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# The Legal 500 Country Comparative Guides

## Switzerland

# WHITE COLLAR CRIME

### Contributor

Pestalozzi



### Christophe Emonet

Partner | [christophe.emonet@pestalozzilaw.com](mailto:christophe.emonet@pestalozzilaw.com)

### Nicolas C. Herren

Partner | [nicolas.herren@pestalozzilaw.com](mailto:nicolas.herren@pestalozzilaw.com)

This country-specific Q&A provides an overview of white collar crime laws and regulations applicable in Switzerland.

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## SWITZERLAND

# WHITE COLLAR CRIME



### 1. What are the key financial crime offences applicable to companies and their directors and officers? (E.g. Fraud, money laundering, false accounting, tax evasion, market abuse, corruption, sanctions.) Please explain the governing laws or regulations.

The Swiss Confederation is responsible for legislating in the field of criminal law, whereas the Swiss Cantons have a little residual competence to enact minor offences in their own laws.

In conformity with the legality principle, most of the criminal offences are enacted in laws adopted by the Swiss Parliament (and not merely regulations).

The federal law which contains the majority of criminal offences, and among them most of the key financial crime offences, is the Swiss Criminal Code (SCC). But criminal offences can also be enacted in other federal laws pertaining to specific legal fields, such as violation of the duty to report suspicions of money laundering, tax evasion and tax fraud, market manipulation, and the offences related to unfair competition, antitrust, breach of data protection, etc.

For the vast majority of financial crime offences, the general provisions of the SCC are applicable. For some criminal administrative offences, certain general provisions (different from the ones of the SCC) apply according to the Criminal Administrative Law Act. An example of such criminal administrative offences is the Violation of the duty of financial intermediaries to report suspicions of money laundering (Articles 37 cum 9 Anti-Money Laundering Act, AMLA).

The key financial crime offences applicable to directors and officers of companies are the following: Misappropriation (Article 138 SCC); Fraud (Article 146 SCC); Disloyal management (Article 158 SCC); Bankruptcy and debt collection felonies or misdemeanours (Articles 163 to 170 SCC); Forgery of a document, which includes accounting documents (Article

251 SCC); Criminal organisation (Article 260ter SCC); Financing terrorism (Article 260quinquies SCC); Money laundering (Article 305bis SCC); Bribery of Swiss or foreign public agents, respectively private individuals (Articles 322ter to 322decies SCC).

The key financial crime offences applicable to corporates are the following: Criminal organisation (Article 260ter SCC); Financing terrorism (Article 260quinquies SCC); Money Laundering (Article 305bis SCC); Active bribery of Swiss or foreign public agents, respectively private individuals (Articles 322ter, 322quinquies, 322septies paragraph 1 and 322octies SCC).

### 2. Can corporates be held criminally liable? If yes, how is this determined/attributed?

Corporates can be held criminally liable according to Article 102 SCC.

The following entities can be criminally liable as corporates: any legal entity under private law, as well as under public law with exception of local authorities; partnerships; sole proprietorships.

There are two main categories of criminal liability for corporations:

A primary liability, which applies only in relation with the following key financial crime offences: Criminal organisation (Article 260ter SCC); Financing terrorism (Article 260quinquies SCC); Money laundering (Article 305bis SCC); Active bribery of Swiss or foreign public agents, respectively private individuals (Articles 322ter, 322quinquies, 322septies paragraph 1 and 322octies SCC). In such primary liability, a corporate is criminally liable irrespective of the criminal liability of any natural person, provided the corporate has failed to take all the reasonable organisational measures that are required in order to prevent one of the above listed offences from being committed in the exercise of commercial activities in accordance with the statutory goals of the corporates.

A subsidiary liability, applicable to all other felonies and

misdeemeanour foreseen in the SCC and in the majority of all other federal laws pertaining to specific fields (cf. Question 1). In such alternative, the corporates are criminally liable for felonies and misdemeanours committed in the exercise of commercial activities in accordance with the statutory goals of the corporates, if it is not possible to attribute this act to any specific natural person due to the inadequate organisation of the corporate.

Such subsidiary liability applies very rarely since it is most of the time possible to find the individual(s) responsible within the corporate concerned.

Corporate criminal liability is in principle not applicable for contraventions (i.e. minor offences).

Intention for corporates is approached differently as for individuals.

