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Switzerland: Strategy and defence in corporate criminal liability

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Summary

IN SUMMARY

Switzerland introduced criminal liability of companies on 1 October 2003, which is rather late compared with other countries. There are only a few court rulings on this topic. Currently, there has been only one ruling by the Federal Supreme Court regarding the Swiss Post, which resulted in the company being acquitted. The former private bank Falcon was the first bank ever to be convicted pursuant to article 102, paragraph 2 of the Swiss Criminal Code. In the appeal procedure, the bank was acquitted in June 2023.

DISCUSSION POINTS

- The origin and development of criminal liability of companies in Switzerland
- Facts and figures on criminal liability of companies in Switzerland
- Case law on criminal liability of companies
- Arguments of the defence in the ***Falcon*** case

REFERENCED IN THIS ARTICLE

- Decision of the Federal Supreme Court on the ***Rhine pollution*** case (BGE 113 Ib 60)
- Decision of the Federal Supreme Court on the ***Swiss Post*** case (BGE 142 IV 333)
- Decision of the Criminal Chamber of the Federal Criminal Court on the ***Credit Suisse / Banev*** case (BStGer SK.2020.21, 15 December 2021)
- Decision of the Appeals Chamber of the Federal Criminal Court on the ***Falcon*** case (BStGer CA.2022.12, 30 June 2023)
- Article 102 of the Swiss Criminal Code
- Police crime statistics of the Swiss Federal Statistical Office

INTRODUCTION

In this article, we discuss the introduction of criminal liability of companies in Switzerland and court decisions that have resulted from these criminal law provisions.

HOW CRIMINAL LIABILITY OF COMPANIES EMERGED IN SWITZERLAND

Unlike other countries, Switzerland had no criminal liability of companies for a long time. It was only on 1 October 2003 that the article on criminal liability of companies was implemented in the Swiss Criminal Code (SCC).[1] Until then, the principle of ***societas delinquere non potest***, according to which companies could not be held criminally liable, prevailed.

The trigger for the introduction of the article for criminal liability of companies was an incident in 1986 involving a fire in a chemical warehouse in Basel.[2] Toxic gases were released, and toxic fire-fighting water was poured into the river, causing severe pollution of the river from Basel to Rotterdam. It was not possible for the authorities to deal with what had happened by applying the traditional means of individual criminal law. At the time, only

the firefighters could be held accountable, not the responsible managers of the chemical company.[3] In addition to this incident, another reason for the introduction of criminal liability of companies was the fear of organised crime. The Federal Council came under pressure, which set legislation on criminal liability of companies in motion.[4]

What Are The Regulations Governing Criminal Liability Of Companies In Switzerland?

Criminal Liability Under Article 102 Of The SCC

The criminal liability of companies is governed by article 102 of the SCC. The law makes a distinction depending on the offence committed within the company. According to article 102, paragraph 1 SCC, the company is only subsidiarily liable for ordinary criminal offences (eg, traffic offences with company cars, fraud and personal injury, etc). This means that the company is liable only if the offence cannot be attributed to a specific individual person due to the lack of organisation of the company.

Only seven specific offences, the catalogue offences, may constitute the basis of a cumulative criminal liability of a company that competes with the criminal liability of an individual person who committed a crime. All of these offences are white-collar or macro-crime offences in the areas of organised crime, money laundering, corruption or the financing of terrorism. This cumulative criminal liability is governed by article 102, paragraph 2 SCC.

In both paragraphs of article 102 SCC, the requirements of a liability are that a criminal offence has been committed in a company in the course of business activities within the scope of the company's purpose.

