiction to the federal authorities in economic crime matters when a substantial part of the unlawful conduct has occurred abroad or in two or several cantons with no clear local focus of the criminal activity. Such matters may include the forming of a criminal organisation, money laundering, terrorist financing and corruption, and general offences against property interests.[7] Similarly, insider trading and manipulation of the market price of securities admitted to trading in Switzerland are also subject to federal jurisdiction.[8]

The authority generally competent at the federal level to investigate and prosecute criminal conduct is the Office of the Attorney General (OAG). Matters in the field of

1 Bernhard Lötscher is a partner at CMS von Erlach Partners Ltd and Aline Wey Speirs is a partner at Altenburger Ltd legal + tax.
2 Swiss Criminal Procedure Code (CPC, SR 312.1).
3 See: Article 22 CPC. The provision roots in Article 123, Paragraph 2 of the Swiss Constitution, which directs that the cantons are responsible for the organisation of the courts, the administration of justice in criminal cases as well as for the execution of penalties and measures, unless the law provides otherwise.
4 e.g., members of the federal government, the federal parliament or the Federal Supreme Court.
5 e.g., offences involving the use of explosives, toxic gas or radioactive substances.
6 Article 23 CPC.
7 Article 24 CPC.
8 Articles 154 to 156 of the Financial Market Infrastructure Act (SR 958.1).

economic crime are being handled by a dedicated division. Likewise, cantons with major financial centres, such as Basle, Ticino, Geneva and Zurich, have special units in charge of investigating and prosecuting economic crime.

The powers of investigation by prosecutors at both federal and cantonal levels are defined by federal law, namely the CPC. They comprise the range of compulsory measures typically available to public prosecutors to secure evidence, ensure that persons attend the proceedings and guarantee execution of the final judgment,[9] in particular summons, tracing of persons and property, remand and preventive detention, searches of records, persons and premises (including dawn raids), seizure and confiscation, DNA analysis and covert surveillance (including surveillance of post and telecommunications, monitoring bank transactions and undercover investigations).

Offences in the financial sector may also trigger regulatory action by the Financial Market Supervisory Authority (FINMA)[10] for contravention of financial markets laws, such as the Anti-Money Laundering Act (AMLA),[11] the Financial Market Infrastructure Act,[12] the Financial Institutions Act,[13] the Financial Services Act[14] and the Banking Act.[15]

Investigations of suspected violations of regulatory laws are often assigned to independent examiners (typically a law firm or an audit firm with expertise in the field at issue); however, these examiners act under the auspices of FINMA. While neither the examiners nor FINMA agents have the power to carry out dawn raids or to search the premises of a financial institution, the law directs the parties subject to an investigation to fully cooperate with FINMA, to allow examiners access to premises and to provide them with all the information and documents that they may require to fulfil their tasks.[16] Thus, in practice, examiners and investigating agents of FINMA have extensive investigative powers.

At the initial stage of regulatory intervention, it is not uncommon that FINMA will order an institution to conduct an internal investigation (mostly assisted by external legal and forensic experts) and to furnish a written report on the findings so as to enable FINMA to make an early assessment of the matter prior to assigning its own resources to the case.

FINMA and the competent federal or cantonal prosecution authorities may exchange information, and they are directed by the law to coordinate their investigations.[17] Moreover, if FINMA obtains knowledge of felonies and misdemeanours pursuant to the Criminal Code (CC)[18] or of offences against penal provisions of financial market acts, it is under a duty to report to the competent prosecution authorities.[19]

9 Article 196 CPC.

10 The scope of regulatory jurisdiction and the powers of FINMA are specified in the Financial Market Supervision Act (FINMASA, SR 956.1).

11 Federal Act on Combating Money Laundering and Terrorist Financing (SR 955.0) (AMLA).

12 Federal Act on Financial Market Infrastructures and Market Conduct in Securities and Derivatives Trading (SR 958.1) (FinMIA).

13 Federal Act on Financial Institutions (SR 954.1) (FinIA).

14 Federal Act on Financial Services (SR 950.1).

15 Federal Act on Banks and Saving Banks (SR 952.0).

16 Articles 29 and 36 FINMASA.

17 Article 38, Paragraphs 1 and 2 FINMASA.

18 Swiss Criminal Code (CC, SR 311.0).

19 Article 38, Paragraph 3 FINMASA. Violations of the criminal provisions of the financial market acts are generally prosecuted by the Federal Department of Finance or, in cases where a matter may be subject to a custodial sentence, by federal or cantonal prosecutors; cf. Article 50 FINMASA.