A company can only be held liable for an offence insofar as it has been committed by a physical perpetrator. The physical perpetrator must have carried out all the objective and subjective elements of the offence for it to be imputed to the company. Where it is established with a sufficient degree of certainty that intent was lacking on the part of the physical perpetrator, the criminal liability of the corporate is excluded.

The lack of organisation is the subjective condition for imputing an offence to a corporate.

For the criminal administrative offences which are submitted to the Criminal Administrative Law Act (cf. Question 1), corporates can be held liable only if the fine envisaged for the individual perpetrator within the corporate do not exceed CHF 5'000 and that the necessary inquiry against such individual would incur disproportionate investigations measures compared to the fine envisaged (Article 7 DPA).

### 3. What are the commonly prosecuted offences personally applicable to company directors and officers?

The commonly prosecuted offences personally applicable to directors and officers are the following: Misappropriation (Article 138 SCC); Fraud (Article 146 SCC); Disloyal management (Article 158 SCC); Bankruptcy and debt collection felonies or misdemeanours (Articles 163 to 170 SCC); Forgery of a document (Article 251 SCC); Money laundering (Article 305bis SCC). An increasing number of directors or officers of Swiss based financial intermediaries are also being prosecuted for Violation of the duty to report suspicions of money laundering (Article 9 and 37 AMLA).

### 4. Who are the lead prosecuting authorities which investigate and prosecute financial crime and what are their responsibilities?

The ordinary lead prosecuting authorities which investigate and prosecute financial crime in Switzerland are the Office of the Attorney General ("OAG") and the various cantonal prosecution offices.

In the context of financial crime, the OAG has mandatory jurisdiction to investigate and prosecute the financial crime offences of Criminal Organization (Article 260ter SCC), Financing terrorism (260quinquies SCC), Money laundering (Article 305bis SCC), Failure to identify the beneficial owner of a financial relationship (Article 305ter SCC) and Bribery of Swiss and foreign public agents (322ter-322septies SCC), provided that these offences have to a substantial extent been committed abroad or have been committed in two or more cantons with no single canton being the clear focus of the criminal activity.

The SFPO may also open an investigation and prosecute any felony against property (such as Misappropriation, Fraud or Aggravated disloyal management) or Forgery & the like felonies if these offences have to a substantial extent been committed abroad or have been committed in two or more cantons with no single canton being the clear focus of the criminal activity.

The SFPO can be considered as a prosecution office specialised in financial crime since these offences represent the main part assigned to the federal jurisdiction. It has offices in the German-, French- and Italian-speaking regions of Switzerland.

The various cantonal prosecution offices have jurisdiction to investigate and prosecute financial crime offences which are not subject to the federal jurisdiction as above mentioned. Among cantons, the jurisdiction is mainly based on the criteria of the place of the commission of the offense. In practice, cantonal prosecution offices also investigate and prosecute very significant financial crime cases with transnational backgrounds (especially Zurich or Geneva prosecution offices).

The cantons have a broad power to organize their prosecution offices as they deem fit to tackle in particular financial crime. As example, the Zurich and Geneva prosecution offices have specific units with prosecutors, financial analysts and policemen handling only financial crime cases.

The main responsibility of all the above-mentioned prosecution offices is to open an inquiry and accuse one

or more persons when the conditions are met, conduct the inquiry with the various means of investigation available (cf. Questions 6-7 below) and, at the end of the inquiry, either close the case, issue a decision condemning the perpetrator (for minor sanctions; cf. Question 18 below) or issue an indictment and send the accused to trial before the competent criminal courts.

For the criminal administrative offences which are submitted to the Criminal Administrative Law Act (cf. Question 1), the competent Federal Administration (such as the Federal Department of Finance regarding criminal offences sanctioned in the AMLA) is the lead prosecuting authority.

### **5. Which courts hear cases of financial crime? Are trials held by jury?**

For the financial crime offences which are submitted to the federal jurisdiction (cf. Question 4), the Federal Criminal Courts (first instance and appeal) are competent and, as last instance, the Criminal Chamber of the Federal Supreme Court.

The above-mentioned Federal Criminal Courts can be considered as courts specialised in financial crime cases since these offences represent the main part assigned to the federal jurisdiction.