EMPIRICAL DATA ON CRIMINAL LIABILITY OF COMPANIES

In Switzerland, there are no official empirical statistics on the number of convictions of companies under article 102 SCC. This is due to the way in which data is collected by the Swiss Federal Statistical Office (FSO). The FSO's conviction statistics are based on the convictions of individuals that result in an entry in the register of convictions. As companies are not entered in the register of convictions, the convicted companies do not appear in the conviction statistics.[5] This is one of the reasons why it is argued that companies should also be entered in the register of convictions.[6]

However, there are statistics on the number of companies that have been accused of an offence. The data is collected by the cantonal police authorities (not legal experts) as part of the police crime statistics.[7] The legal classification of criminal offences may therefore not always be correct, and it is not possible to infer from this data the number of convictions. Nevertheless, certain trends can be deduced from the statistics. The latest figures available are those for 2023, published by the FSO on 25 March 2024.

The number of companies that are listed as defendants has increased slightly in recent years but is still very low in absolute numbers. In 2019, a total of 247 companies were registered in Switzerland. In 2020, the number rose drastically to 548, probably due to the coronavirus pandemic, as 395 of the 548 cases registered in 2020 alone were fraud offences, presumably relating to government loans granted to companies during the pandemic. In 2021, the numbers dropped to 512, in 2022 to 388 and in 2023 to 179 registered defendant companies.[8]

As already mentioned, these numbers do not show the convicted companies – on the contrary. Since the liability of the company is subsidiary under article 102, paragraph 1 SCC, it is often the case that companies were recorded by the police as a defendant at the beginning of the investigation. However, as soon as an individual person has been identified, this person is subject to criminal liability and not the company. Only in the case of the catalogue offences listed under article 102, paragraph 2 SCC (money laundering and financing of terrorism, etc) is it possible for the company to be prosecuted, if the offence can be attributed to a specific individual person.

The police crime statistics show that the cases in which companies were registered as defendants are hardly ever cases of the seven catalogue offences listed in article 102, paragraph 2 SCC. The only catalogue offence that occurs relatively frequently is money laundering. In 2020, 208 companies were registered as defendants in criminal proceedings; in 2021, it was 88 companies; in 2022, it was 42 companies; and, in 2023, it was 10 companies. For other catalogue offences (eg, criminal organisation (article 260-ter SCC)), no companies were registered as defendants at all between 2020 and 2023, while there were only a few cases of corruption (eg, one case of private bribery (article 322-octies SCC) in 2021).[9] This is also reflected in the case law. To date, convictions under article 102, paragraph 2 SCC have mainly been in connection with money laundering and less frequently with corruption.

SWISS CASE LAW ON CRIMINAL LIABILITY OF COMPANIES

As there have been no court decisions of subsidiary criminal liability within the meaning of article 102, paragraph 1 SCC in practice (apart from one case of a traffic offence involving a company car, which was settled by a summary penalty order),[10] the following explanations are limited to cases of cumulative criminal liability under article 102, paragraph 2 SCC. It is not entirely clear why there are no cases under paragraph 1, even though – as we have seen above – companies repeatedly appear in the police crime statistics as accused persons even outside the catalogue of offences under paragraph 2. It must be assumed either that the cases were abandoned or that an individual person was convicted.

Settlement By Summary Penalty Order

Although there are some criminal cases in which companies are accused persons (at least initially), these cases hardly ever reach the courts. There is very little case law on criminal liability of companies. However, the lack of court rulings does not mean that there have been no convictions. The majority of convictions occurred by virtue of issuing a summary penalty order. Summary penalty orders are issued not by the court but directly by the public prosecutor's office. This fast-track procedure is in the interest of the state, as the matter is settled quickly and often results in large payments to the state. In many cases, a summary penalty order is also in the interest of the accused company as a result of the fact that summary penalty orders attract much less public attention than court decisions and, to a certain extent, are open to negotiation.