FINMA has no powers to impose penal sanctions such as fines. However, it may respond to contraventions of regulatory rules with severe administrative measures.[20]

Suspected unlawful restraints of competition pursuant to the Cartel Act (CartA)[21] are investigated by the secretariat of the Competition Commission (COMCO). The secretariat has far-reaching investigative powers. It may, without prior court approval, order production of documents and information, carry out witness hearings, interview managers and staff of enterprises believed to be involved in a cartel or other restraints of competition, conduct dawn raids, demand expert reports and seize evidence.[22]

In line with international law protecting civil rights,[23] Swiss law recognises that no one must be held to incriminate himself or herself (*nemo tenetur se ipsum accusare*). The CPC expressly confirms this principle, specifying that the accused party is entitled to refuse to make a statement or cooperate in criminal proceedings.[24] This does not apply, however, in administrative investigations, such as those conducted by FINMA or COMCO.[25] Moreover, the Federal Supreme Court in a recent verdict clarified that COMCO can call former board members as witnesses and that the enterprise acting through its current board members may not invoke the *nemo tenetur* principle.[26]

What is more, in the context of criminal investigations in a corporate context, the *nemo tenetur* principle is subject to important limitations.

Swiss criminal law is characterised by the premise that an enterprise, subject to certain exceptions, cannot be held criminally liable.[27] The investigation and prosecution of unlawful conduct is thus often directed against employees only, so that the enterprise, not being in a position to make use of the defence rights of an accused party, cannot refuse to cooperate with the prosecuting authorities. Where undertakings are subject themselves to criminal liability,[28] they enjoy the same procedural guarantees as Swiss law would grant to any individual. Because the procedural rules make a distinction between the accused enterprise and those directors, officers and employees who can be called upon by the prosecuting authorities as information persons or witnesses, the options for enterprises to prevent disclosure of internal matters is nevertheless limited. Also, cooperation may be condoned by mitigating sanctions

20 Article 31 et seq. FINMASA.

21 Federal Act on Cartels and Other Restraints of Competition (SR 251).

22 See, in particular, Articles 40 and 42 of the Cartel Act (CartA).

23 Article 14, Paragraph 3(g) of the International Covenant on Civil and Political Rights and Article 6 of the European Convention of Human Rights.

24 Article 113, Paragraph 1 CPC.

25 In conjunction with FINMA and Competition Commission (COMCO) investigations, the targeted party is subject to a comprehensive duty to cooperate (Articles 29 and 36 FINMASA and Article 40 CartA).

26 Federal Supreme Court, judgment dated 8 March 2021, 2C_383/2020.

27 The principle known as *societas non delinquere potest* was abolished in Swiss criminal law only on 1 October 2003, when Article 102 CC on corporate criminal liability entered into force.

28 Pursuant to Article 102, Paragraph 2 CC, undertakings may be held criminally liable for participation in a criminal organisation (Article 260 *ter* CC), financing of terrorism (Article 260 *quinquies* CC), money laundering (Article 305 *bis* CC) and bribery (Articles 322 *ter*, 322 *quinquies*, 322 *septies*, Paragraph 1 or 322 *octies* CC).

or by not sanctioning the undertaking at all.[29] Finally, and importantly, refusing to cooperate is rarely beneficial: a protracted investigation persistently absorbs management capacity, often disrupts business relationships, erodes reputation and creates legal and financial uncertainties.

II CONDUCT

i Self-reporting

As mentioned in Section I, Swiss law recognises the *nemo tenetur* principle. This rule also applies to legal entities.

For undertakings active in the field of financial intermediation[30] and legal entities that trade in goods commercially and accept cash in so doing, Swiss anti-money laundering legislation provides for an important exception: they must report suspected money laundering or connections to terrorist financing or criminal organisations to the Money Laundering Reporting Office of Switzerland (MROS).[31] This reporting duty also exists in cases where the undertaking itself is involved in the money laundering transaction. Non-compliance may entail a fine and, more importantly, regulatory sanctions.

Within the ambit of administrative (regulatory) law, the Financial Market Supervision Act (FINMASA) requires supervised persons and entities and their auditors to immediately report to FINMA any incident that is of substantial importance to the supervision.[32] The incidents referred to by the FINMASA comprise significant cases of unlawful conduct, including criminal acts such as the embezzlement of clients' assets, disloyalty, criminal mismanagement, money laundering or large-scale tax offences.

Although Swiss cartel law does not stipulate a self-reporting duty, it strongly encourages undertakings to report unlawful restraints by providing for leniency, which ranges from a mere reduction to a full waiver of (administrative) sanction payments.[33] Against the background that sanction payments under the CartA may amount to 10 per cent of the turnover achieved in Switzerland in the preceding three financial years, the incentive to report is a strong one. Indeed, leniency applications (which necessarily require admission of own wrongdoing) are a common phenomenon in cartel law investigations. The criteria for assessing sanctions, and likewise the conditions and procedures for obtaining partial or complete immunity from sanctions, are set out in detail in an ordinance of the Swiss government, so that applicants may determine with a reasonable degree of certainty if and to what extent they may profit from self-reporting and cooperation.[34]

29 Article 47 et seq. CC.

30 Financial intermediaries include banks, investment companies, insurance companies, securities traders, central counterparties and securities depositories, providers of payment services, casinos and asset managers.