When cantonal criminal authorities are competent, financial crime cases are heard in principle by cantonal ordinary criminal courts (first instance and appeal) and, as last instance, the Criminal Chamber of the Federal Supreme Court.

The entry into force of the Swiss Criminal Procedural Code in January 2011 (SCPC) ended the possibility for Swiss Cantons to have trials held by jury.

### **6. How do the authorities initiate an investigation? (E.g. Are raids common, are there compulsory document production or evidence taking powers?)**

An investigation may be initiated by the police or by the public prosecutor (Article 300 SCPC).

The police can start enquiries upon a complaint of a citizen or of a legal entity, upon instruction by the public prosecutor, upon information received from another criminal authority or upon its own findings (Articles 301, 302, 303, 307 SCPC).

In white-collar crime matters, the opening of an investigation is regularly triggered by a denunciation

from the Money Laundering Reporting Office of Switzerland (MROS). Indeed, financial institutions have an obligation to report to the MROS suspicious activities under the Anti-Money Laundering Act (AMLA).

The public prosecutor shall open an investigation if there is reasonable suspicion that an offence has been committed (Article 309 SCPC). The public prosecutor must gather the evidence himself (Article 311 SCPC) or can give assignments to the police (Article 312 SCPC).

The authorities may use coercive measures if they are necessary and proportional (Article 197 SCPC). They include summoning to hearings (Articles 201 et seq. SCPC), arrests and pre-trial detention (Articles 210, 212 et seq. SCPC), searches of premises (Articles 244 et seq. SCPC), searches of documents and information (Articles 246 et seq. SCPC).

Searches can be carried out if authorised by written warrant (Article 241 SCPC). Houses, dwellings and other rooms not generally accessible may only be searched with the consent of the owner. The owner's consent is not required if it is suspected that on the premises: there are wanted persons; there is forensic evidence or property or assets that must be seized; offences are being committed (Article 244 SCPC).

Documents, audio, video and other recordings, data carriers and equipment for processing and storing information may be searched if it is suspected that they contain information that is liable to seizure (Article 246 SCPC). These can however be sealed if the owner considers that they may not be searched or seized due to the right to remain silent or to refuse to testify or for other reasons (Article 248 SCPC).

In practice, investigating authorities do not refrain from raiding any premises, even law firms' offices, when they have reasons to believe that evidence can be found in them.

### **7. What powers do the authorities have to conduct interviews?**

The police on delegation from the public prosecutor, the public prosecutor and the tribunals have the competence to conduct interviews (Article 142 SCPC). The person to be heard as well as the parties to the proceeding (plaintiff, accused person) are summoned to the hearing. Any person summoned by a criminal justice authority must comply with the summons (Article 205 para. 1 SCPC). If that person fails to comply, his/her appearance can be enforced by the police (Articles 207 et seq. SCPC). The person is reminded of his/her rights and obligations, which vary according to his/her

procedural status (accused person, plaintiff, witness, expert, etc.). After the authority has asked its questions, the parties may ask theirs (Article 147 SCPC).

### **8. What rights do interviewees have regarding the interview process? (E.g. Is there a right to be represented by a lawyer at an interview? Is there an absolute or qualified right to silence? Is there a right to pre-interview disclosure? Are interviews recorded or transcribed?)**

The interviewees have a right to be heard in a language they understand and can thus benefit from an interpreter.

They also have a right to be assisted by a lawyer no matter whether they are interviewed as a witness, an accused person or as a person providing information, which is usually an intermediary status between witness and accused (Article 127 para. 1 SCPC). When the potential sanctions for the offence committed are important (Article 130 SCPC) and the accused person does not have a lawyer, the authorities will provide one (Article 131 SCPC).

The right to silence depends on the procedural status of the interviewee. A witness has the obligation to answer and tell the truth, at the risk of a sanction (Article 163 para. 2 and 307 SCPC), subject to the certain rights to refuse to testify (e.g. due to a personal relationship with the accused, or for personal protection or to protect closely related persons, or due to official secrecy or professional confidentiality). An accused however can refuse to testify and to collaborate (Article 158 para. 1 let. b SCPC). A plaintiff is heard as a "person providing information" (Article 178 let. a SCPC). They are obliged to testify - but not to tell the truth - before the public prosecutor, before the courts and before the police if they conduct the interview on behalf of the public prosecutor. Their unjustified refusal to do so may be interpreted against them in the assessment of the evidence. The rights to refuse to testify applicable to witnesses mentioned above apply *mutatis mutandis* (Article 180 para. 2 SCPC).