To give just a few examples – the cases settled by summary penalty order include the conviction in 2011 of the Swiss subsidiary of the French Alstom Group, which was fined 2.5 million Swiss francs and ordered to pay an equivalent claim[11] of over 36 million Swiss francs. The company had failed to take the necessary precautions against the bribery of foreign public officials in Latvia, Tunisia and Malaysia.[12] In addition, a summary penalty order was issued against the Brazilian construction group Odebrecht (currently the highest

fine of 4.5 million Swiss francs).[13] In a recent summary penalty order dated 1 March 2024, the Office of the Attorney General of Switzerland ordered the Geneva-based commodities trading company Gunvor to pay around 86.7 million Swiss francs. Of this amount, 4.3 million Swiss francs relate to the fine, 82.3 million Swiss francs to the equivalent claim and the remainder to the costs of the proceedings. Gunvor had been convicted of corporate criminal liability in connection with bribery of foreign public officials.[14]

Selected Court Rulings

The Post Ruling

There are very few cases of criminal liability of a company that have resulted in court proceedings. One of these cases is the so-called *Swiss Post* ruling.[15] In Switzerland, this is the only case of criminal liability under article 102, paragraph 2 SCC that was decided by the Federal Supreme Court, the highest national court. In December 2004, a Swiss public limited company was granted a licence to act as a financial intermediary. The company had two executive bodies, A and B. Just two months later, on 10 February 2005, 5 million Swiss francs were transferred to an account held in the name of the limited company. The very next day, A withdrew 4.6 million Swiss francs in cash from this account at a post office counter, allegedly for the purchase of a precious gemstone. B allegedly took this money to Rome, where she handed it over to an unknown person. The money has since disappeared. Following lengthy proceedings, the two company executives were convicted of commercial fraud, money laundering and qualified embezzlement by the Federal Supreme Court in 2014.[16]

The public prosecutor charged Swiss Post as a company with money laundering because it did not carry out prior checks on the origin and use of the money withdrawn and because this was not required by the company's internal regulations. In the first instance, Swiss Post was found guilty of money laundering under article 305-bis SCC.[17] Both the indictment and the first instance verdict for money laundering were wrong in principle. The offences listed in article 102, paragraph 2 SCC, which also include money laundering, are only the so-called underlying offences that are committed by an individual person in the company. The company itself cannot be convicted of these offences itself (ie, it cannot be convicted of money laundering). A company may be convicted under article 102, paragraph 2 SCC only for the organisational deficiency in the company that made the underlying offence possible. It must therefore first be proven that a person in the company has committed one of the catalogue offences under article 102, paragraph 2 SCC; otherwise, the company is not liable to prosecution. Article 102, paragraph 2 SCC does not establish a strict liability on the part of the company.

In the *Swiss Post*case, no individual person within Swiss Post was identified as having committed money laundering. Due to the lack of an underlying offence, the Federal Supreme Court ultimately acquitted Swiss Post.[18]

Credit Suisse Ruling

For a long time, there were no cases in which banks were prosecuted on the basis of article 102, paragraph 2 SCC. Then, in 2021, two cases became public in which banks were defendants. Although the Federal Supreme Court has not (yet) ruled on these cases, the Federal Criminal Court has already issued rulings.

One of these cases was the ***Banev*** case against the Swiss bank Credit Suisse.[19] Evelin Banev was the head of an alleged Bulgarian drug gang. The Office of the Attorney General of Switzerland accused the bank of enabling Banev's drug gang to launder 55 million Swiss francs between 2004 and 2007. In June 2022, the Federal Criminal Court issued its first instance judgment. The Court convicted a Credit Suisse employee of qualified money laundering. With regard to Credit Suisse, the Court found that, during the period in question, there were deficiencies within the bank with regard to both the management of the client relationship with the criminal organisation and the monitoring of the implementation of the anti-money laundering rules. The court sentenced Credit Suisse to a fine of 2 million Swiss francs for violating article 102, paragraph 2 SCC and an equivalent claim of more than 19 million Swiss francs. The Court held that the amount of the equivalent claim corresponded to the assets that could not be confiscated due to internal deficiencies at Credit Suisse, which had facilitated the money laundering.[20] Appeals have been filed against the decision.[21]

Falcon Ruling

The other case against a bank in which the Federal Criminal Court has already issued its second decision (by the Appeals Chamber) is the case against Falcon. taormina law defended Falcon, and a few arguments of the defence will be discussed below.