31 Article 9 of the Anti-Money Laundering Act. The Money Laundering Reporting Office of Switzerland is a member of the Egmont Group, which is an international association of financial intelligence units, whose objective is to foster a secure, prompt and legally admissible exchange of information to combat money laundering and terrorist financing.

32 Article 29, Paragraph 2 FINMASA.

33 Article 49a, Paragraph 2 CartA.

34 See: Ordinance on Sanctions Imposed for Unlawful Restraints of Competition (Cartel Act Sanctions Ordinance, SR 251.5).

ii Internal investigations

The need to tackle suspected or actual irregularities by way of an internal investigation typically originates from diligence duties imposed by civil and administrative (regulatory) law.

As already noted, undertakings subject to supervision by FINMA are obliged to report incidents that are material from a regulatory perspective. If a matter that comes to the attention of a supervised undertaking potentially meets that criterion, the undertaking will have to clarify the pertinent facts and assess them in respect of the need to take action, including, besides reporting to FINMA, possible measures to restore compliance.

At the civil law level, an internal investigation may become imperative for board members and senior managers of an undertaking to fulfil their duty to ascertain compliance with applicable governance standards. The Swiss Code of Obligations[35] provides that members of the board and others engaged in managing an entity's business must perform their duties with all due diligence and safeguard the interests of the undertaking in good faith.[36] Culpable ignorance of material misconduct may lead to personal liability.[37]

An aspect to be given due consideration in the context of internal investigations is the protection of employees' rights. Though it is widely recognised in Swiss doctrine and practice that communications of employees that relate to the performance of their work may be searched without their knowledge or specific consent if the prevailing interests of the employer so require, the principle of proportionality and the privacy rights of the employees must be respected.[38] Hence, any analysis of the contents of correspondence should be preceded by a process that permits the separation of potentially relevant communications from those that are unlikely to require review. Searching communications is also relevant under data protection law.[39] In particular, the analysis of data for communication patterns and the disclosure of personal data to third parties may be unlawful unless justified by an overriding interest of the employer.[40]

As a result of their general obligation of loyalty to their employers,[41] employees must cooperate in an internal investigation, inter alia, by undergoing interrogation, unless they would thus incriminate or expose themselves to civil (or criminal) liability. To enable employees to adequately exercise their rights and – not least – to create an atmosphere of mutual confidence promoting their willingness to cooperate, undertakings should, and in practice regularly do, encourage employees to retain independent counsel. Related costs are typically covered by the employer.

Confidentiality is key to preserving freedom of action with a view to responding to the findings of an internal investigation. This applies even in cases where the undertaking may ultimately have to share its findings with the (regulatory) authorities or proceed to voluntary self-reporting. To ensure confidentiality, undertakings regularly retain law firms

35 Federal Act on the Amendment of the Swiss Civil Code, Part Five: Code of Obligations (CO, SR 220).
36 Article 717 CO.
37 Article 754 CO.
38 Articles 328 and 328b CO.
39 Federal Act on Data Protection (FADP, SR 235.1).
40 Article 12 et seq. FADP.
41 Article 321a, Paragraph 1 CO.

to lead internal investigations.[42] If the investigation is embedded in the law firm's advisory or legal representation mandate, attorney–client privilege may protect certain work product, such as minutes of interviews, meeting notes and reports.

Swiss case law underlines the importance of placing an internal investigation into the wider context of specific attorney work if confidentiality is a concern.[43] Undertakings cannot simply 'outsource' fact-finding or investigation record-keeping to law firms to preserve privilege. Attorney–client privilege applies comprehensively only when the collation of facts, their interpretation and legal analysis are inseparable elements of one and the same comprehensive (advisory or defence) mandate.

iii Whistle-blowers

After seven years of legislative work, the plan to introduce to existing laws specific provisions on whistle-blowing in the private sector failed. In spring 2020, the Swiss parliament rejected the proposed legislation.

Whistle-blowing in the private sector will, thus, continue to be governed by the general rules and principles of employment, company, criminal and data protection law. An employee must raise suspected or known irregularities with his or her employer according to applicable internal rules (if any) prior to releasing any information to external bodies, thereby incurring the risk of retaliation; otherwise, the employee may be in breach of contractual loyalty and confidentiality obligations towards the employer, and may face criminal liability. Whether disclosure to authorities or to the public is legal continues to be decided by the courts on a case-by-case basis; an incalculable risk for potential whistle-blowers, and a situation that is at odds with both Organisation for Economic Co-operation and Development (OECD) guidelines and the policy framework adopted by the EU for the protection of whistle-blowers.[44]

As, in effect, Swiss law does not require undertakings to set up a specific internal whistle-blowing unit to which employees may report confidentially, nevertheless, in line with international guidelines and best practice, many corporations have introduced a mechanism or designated an independent body to which suspected misconduct can be reported. Studies show that the number of companies having introduced a reporting point has remained unchanged during the past few years (about 11 per cent).[45] Considerable differences exist between large international corporations where the majority of the designated internal or external reporting points are to be found (71 per cent) and smaller to medium-sized enterprises where such reporting points are still rare (less than 10 per cent). According to representative studies, the key reasons for not introducing a reporting point are the absence of a mandatory regulation and a general scepticism as to the effectiveness or advantage to the company itself.