The accused and the plaintiff have access to the file at the latest following the first interview of the accused and the gathering of the essential evidence by the public prosecutor (Article 101 para. 1 SCPC). In practice, access to the file is seldom given before the first interview of the accused. Regarding the plaintiff, there may be further restrictions to the access of the file, depending on specific circumstances, for example when the plaintiff is a foreign State or a foreign public entity considered as

a quasi-foreign State. The investigating prosecutor has a rather broad discretionary power in this regard. As detailed under Question 12 below, access to the file by third parties is subject to further conditions.

A clerk of court takes minutes of the interviewee's declarations as summarised and dictated by the authority conducting the interview (Articles 76 and 78 SCPC). Cumulatively, as for any relevant investigation acts, the director of the proceedings may order that an audio or video recording of all or part of a procedural act be made (Article 76 para. 4 SCPC). This being said, such recording is seldom in financial crime offences.

### **9. Do the laws or regulations governing financial crime have extraterritorial effect so as to catch conduct of nationals or companies operating overseas?**

In principle, Swiss material laws and regulations governing financial crime are applicable on Swiss territory (Article 3 SCC, principle of territoriality).

The principle of territoriality applies if an offence is committed on Swiss soil. It can also apply in relation with various financial crime offences if their result occurs on Swiss soil (Article 8 SCPC).

The place of commission in matters of white-collar crime is interpreted broadly. It suffices that only a part of the offence took place in Switzerland. When the financial crime, felony or tax fraud misdemeanour is committed abroad, Swiss criminal authorities might still have jurisdiction for Money laundering if the assets stemming from said predicate felonies/misdemeanour are transferred to Switzerland and that such predicate offence is also liable to prosecution at the place of commission (Article 305bis para. 3 SCC).

Swiss material laws and regulations can also have extraterritorial effect in case an international treaty provides so (Article 6 SCC) and if the act is also liable to prosecution at the place of commission or no criminal law jurisdiction applies at the place of commission; and if the person concerned remains in Switzerland and is not extradited to the foreign country. For example, in white-collar crime matters, there are:

- The 1990 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime;
- The 1997 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions;
- The 1999 Council of Europe Criminal Law

Convention on Corruption;

- The 1999 United Nations International Convention for the Suppression of the Financing of Terrorism.

Furthermore, a person who committed an offence abroad is liable in Switzerland if cumulatively: the offence is also liable to prosecution at the place of commission or the place of commission is not subject to criminal law jurisdiction; the person concerned is in Switzerland or is extradited to Switzerland due to the offence; and under Swiss law extradition is permitted for the offence, but the person concerned is not being extradited. If the author is not Swiss and if the felony or misdemeanour was not committed against a Swiss person, the foregoing is applicable only if the request for extradition was refused for a reason unrelated to the nature of the offence; or if the offender has committed a particularly serious felony that is proscribed by the international community (Article 7 SCC).

Finally, Swiss material laws and regulations will apply in case of prosecution in Switzerland upon delegation from another State (Article 85-87 ) of the Federal Act on International Mutual Assistance in Criminal Matters, IMAC). If Swiss jurisdiction is not yet established, it shall be determined in accordance with Article 32 SCPC, which provides that where an offence was committed abroad or if the place of commission cannot be established, the authorities of the place where the accused is domiciled or habitually resident have jurisdiction to prosecute and adjudicate the offence.

### **10. Do the authorities commonly cooperate with foreign authorities? If so, under what arrangements?**

Yes, the Swiss authorities commonly cooperate with foreign authorities notably in financial crime matters by providing foreign authorities with information and documentation and/or by seizing assets in Switzerland pending a definitive and enforceable foreign judgment and/or, when necessary and under more restrictive conditions, by extraditing the accused/convicted person.

Mutual international assistance in criminal matters between Switzerland and other countries can be based on either:

- Multilateral international treaties when their provisions related to mutual international assistance are directly applicable;
- Bilateral international treaties.

When there is no such treaty, Switzerland is still regularly providing mutual international assistance in

criminal matters under the IMAC.