The case involved the bank and its former CEO, A, as well as an investment company that was the ultimate mother company of the bank. The investment company wanted to increase its stake in the Italian financial institution UniCredit and acquired a €62 million share package in 2012. The transaction was accompanied by Falcon. According to the indictment, there was an alleged concentration of power since the seller of the shares, B, was the chair of the board of directors of the investment company as well as the former chair of the board of directors of Falcon. As a result of this, he was qualified by the Office of the Attorney General of Switzerland as a so-called de facto executive body of Falcon. In the view of the Attorney General's Office of Switzerland, a massively inflated price was paid for the stake in UniCredit. Separate proceedings were brought against the seller for mismanagement but were suspended and no conviction has yet been obtained. Although there was no conviction in the Swiss proceedings, the first instance of the Federal Criminal Court found that B had committed qualified criminal mismanagement by selling Falcon his privately held shares worth €61.7 million as well as worthless additional rights ('certain rights') for a total price of €210 million. This was the alleged predicate offence for the subsequent money laundering, which allegedly took place as follows:

After the sale, proceeds totalling €194 million were received into accounts of B at Falcon for the alleged unlawful enrichment of B. At the request of B, CEO A subsequently helped to ensure that various complex transactions were carried out via Falcon, according to the indictment, in order to thwart the confiscation of these proceeds of crime. The Office of the Attorney General of Switzerland charged the CEO of Falcon with money laundering and the bank itself with criminal liability under article 102, paragraph 2 SCC.

The Federal Criminal Court ruled differently. It found that CEO A neither knew nor must have known that the funds in question were the proceeds of a crime, and therefore acquitted him of the charge of money laundering. However, in the court's view, B had committed the offence of money laundering and was a responsible individual within the meaning of article 102, paragraph 2 SCC due to his position as a de facto executive body. It found that the execution of the money transactions without due consideration was facilitated by organisational deficiencies at Falcon. On 15 December 2021, Falcon became the first bank in

Swiss history to be held accountable under article 102, paragraph 2 SCC. Falcon was ordered to pay a fine of 3.5 million Swiss francs and an equivalent claim of 7.2 million Swiss francs.[22]

However, this judgment did not become final. Falcon appealed, and in its judgment of 30 June 2023,[23] the Appeals Chamber of the Federal Criminal Court confirmed the acquittal of the CEO and this time also acquitted Falcon.[24]

ARGUMENTS OF THE DEFENCE IN THE FALCON CASE

The Office of the Attorney General of Switzerland intended to conclude the proceedings with a summary penalty order. The decision to ask for ordinary proceedings and not to accept a summary penalty order was of strategic importance. This decision was taken in view of the risk of a negative judgment, which ultimately always exists in court proceedings, and despite the publicity surrounding it. The view prevailed that the bank should not be criminally convicted on the basis of the facts of the case.

According to the indictment, the bank should have been convicted on the basis of article 102, paragraph 2 SCC in conjunction with article 305-bis SCC as the underlying offence for criminal liability of companies. For the defence of the bank, various points were addressed. Two were of particular importance. First, there was the absence of a predicate offence as required by article 305-bis SCC. If it can be established that there is no predicate offence to money laundering, the company is ultimately not liable to prosecution: no money laundering without a predicate offence, hence no underlying offence for criminal liability of the company without money laundering. Second, there was the lack of causality between the organisational deficiencies and the alleged money laundering.