The case law of the Federal Supreme Court provides guidance, in particular with respect to the requirements that employees must meet before reporting to the public.[46]

42 Swiss law does not recognise a legal privilege of in-house counsels and legal advisers who are not members of the Bar Association, even if the work they perform may qualify as legal advice.

43 Federal Supreme Court, judgment of 20 September 2016, 1B_85/2016; Federal Criminal Court, judgment of 4 September 2017, BE.2017.2.

44 Directive EU 2019/1937 of 23 October 2019 on the protection of persons who report breaches of Union law.

45 See: HTW Chur, 'Whistleblowing Report 2019', https://whistleblowingreport.ch.

46 See: DFT 127 III 310, 30 March 2011, consid. 5.

First, employees are bound not to disclose to the public any information concerning their employer and its business that is not in the public domain. Generally, employees must remain silent even about offences committed within the employer's domain unless there is a public interest in the disclosure that overrides the employer's interest in keeping unlawful conduct confidential. The proportionality test requires that an employee informs the employer before notifying the authorities and, further, that employees may report to the public only if the notified authorities fail to take action.

The public sector is ahead of the private sector regarding protection of whistle-blowers. Since 2011, employees of the federal government must report criminal conduct to the penal authorities[47] and may inform the Swiss Federal Audit Office about suspected irregularities.[48] In 2017, the federal government introduced an official and secured digital platform where public employees or private persons may report suspected misconduct anonymously.[49] Since the introduction of the platform, the number of reports has increased significantly.[50]

The Swiss Federal Police (Fedpol) is operating a web-based platform for reporting suspected corruption.[51] The platform safeguards the anonymity of the person reporting and stores neither the IP addresses, time nor the metadata that may allow identification of the person or of the computer used to make the report. Fedpol reviews each report for criminal relevance before forwarding it to the competent internal office, external agency (e.g., cantonal police) or, in the case of irregularities within the federal administrative units, to the Federal Audit Office for follow-up action.[52]

Non-government organisations, such as Transparency International, promote the importance of whistle-blowing in the fight against commercial crime and corruption, and advocate ensuring that whistle-blowers are afforded proper protection and disclosure opportunities under the law.[53]

In the absence of pertinent legislation, Swiss companies are advised to take guidance on generally accepted practices when shaping their own whistle-blowing policies. To encourage internal reporting, companies should, in particular: (1) designate an independent whistle-blowing unit; (2) specify rules of procedure to follow up on reported irregularities; (3) prohibit dismissal or disadvantages because of reports; and (4) allow for anonymous reports.

III ENFORCEMENT

i Corporate liability

Criminal law provides for a general ancillary liability of an undertaking for felonies or misdemeanours committed in its business domain if it is not possible to attribute the wrongful act to any specific individual perpetrator because of inadequate organisation by the undertaking.[54] Moreover, an undertaking may be subject to criminal liability, irrespective of

47 Article 22a Federal Act on Personnel (BPG, SR 172.220.1).

48 See: www.efk.admin.ch/de/whistleblowing-d.html.

49 See: www.whistleblowing.admin.ch.

50 From around 70 reports in previous years to 148 reports in 2019.

51 See: www.fightingcorruption.ch.

52 See: www.fedpol.admin.ch/fedpol/en/home/kriminalitaet/korruption.html.

53 See: *International Principles for Whistle-blower Legislation* published by Transparency International in 2013; https://transparency.ch/wp-content/uploads/2017/08/2013_WhistleblowerPrinciples_EN.pdf.

54 Article 102, Paragraph 1 CC.

the liability of any individual perpetrator, for participation in a criminal organisation,[55] the financing of terrorism,[56] money laundering[57] or bribery[58] if it is found to have failed to take all reasonable organisational measures required to prevent an offence of this kind.[59]

The law on corporate criminal liability thus sanctions organisational deficiencies rather than the criminal conduct (for which the individual perpetrator remains responsible), thereby creating a strong incentive for undertakings to establish sound compliance and government standards.