### **11. What are the rules regarding legal professional privilege? Does it protect communications from being produced/seized by financial crime authorities?**

Legal professional privilege allows a person to refuse to testify (Article 171 SCPC). Such person can be released of his/her duty by the person to whom the confidential information pertains or through the written consent of the competent authority (Article 171 para. 2 let. b SCPC). For lawyers registered at the Swiss bar, as foreign or Swiss lawyer, and who practice legal representation in Switzerland, it is an absolute right, which means that it is opposable even when said lawyer is released of his/her duty of confidentiality (Articles 2 and 13 Federal Act on Attorneys).

Legal professional privilege further protects communications from being used by financial crime authorities.

The above privilege only applies to typical lawyer activity (e.g. drafting of legal acts, assistance and representation before authorities, legal consultancy, etc.) and not to atypical activity (e.g. asset management or administration of companies). Therefore, it does for example not apply to in-house counsels, save for their correspondence with an external registered lawyer when the corporate has appointed such.

Moreover, the principle under the SCPC is that documents used in communications between a person (i.e. the accused person, a victim or a witness) and its attorney cannot be seized, regardless of where these documents are located provided, as explained, that the communications relate to the attorney's typical activity. In recent leading case law, the Federal Supreme Court specified that in criminal proceedings, communications between the accused party and his/her lawyer are protected by attorney-client privilege and may not be seized, irrespective of where such lawyer is admitted to practice (Article 264 para. 1 let. c SCPC). However, the Federal Supreme Court held that communications between a third party (e.g. the plaintiff or a witness) and non-Swiss/EU/EFTA lawyers are not protected from seizure by attorney-client privilege. Further, the protection does not apply if the attorney is accused of an offence in the proceeding.

### **12. What rights do companies and**

### Individuals have in relation to privacy or data protection in the context of a financial crime investigation?

A criminal investigation is never public (Article 69 para. 3 let. a SCPC). Members of the criminal justice authorities are required to treat as confidential information that comes to their knowledge in the exercise of their official duties (Article 73 para. 1 SCPC). The director of proceedings may further require, under certain restrictive conditions, private claimants and other persons involved in the proceedings and their legal agents, under threat of a sanction of Article 292 SCC, to maintain confidentiality with regard to the proceedings and the persons concerned if the object of the proceedings or a private interest so requires (Article 73 para. 2 SCPC).

Only a party to the proceeding (i.e. the plaintiff, the accused, the prosecutor's office) may consult the file of the case (Articles 101, 104 and 107 para. 1 let. a SCPC). This access may be restricted if a party abuses its rights or if it is necessary to safeguard private or public interests in preserving confidentiality (Article 108 para. 1 SCPC). Third parties may inspect the case documents if they claim to have an academic or other legitimate interest in doing so and if inspection is not contrary to any overriding public or private interests (Article 101 para. 3 SCPC).

Only trial hearings are generally open to the public (Article 69 para. 1 SCPC).

### 13. Is there a doctrine of successor criminal liability? For instance in mergers and acquisitions?

There is no such doctrine for private individuals since the criminal liability is *intuitu personae* which means it is only applicable against people who fulfil the various conditions of the offence.

For corporates in the context of a merger for instance, the status of injured party and therefore that of plaintiff in criminal proceedings does not pass to the acquiring company. This was confirmed again recently by the Federal Supreme Court.

For corporates as perpetrators, the question is debated. The majority doctrine however seems to consider that, for instance in mergers and acquisitions, the legal personality and the principle of the individuality of sanctions must be respected and would therefore exclude successor criminal liability.

This being said, for criminal sanctions such as confiscation of assets stemming from an offence, these are measures with an *in rem* effect which can apply against either the perpetrator or a third party under certain conditions.

### 14. What factors must prosecuting authorities consider when deciding whether to charge?

We understand the notion of "charging" a person as being the moment when a person is indicted and the indictment is transferred to the competent tribunal, as opposed to the moment of accusation, earlier during the investigation, when a person is informed that a criminal investigation is being conducted against him/her.

A person will be accused by the prosecuting authorities as soon as they suspect that he/she has committed an offence, on the basis of a report of a criminal offence, a criminal complaint or in a procedural act carried out by a criminal justice authority (Article 111 SCPC). Sometimes, even when the suspicions are still unsubstantiated, a person can be accused in order to guarantee his/her the rights linked to his/her status, e.g., access to the file (Article 101 SCPC), etc.