According to the prosecution, the predicate offence required by article 305-bis SCC had been mismanagement. The existence of such an offence was questioned on the basis of the files. It was then shown that, even if money laundering were to be affirmed and subsequently considered as an underlying offence for criminal liability, the money laundering was not committed within the company; the act of money laundering was attributed to a person whom the prosecution qualified as a de facto executive body. However, it is highly questionable whether the legal concept of the de facto executive body, which originated in civil law, fulfils the requirement of article 102, paragraph 2 SCC (ie, that the offence must be committed within the company). Finally, it was shown that the requirement that the offence be committed 'in the course of business' was clearly not met.

Article 102 SCC requires a lack of organisation to be the cause of the offence committed. The defence pointed out that even if all the alleged organisational deficiencies had been absent, the transactions in question – qualified as money laundering by the Office of the Attorney General of Switzerland – would still have taken place; it was simply not obvious to those involved that the transactions in question could be illegal. They would therefore not have been prevented even if appropriate organisational measures had been taken.

Endnotes

[1] See article 102 of the Swiss Criminal Code (https://www.fedlex.admin.ch/eli/cc/54/757_781_799/en#book_1/part_1/tit_7).

[2] https://relevancy.bger.ch/php/clir/http/index.php?highlight_docid=atf%3A%2F%2F113-IB-60%3Ade&lang=de&type=show_document#page62 (last visited 22 March 2024).

[3] Mark Pieth, Die Reform der Strafrechtlichen Unternehmenshaftung in der Schweiz, in: Unternehmensstrafrecht (ed. Lehmkuhl & Wohlers, 2020), at 283; Botschaft [Federal Council Dispatch] zur Änderung des Schweizerischen Strafgesetzbuches (Allgemeine Bestimmungen, Einführung und Anwendung des Gesetzes) und des Militärstrafgesetzes sowie zu einem Bundesgesetz über das Jugendstrafrecht, 21 September 1998, BBl 1999 II 1979, at 2140.

[4] Marcel Alexander Niggli and Diego R Gfeller, in: Basler Kommentar (4th ed. 2018 Niggli/Wiprächtiger), at Art. 102 N 14.

[5] For the methodology of the criminal conviction statistics, see FSO, fact sheet, https://www.bfs.admin.ch/bfs/de/home/statistiken/kriminalitaet-strafrecht/erhebungen/sus.assetdetail.7097.html (last visited 22 March 2024).

[6] eg, Nora Markwalder, Warum braucht es ein Strafregister für Unternehmen?, in: Empreinte d'une pionnière sur le droit pénal Mélanges en l'honneur sur d'Ursula Cassani (ed. Jeanneret & Sträuli, 2021), at 257–267.

[7] FSO, Police Crime Statistics (PCS), Swiss Criminal Code (SCC): Criminal offenses and accused persons, 2023, published on 25 March 2024, at https://www.bfs.admin.ch/bfs/de/home/statistiken/kriminalitaet-strafrecht/polizei/straftaten.assetdetail.30887730.html (last visited 2 May 2024).

[8] FSO, Police Crime Statistics (PCS), Swiss Criminal Code (SCC): Criminal offenses and accused persons, 2023, published on 25 March 2024, at https://www.bfs.admin.ch/bfs/de/home/statistiken/kriminalitaet-strafrecht/polizei/straftaten.assetdetail.30887730.html (last visited 2 May 2024); on this topic, see Nora Markwalder, Die Sanktionierung von Unternehmen gemäss Art. 102 StGB in Theorie und Praxis – Part 2, ZStrR 140/2022, at 273–301.

[9] See footnote 6. The numbers of companies listed as defendants regarding article 322-octies SCC in 2022 and 2023 and article 260-quinquies SCC in 2023 has not been published due to data protection reasons.

[10] Summary penalty order issued by the Freiburg public prosecutor's office on 5 January 2005, published in Freiburger Zeitschrift für Rechtsprechung, FZR 2005, at 60.

[11] If the assets subject to forfeiture are no longer available, the court may uphold a claim for compensation by the state in respect of a sum of equivalent value (article 71 SCC).