Swiss law is rooted in the principle that all acts – including unlawful conduct – of board members or senior managers committed in their official capacity are deemed to be acts of the undertaking itself and may therefore expose the undertaking to civil liability.[60] Likewise, an undertaking is subject to civil liability for any loss resulting from acts of employees unless it proves that it has taken all precautionary measures required in the circumstances to prevent the loss concerned.[61] Non-compliance with statutory duties by members of the board or senior managers (including the duty to ascertain adequate organisation and effective overall supervision regarding compliance with the law, the articles of association, operational regulations and directives) may also trigger the personal civil liability of board members.[62]

ii Penalties

Undertakings may be fined up to 5 million Swiss francs for criminal conduct that occurs in their domain.[63] Moreover, assets that have been acquired through, or that are intended to be used in, the commission of a criminal offence (e.g., bribes) are subject to disgorgement.[64]

Contraventions of regulatory rules in the financial sector are primarily sanctioned by measures aiming to restore compliance with the law to protect either the public or the good functioning of financial markets. The array of instruments available to FINMA comprises corrective measures such as cease-and-desist orders, declaratory rulings, disqualification of the individuals responsible from acting in a management capacity, trading in financial instruments or providing advisory services at a financial institution, publication of supervisory rulings, confiscation of profit made through a serious violation of supervisory provisions, revocation of licence, withdrawal of recognition or cancellation of registration and compulsory dissolution.[65] Anyone who wilfully disregards licensing, recognition or registration requirements stipulated in financial markets legislation or wilfully provides wrong information to FINMA, auditors or supervisory or self-regulating organisations is liable to a custodial sentence of up to three years or a monetary penalty. Negligent conduct may be fined by up to 250,000 francs. Non-compliance with FINMA rulings is subject to a fine of

55 Article 260 *ter* CC.
56 Article 260 *quinquies* CC.
57 Article 305 *bis* CC.
58 Article 322 *ter*, 322 *quinquies*, 322 *septies*, Paragraph 1 or 322 *octies* CC.
59 Article 102, Paragraph 2 CC.
60 Article 55, Paragraph 2 Civil Code.
61 Article 55, Paragraph 1 CO.
62 Article 754 CO.
63 Article 102 CC.
64 Article 70 et seq. CC.
65 Article 31 et seq. FINMASA.

up to 100,000 francs.[66] In addition, financial market laws provide for (in some instances severe) sanctions in the event of a breach of rules of proper conduct, reporting, notification, cooperation and record-keeping duties.[67]

COMCO may sanction undertakings that have participated in a cartel or unlawful vertical restraints, or that have abused their dominant position in the market, by charging up to 10 per cent of the turnover achieved in Switzerland in the preceding three financial years. The same sanction may be imposed by COMCO on undertakings that breach an amicable settlement made with, or a final and non-appealable ruling issued by, COMCO or an appellate body.[68] In the event of a breach in the context of merger control matters, COMCO may charge up to 1 million francs or, in the case of repeated non-compliance, up to 10 per cent of the combined turnover that the undertakings concerned have achieved in Switzerland.[69] Undertakings that fail to fulfil their obligation to provide information or produce documents to COMCO are subject to a charge of up to 100,000 francs.[70] In addition, COMCO may fine individuals up to 100,000 francs.[71]

iii Compliance programmes

The existence of an adequate compliance programme is a key defence to corporate criminal liability. As noted above, Swiss law holds undertakings criminally liable not for offences committed by individuals within their domain but for the failure to take all organisational measures required to prevent such offences. Among the measures required, compliance programmes have a pivotal role.[72]

From a regulatory perspective, compliance policies are an indispensable element of the mandatory internal control system of undertakings supervised by FINMA. Failure to establish a compliance programme constitutes a breach of the regulatory duty to ensure adequate organisation and may thus entail regulatory sanctions.[73]

In the area of competition law, the existence of compliance programmes to prevent contraventions of the CartA may provide a decisive argument to shield members of the governing bodies of an undertaking involved in unlawful conduct from personal criminal liability under Articles 54 and 55 CartA.

Valuable guidance for establishing a compliance programme in accordance with standards accepted as adequate by Swiss authorities may be found in ISO 19600 on compliance management systems, ISO 31000 on risk management and ISO 37001 on anti-bribery systems.[74]

66 Article 44 et seq. FINMASA.

67 Article 147 et seq. FinMIA, Article 69 et seq. FinIA and Article 89 et seq. of the Financial Services Act.

68 Articles 49 and 50 CartA.

69 Article 51 CartA.

70 Article 52 CartA.

71 Article 54 et seq. CartA.

72 Article 102, Paragraph 2 CC.

73 See: FINMA Circular 2017/1 'Corporate governance – banks', note 6.

74 See also: OECD (2014), *Risk Management and Corporate Governance*, Corporate Governance, OECD Publishing, http://dx.doi.org/10.1787/9789264208636-en.

iv Prosecution of individuals

Criminal law primarily addresses the conduct of individual perpetrators. Liability of undertakings is basically of an accessory nature only. Accordingly, criminal prosecution inevitably means prosecution of individuals, also in a corporate crime context.