Before even opening an investigation, the public prosecutor may renounce and immediately issue a no-proceedings order (Article 310 SCPC) in particular when:

- the constituent elements of the offence are not fulfilled;
- when procedural impediments such as jurisdiction or statute of limitations;
- when the level of culpability and consequences of the offence are negligible (Article 52 SCC);
- when the accused has made reparation for the loss, damage, or injury caused (Article 53 SCC).

If one or more persons have been accused, the prosecuting authority may still abandon the proceeding during or at the end of the preliminary investigation, before specifying the charges in an indictment and sending him back to court for trial, if (Article 319 SCPC):

- no suspicions are substantiated that justify bringing charges;
- the conduct does not fulfil the elements of an offence;
- grounds justifying the conduct mean that it does not constitute an offence;
- it is impossible to fulfil the procedural requirements or procedural impediments have

- arisen; or
- a statutory regulation applies that permit the public prosecutor to dispense with bringing charges or imposing a penalty.

The principle in *dubio pro duriore* (if in doubt, in favour of the victim) directs the investigation phase of the proceeding (contrarily to the phase of trial, where the principle of *dubio pro reo* applies). The case can only be dismissed if the impunity of the accused's actions appears clear or if the conditions for criminal proceedings are clearly lacking. In this context, the evidential situation must appear clear, failing which the public prosecutor cannot anticipate the assessment of the trial judge. Thus if in doubt, the prosecutor must issue an indictment with detailed charges and transmit the file to the courts.

### 15. What is the evidential standard required to secure conviction?

The evidential standard required is "beyond reasonable doubt". The principle in *dubio pro reo* applies in criminal matters and provides that doubt benefits the accused since the beginning of the trial phase. The criminal court must not declare itself convinced of the existence of a fact unfavourable to the accused if, from an objective point of view, there are serious and insurmountable doubts as to the existence of the admitted facts.

Regarding the subjective element necessary to convict, a person is considered to have committed an offence intentionally also if he/she only foresees and accepts the outcome (*dolus eventualis*; Article 12 para. 2 SCC). This intention can be proven by external factual/circumstantial evidence and/or confession. These elements include the extent of the risk – known to the person concerned – that the objective elements of the offence would be realised, the seriousness of the breach of the duty of care, the motives, and the manner in which the act was committed. The more likely it is that the objective elements of the offence will be realised and the more serious the breach of the duty of care, the closer one comes to concluding that the perpetrator has accepted the realisation of these elements.

### 16. Is there a statute of limitations for criminal matters? If so, are there any exceptions?

Most white-collar crimes of a certain significance have a statute of limitations of 15 years. For less important offences, the statute of limitations is of 10 years, or even 7 years (Article 97 SCC). Substantial amendments have

been made in statute of limitations matters in the last 20 years. Since the principle of *lex mitior* applies to the statute of limitations, one must analyse for each case individually what is the statute of limitations applicable to the offences.

In principle, the limitation period begins on the day on which the offender committed the offence.

For offences committed by omission, the limitation period begins to run when the obligations come to an end. For example, in the case of a financial intermediary, who/which has an obligation to report any suspicion of a financial offence, the limitation only starts to run when a full communication has been made to the MROS.

Exceptionally, the authority might consider: the day on which the final act was carried out if the offence consists of a series of acts carried out at different times; or the day on which the criminal conduct ceased if the criminal conduct continued over a period of time (Article 98 SCC).

The time limit no longer runs if a judgment is issued by a Court of First Instance before its expiry.

### 17. Are there any mechanisms commonly used to resolve financial crime issues falling short of a prosecution? (E.g. Deferred prosecution agreements, non-prosecution agreements, civil recovery orders, etc.) If yes, what factors are relevant and what approvals are required by the court?

Answers included under Question 18.

### 18. Is there a mechanism for plea bargaining?

There are no such mechanisms under Swiss law. There are however three procedures which allow a certain level of informal negotiation with the public prosecutor.