[12] Press release from the Office of the Attorney General of Switzerland dated 22 November 2011 (-https://www.bundesanwaltschaft.ch/mpc/en/home/medien/archiv-medienmitteilungen/nsb_medienmitteilungen.msg-id-42300.html) (last visited 22 March 2024).

[13] Press release from the Office of the Attorney General of Switzerland dated 21 December 2016 (https://www.admin.ch/gov/de/start/dokumentation/medienmitteilungen.msg-id-65077.html) (last visited 22 March 2024).

[14] Press release from the Office of the Attorney General of Switzerland dated 1 March 2024 (https://www.admin.ch/gov/de/start/dokumentation/medienmitteilungen.msg-id-100264.html) (last visited 22 March 2024).

[15] https://www.bger.ch/ext/eurospider/live/de/php/clir/http/index.php?highlight_docid=atf%3A%2F%2F142-IV-333%3Ade&lang=de&zoom=&type=show_document (last visited 22 March 2024).

[16] See decision of the Federal Supreme Court of 7 July 2014, BGer 6B_1198/2013 (-https://www.bger.ch/ext/eurospider/live/de/php/aza/http/index.php?highlight_docid=aza%3A%2F%2F18-07-2014-6B_1198-2013&lang=de&type=show_document&zoom=YES&;) (last visited 22 March 2024).

[17] See decision of the District Court Solothurn-Lebern of 19 April 2011, AGer Nr. SLSPR.2010.00109-ASL.

[18] See decision of the Federal Supreme Court of 11 October 2016, BGer 6B_124/2016, published in BGE 142 IV 333 (-https://www.bger.ch/ext/eurospider/live/de/php/clir/http/index.php?highlight_docid=atf%3A%2F%2F142-IV-333%3Ade&lang=de&zoom=&type=show_document) (last visited 22 March 2024).

[19] https://bstger.weblaw.ch/cache?guiLanguage=de&id=0a4d5773-1ad2-4b2b-a745-2f03f9ab7253&filters=%5B%5B%22rulingDate%22%2C%5B%7B%22from%22%3A%2220 21 - 12 - 15 - T00%3A00%3A00.000Z%22%2C%22to%22%3A%222021-12-15T22%3A59%3A59.999Z%22%7D%5D%5D%5D&sort-field=relevance&sort-direction=relevance (last visited 22 March 2024).

[20] See decision of the Criminal Chamber of the Federal Criminal Court of 27 June 2022, SK.2020.62 (https://bstger.weblaw.ch/cache?guiLanguage=de&q=SK.2020.62&id=41246329-65ff-4659-8617-cd57d602504a&sort-field=relevance&sort-direction=relevance) (last visited 22 March 2024).

[21] Notice of the Federal Criminal Court in the Federal Gazette of 27 July 2022, BBl 2022 1845 (https://www.fedlex.admin.ch/eli/fga/2022/1845/de) (last visited 22 March 2024).

[22] Decision of the Criminal Chamber of the Federal Criminal Court of 15 December 2021, SK.2020.21 (-https://bstger.weblaw.ch/cache?guiLanguage=de&id=0a4d5773-1ad2-4b2b-a745-2f03f9ab7253&filters=%5B%5B%22rulingDate%22%2C%5B%7B%22from%22%3A%2220 21 - 12 - 15 - T00%3A00%3A00.000Z%22%2C%22to%22%3A%222021-12-15T22%3A59%3A59.999Z%22%7D%5D%5D%5D&sort-field=relevance&sort-direction=relevance) (last visited 22 March 2024).

[23] https://www.bstger.ch/de/media/comunicati-stampa/2023/2023-07-03/1351.html (last visited 22 March 2024).

[24] As no written judgment has yet been issued, see press release of the Federal Criminal Court dated 3 July 2023 (-https://www.bstger.ch/de/media/comunicati-stampa/2023/2023-07-03/1351.html) (last visited 22 March 2024).

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