To enhance the preventive effect of enforcement in the financial sector, FINMA has since 2014 stepped up its action against individuals for suspected serious breaches of supervisory law.[75] Consequently, action against individuals is also a common feature of regulatory proceedings.[76]

Coordination of defence strategies and arguments between the undertaking and a targeted employee is often delicate as it may be perceived as collusion. In penal matters, supporting the defence of a suspected person by sharing information relating to the investigation, non-disclosure of relevant evidence, incomplete or misleading fact statements or the like may amount to unlawful assistance to evade prosecution.[77] Furthermore, prosecuting authorities may, and often do, impose a duty of confidentiality on witnesses.[78]

Ideally, the undertaking therefore limits interaction with the targeted employee to obtaining information from him or her (or the employee's counsel), whereas it cannot keep the employee apprised of its own strategies, actions and communications with the authorities.

During an investigation, an employee's contract should not be terminated. For as long as the employment relationship continues, the undertaking has a handle on the employee to assert compliance with directives and instructions and loyal safeguarding of the undertaking's interests,[79] which may include cooperation in fact finding and reporting on developments of concern to the employer.

While the undertaking may consider releasing the employee from his or her work pending the investigation (garden leave) for reputational reasons, or to avoid undue interference, it should not take disciplinary measures prior to completion of the investigation. Also, when considering any disciplinary measures, the undertaking must apply principles of fair process; the safeguarding of an employee's personal rights (including the right to be heard) is mandatory.[80] Regularly, undertakings concerned about criminal or administrative proceedings arrange for independent legal counsel to support the employee under investigation and sustain the resulting cost. As a rule, legal fees are paid by the employee only if he or she acted manifestly against internal regulations, instructions or statutory law.

75 FINMA guidelines on enforcement policy of 25 September 2014.

76 See: https://www.finma.ch/en/documentation/finma-publications/kennzahlen-und-statistiken/statistiken/enforcement/.

77 Article 305 CC.

78 Article 165 CPC.

79 Articles 321a and 321d CO.

80 See: Article 328, Paragraph 1 CO.

IV INTERNATIONAL

i Extraterritorial jurisdiction

Switzerland imposes its laws and jurisdiction on undertakings (foreign or domestic) for conduct that took place outside Switzerland in several areas. This extraterritorial reach is often in line with obligations in international treaties and bodies to which Switzerland is a party, such as the United Nations, the European Convention on Human Rights and the OECD, and aims to safeguard against the infringement of human rights by corporations.[81]

In the public law domain, the Act against Unfair Competition,[82] the CartA, the Data Protection Act and the Public Procurement Act[83] have extraterritorial reach. The competition law, for example, applies in all matters that have an unfair impact on the Swiss market irrespective of whether the infringing conduct took place within or outside Switzerland (effects doctrine).[84] Similarly, competition law offences that have an effect in Switzerland can be investigated and sanctioned by COMCO even if they took place abroad.

Criminal law follows the principle of territoriality but extends its reach with respect to certain offences. For example, Article 322 *septies* CC declares it punishable to offer foreign officials and, respectively, for foreign officials to request or accept undue advantages. Article 322 *octies* CC on bribery in the private sector also applies to employees, agents, etc. of undertakings abroad.

A controversial initiative seeking to extend liability of Swiss undertakings to the conduct of controlled entities abroad, and to introduce mandatory governance standards based on the United Nations Guiding Principles on Business and Human Rights, narrowly lost the public vote in 2020.[85] New legislation passed by Parliament as a 'counterproposal to the initiative' is likely to come into effect in August 2021 after the expiry of the referendum deadline. The counterproposal requires undertakings with a balance sheet of at least 20 million francs or sales of at least 40 million francs with at least 500 full-time employees to prepare an annual 'non-financial information' report, namely information on environmental impact, social affairs, human rights and anti-corruption efforts in Switzerland and abroad.[86] Further the legislation imposes a due diligence obligation with respect to conflict minerals and child labour on all companies registered or with headquarters in Switzerland. It requires (1) the establishment of a management system and the definition of a supply chain policy; (2) the identification and assessment of risks in the supply chain; (3) the establishment of a risk management system with concrete measures to minimise the identified risks; and (4) annual reporting. In connection with the due diligence regarding conflict minerals, an audit by an external independent third party is required.[87] In the event of a breach of the aforementioned

81 See: Report of the Swiss Centre of Expertise in Human Rights, 'Extraterritorialität im Bereich Wirtschaft und Menschenrechte', 15 August 2016, www.skmr.ch/cms/upload/pdf/160815_SKMR_Studie_Extraterritorialitaet.pdf.