The first procedure is through an abandonment of the proceeding (Article 319 SCPC), as mentioned under Question 14. This is usually the procedure adopted when the suspicions have not been sufficiently substantiated to justify bringing charges or when the person has already been convicted abroad and it is unnecessary to add sanctions. In this context, reparation of the damage (Article 53 SCC) or payment of the procedural costs can favour such an abandonment decision. Even if an abandonment of the proceeding is decided, the related decision can still order the confiscation of assets or a



compensation claim against the accused. The conditions to reach an abandonment of the proceeding are usually discussed between the prosecutor, the accused and the plaintiff.

The second procedure is through a summary penalty order (Article 352 SCPC). This is usually the procedure adopted when the prosecuting authority considers that there are enough charges to convict the accused and that the sentence to be imposed does not exceed 6 months of imprisonment, or a monetary penalty of 180 daily penalty units. A summary penalty order can also provide for the confiscation of assets or a compensation claim against the accused. The prosecuting authority, the accused and the plaintiff may all have an interest in discussing such solution, which shortens the proceeding and limits the sentence of the accused. If no opposition is made within ten days of the summary penalty order, the latter becomes a final judgment (Article 354 SCPC).

The third procedure is through accelerated proceedings (Articles 358 *et seq.* SCPC). Before the end of the preliminary investigation, and the issuance of an indictment, the accused may request the public prosecutor to conduct accelerated proceedings provided the accused admits the matters essential to the legal appraisal of the case and recognises, if only in principle, the civil claims. The prosecutor will draft an indictment and once it is agreed upon by the parties, the prosecutor will pass it to the court. The latter will only verify whether the conditions of the accelerated proceedings are met: the accused admits the matters essential to the legal appraisal of the case, all parties agree on the draft indictment, the sentence does not exceed five years of imprisonment and is appropriate in the given case. As for the two previous ways, the prosecuting authority, the accused and the plaintiff may all have an interest in discussing such solution, in particular to shorten the investigative phase and to avoid the uncertainties of the outcome of a trial.

### **19. Is there any requirement or benefit to a corporate for voluntary disclosure to a financial crime authority?**

Voluntary disclosure and/or full cooperation during the investigation constitute potential grounds for mitigation of the sentence. The court shall reduce the sentence if the offender has shown genuine remorse, and in particular has made reparation for the damage or loss caused, insofar as it may reasonably be expected of him (Article 48 *let. d* SCC).

To our knowledge, the case law has not excluded the application to corporates of these grounds for mitigation.

A voluntary disclosure and/or full cooperation during the investigation can also favour the discussion with the prosecuting authority in order to reach one of the three procedures mentioned under Q18, i.e. the abandonment of the proceeding or a summary penalty order if the offence is not too serious or even accelerated proceedings if the offence is a more serious.

### **20. What rules or guidelines determine sentencing? Are there any leniency or discount policies? If so, how are these applied?**

In Swiss criminal law, there are two types of sanctions: sentences and measures. Sentences include imprisonment, monetary penalties and fines. Key measures related to financial crime offenses are confiscation of assets and compensation claim, and to a lesser extent the prohibition from carrying on an activity (such as in the financial sector).

#### *For individuals*

All the above sanctions apply to individuals.

For financial crime offences, imprisonment can go in principle from three days to ten years.

Monetary penalties ranges from 3 daily penalty units to 180 daily penalty units. In certain cases such as aggravated money laundering, the monetary penalty can go up to 500 daily penalty units (Article 305bis para. 2 SCC). The court decides on the number according to the culpability of the offender. A daily penalty unit normally amounts to a minimum of CHF 30 and a maximum of CHF 3'000 (Article 34 SCC). In certain cases, such as aggravated money laundering, imprisonment can be combined with a monetary penalty (Article 305bis para. 2 SCC).

Fines can go up to hundreds of thousands of Swiss Francs, e.g., maximum of CHF 500'000.- for a violation by financial intermediaries of their duty to report (Article 37 AMLA).

The court determines the sentence according to the culpability of the offender. It takes account of the previous conduct and the personal circumstances of the offender as well as the effect that the sentence will have on his/her life. Culpability is assessed according to the seriousness of the damage or danger to the legal interest concerned, the reprehensibility of the conduct, the offender's motives and aims, and the extent to which the offender, in view of the personal and external circumstances, could have avoided causing the danger or damage. The court decides on the value of the daily

penalty unit (for monetary penalties) according to the personal and financial circumstances of the offender at the time of conviction, and in particular according to his/her income and capital, living expenses, any maintenance or support obligations and the minimum subsistence level (Article 47 SCC).