82 Federal Act Against Unfair Competition (UCA, SR 241).

83 Federal Act on Public Procurement (SR 172.056.1).

84 Articles 3 and 7 UCA.

85 This initiative is known as 'Konzernverantwortungsinitiative'; see: http://konzern-initiative.ch.

86 New Article 964 *quinquies* CO.

87 New Article 964 *sexies* and 964 *septies* CO.

reporting obligations on non-financial information and in the areas of conflict minerals and child labour, the draft law provides that companies can be sanctioned with a fine of up to 100,000 francs.[88]

ii International cooperation

Switzerland cooperates with other countries' government agencies, judiciary or prosecution authorities by way of administrative assistance or judicial assistance.[89] The distinction between these two routes of cooperation is important. The Federal Supreme Court underlined that administrative assistance is limited to cooperation between administrative bodies for administrative purposes only (for example, the enforcement of tax laws), whereas information required for the purposes of criminal prosecution must be sought by way of judicial assistance in criminal matters.[90] Therefore, the rules, and the specific procedural guarantees, of judicial assistance cannot be bypassed via the administrative assistance route.

In criminal matters, Switzerland provides assistance that is not treaty-based under the International Mutual Legal Assistance Act (IMAC).[91] There is no extradition of Swiss nationals against their will, but foreigners can be extradited under applicable international treaties or the IMAC.[92]

FINMA cooperates with foreign supervisory authorities in specific supervisory or enforcement proceedings. The latest statistics (published in 2020)[93] show a steady number of requests for international cooperation (436 in 2016, 457 in 2017, 340 in 2018, 333 in 2019 and 337 in 2020) pertaining mostly to offences of insider trading, market manipulation and breach of reporting duties. On-site supervisory reviews performed by foreign financial market supervisory authorities are on the increase.

COMCO participates in a number of competition authority networks, such as the Competition Committee of the OECD and the International Competition Network. Bilateral and multilateral cooperation agreements exist between Switzerland and the European Union and other countries. The degree of integration allows for an efficient prosecution of anticompetitive cross-border activities.[94]

iii Local law considerations

There are certain criminal provisions that need to be considered in an investigation abroad having a nexus to Switzerland.

The first is the prohibition to carry out activities on behalf of a foreign state on Swiss territory without official approval, where the activities are the responsibility of a public authority or an official pursuant to Article 271 CC. This provision is intended to prevent the exercise of foreign official power on Swiss territory and thus protect state sovereignty. An act attributable to an authority or official is any act that characterises itself as such by its nature and purpose, regardless of whether it was carried out by a person formally holding an official

88 New Article 325 *ter* CC.

89 The Swiss government maintains a comprehensive database on the sources of law and forms relevant in international legal assistance, www.rhf.admin.ch/rhf/de/home/rechtshilfefuehrer/laenderindex.html.

90 Federal Supreme Court judgment dated 28 December 2017, 2C_640/2016.

91 Federal Act on International Mutual Assistance in Criminal Matters (SR 351.1).

92 Article 32 of the International Mutual Legal Assistance Act.

93 See: www.finma.ch/de/durchsetzung/amtshilfe/internationale-amtshilfe/.

94 See: www.weko.admin.ch/weko/en/home/comco/international-cooperation.html.

position. The decisive factor is, therefore, not the individual, but the official character of the conduct. The Federal Supreme Court recently held that the disclosure of client information to US authorities by a Swiss-based asset management company with a view to facilitating the conclusion of a non-prosecution agreement violated Article 271 CC, despite the responsible manager of the company claiming he had not and could not have been aware that he was committing an unlawful act at the time of the relevant conduct.[95] The criminal sanction may also apply to foreign attorneys travelling to Switzerland for the purpose of an investigation[96] and may even cover the remote accessing of information via a Swiss-based server.

The second is the ban on divulging Swiss business secrets to foreign entities and states pursuant to Article 273 CC. A 'Swiss business secret' is any information of commercial value that is not in the public domain outside Switzerland and that typically relates to a business domiciled in Switzerland.[97] It applies also to the intra-group and cross-border disclosure of business secrets from a subsidiary to the parent company. Even the inadvertent cross-border disclosure of facts may constitute a violation of Swiss business secrecy. Further, Article 47 of the Banking Act sanctions the duty on banks to keep private information about their clients and their clients' financial affairs (often referred to as bank secrecy). Financial institutions other than banks are subject to similar confidentiality duties.[98]

Article 162 CC makes it an offence to reveal a business secret that has to be guarded pursuant to a statutory or contractual obligation.

In Swiss law, attorney–client privilege is expressly guaranteed by the Attorneys Act[99] and any breach is sanctioned by criminal law.[100] However, the concept of legal privilege is fairly narrow and does not (yet) encompass legal advice from in-house counsel or external legal experts who are not members of the Swiss Bar.[101] A recent proposal for amendments to the Swiss Code on Civil Procedure contains a new Article 160a, which – if enacted – extends legal privilege to in-house counsel and their team for 'attorney-specific' work performed under the auspices of a person who attained a domestic bar registration or equivalent permit for attorney work.[102]

V YEAR IN REVIEW

The year 2020 proved to be an exceptional one for the OAG. The authority was caught up in organisational mayhem following the resignation of the former Attorney General and a disciplinary investigation by the Supervisory Authority for the Office of the Attorney General of Switzerland, which found that the Attorney General had, inter alia, repeatedly made misleading and untrue statements, violated the OAG's code of conduct on the

95 Federal Supreme Court Decision 6B_804/2018 of 4 December 2018.

96 Spehl/Gruetzner (eds.), *Corporate Internal Investigations*, CH Beck oHG, Munich 2013, Germany, p 360, n 25.

97 id., p 361 n 29.

98 See: Articles 69 FinIA and 147 FinMIA.

99 Article 13 Federal Act on Free Movement of Attorneys (BGFA, SR 935.61).

100 Article 321 CC: the person violating the professional secret may, upon complaint, be liable to a custodial sentence of up to three years or to a monetary penalty.

101 Whether and to what extent foreign lawyers can invoke legal advice or representation privilege widely depends on the rules applying in their own jurisdiction. Switzerland tends to recognise the core elements of foreign privilege rules.

102 See: www.bj.admin.ch/bj/de/home/staat/gesetzgebung/aenderung-zpo.html.

avoidance of conflicts of interest and obstructed the investigation. The office of the Attorney General of Switzerland remains vacant to date. Nevertheless, the OAG was operational in the past year and concluded around 1,000 criminal and mutual assistance proceedings. In 2020, forfeitures and compensation claims amounting to an impressive total of over 500 million francs were secured. Further, the Federal Supreme Court confirmed forfeiture orders in the procedure concerning Czech mining company Mostecka Uhelna Spolecnost (known as MUS) of around 200 million francs relating to money laundering proceedings in Uzbekistan.

On 25 September 2020, the Swiss parliament approved the Convention of the Council of Europe on the Prevention of Terrorism of 16 May 2005 and adopted corresponding implementing legislation, inter alia, enhancing the potential for cooperation between judicial authorities and foreign agencies. New Article 80d *bis* IMAC authorises the transfer of information and evidence prior to hearing the persons concerned in cases of organised crime or terrorist financing; party rights may be exercised only after the fact. New Articles 80d *ter* to 80d *duodecies* IMAC provide a comprehensive set of rules on the employment of joint international investigation teams. In the field of combating money laundering, the MROS is newly permitted to provide assistance to peer organisations in other jurisdictions, including in the absence of a previous suspicious activity report by a Swiss financial intermediary.[103]

The amendments to the IMAC and the AMLA will enter into force on 1 July 2021.

VI CONCLUSIONS AND OUTLOOK

Navigating an undertaking through criminal or administrative investigations remains a challenge:

a Multi-jurisdictional investigations: the potential for cooperation between law enforcement authorities in cases of organised and cross-border crime has been significantly enhanced by the legislation implementing the Council of Europe Convention of the Prevention of Terrorism; the procedural rights of the parties concerned have been severely restricted, in particular as a result of the amendments to the IMAC.

b Attorney–client privilege in connection with internal investigations: case law continues to undermine the protection of attorney work products in internal investigations. The proposed extension of legal privilege to in-house lawyers may bring some relief.

c Protection of whistle-blowers: the proper handling of whistle-blower reports continues to be an unresolved issue. The mutual rights, obligations and duties of individuals on the one hand and undertakings on the other remain uncodified in Switzerland. In the absence of a specific legal framework, companies should seek professional advice on what is currently considered best practice.

103 Article 11a, Paragraphs 2 *bis* and 3 AMLA.

Appendix 1

ABOUT THE AUTHORS

BERNHARD LÖTSCHER

CMS von Erlach Partners Ltd

Bernhard Lötscher's main practice areas are international mutual assistance in administrative, civil and criminal matters, and advising an international corporate clientele on issues of criminal law and investigations. His professional experience also encompasses general contract, banking and financial services law. He is a member of the CMS dispute resolution practice group, the CMS anti-bribery and corruption practice group, and the banking and finance practice group.

Bernhard Lötscher has been a partner at CMS since 2001, heading the firm's white-collar crime team.

ALINE WEY SPEIRS

Altenburger Ltd legal + tax

Aline Wey Speirs is a partner at Altenburger Ltd legal + tax. Her practice focuses on litigation, international commercial arbitration and enforcement law. She advises and represents private and corporate clients at all stages of the dispute resolution process.

Aline Wey Speirs has particular expertise in white-collar crime-related matters and in the securing and tracing of assets. She has represented clients in multi-jurisdictional trust litigations, commercial disputes, bankruptcy and debt collection procedures. In addition, she has broad experience in enforcing judgments and arbitral awards.

CMS VON ERLACH PARTNERS LTD

Dreikönigstrasse 7
8022 Zurich
Switzerland
Tel: +41 44 285 11 11
Fax: +41 44 285 11 22
bernhard.loetscher@cms-vep.com
cms.law

ALTENBURGER LTD LEGAL + TAX

Seestrasse 39
8700 Kusnacht-Zurich
Switzerland
Tel: +41 58 810 22 22
Fax: +41 58 810 22 25
wey@altenburger.ch
www.altenburger.ch

an LBR business

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