Regarding measures, all assets stemming directly from any offense, or their replacement value (as long as the paper trail is established), can be confiscated in the hands of the perpetrator or even of third parties under certain conditions. When the paper trail cannot be established, any equivalent value of the assets obtained through the offense can be seized in the hands of the perpetrator or even of third parties under certain conditions and a compensation claim pronounced. Confiscation and compensation claim are pronounced in favour of the public entity where the proceeding is conducted (for example: Swiss Confederation if the federal criminal authorities have jurisdiction, Canton of Geneva if the Geneva criminal authorities have jurisdiction). The victim of the offense can obtain under certain conditions the allocation of the confiscated assets or of the compensation claim. (Articles 70 to 73 SCC).

#### *For corporates*

Only fines can be used as sanction against corporates. The maximum is set at CHF 5 million (Article 102 para. 1 SCC). The court assesses the fine in particular in accordance with the seriousness of the offence, the seriousness of the organisational inadequacies and of the loss or damage caused, and based on the economic ability of the corporate to pay the fine (Article 102 para. 3 SCC).

Regarding measures, confiscation of assets and compensation claim are applicable at the same conditions as for individuals (cf. above).

Whether for individuals or corporates, every offence provides for a minimum or maximum sentence which must be respected, save if there are grounds for mitigation or aggravation.

Art. 48 SCC provides grounds for mitigation of the sentence, notably:

- the offender acted for honourable motives, while in serious distress, or while of the view that he was under serious threat;
- the offender has shown genuine remorse, and in particular has made reparation for the injury, damage or loss caused, insofar as this may reasonably be expected of him;
- the need for punishment has been

substantially reduced due to the time that has elapsed since the offence and the offender has had a good conduct in this period.

If one of these grounds applies, the court is not bound by the minimum penalty that the offence carries (Article 48a SCC). Furthermore, the courts can refrain from sanctioning a person even if convicted in the cases mentioned under Question 14: when the level of culpability and consequences of the offence are negligible (Article 52 SCC), or when the accused has made reparation for the loss, damage, or injury caused (Article 53 SCC).

If the offender, by committing one or more criminal actions, has fulfilled the requirements for two or more penalties of the same form, the court shall impose the sentence for the most serious offence at an appropriately increased level. It may not, however, increase the maximum level of the sentence by more than half, and it is bound by the statutory maximum for that form of penalty (Article 49 SCC). It is uncertain whether this increase also applies to corporates.

### **21. In relation to corporate liability, how are compliance procedures evaluated by the financial crime authorities and how can businesses best protect themselves?**

As mentioned under Question 2, in case of primary corporate liability, which applies only in relation with offences of Criminal organisation, Financing terrorism, Money laundering and Active bribery of Swiss or foreign public agents, respectively private individuals, corporates are liable if they failed to take all the reasonable organisational measures that are required in order to prevent one of the above listed offences.

As to the subsidiary corporate liability, which applies for most of all the other felonies and misdemeanours, corporates are liable if it is not possible to attribute the criminal act to any specific individual due to their inadequate organisation.

Failure in the organisation of the corporates is a central condition of their criminal liability. Therefore, assessment of the organisation of the corporates by the financial crime authorities, and in particular of their compliance procedures, is central to assess their criminal liability in each cases.

The seriousness of the organisational inadequacies is also one of the main criteria to assess the amount of the fine sanctioning the liable corporate.

Financial criminal authorities may also take into account

to either exclude or reduce a fine imposed to a corporate, depending on the seriousness of the offense committed and the measures taken since the offence was committed to improve the organisation, such as its compliance procedures, the continuous education of employees, the further level of supervision, etc.

## 22. What penalties do the courts typically impose on individuals and corporates in relation to the key offences listed at Q1?

### For individuals

- *Criminal mismanagement (Article 158 SCC), Money laundering (Article 305bis SCC)*: The offender faces imprisonment of up to three years or a monetary penalty. In the aggravated cases of these offences, the offender is subject to imprisonment of up to five years or a monetary penalty. As mentioned under Question 20, in certain cases such as aggravated money laundering, imprisonment can be combined with a monetary penalty (Article 305bis para. 2 SCC).
- *Misappropriation (Article 138 SCC) and Fraud (Article 146 SCC)*: The offender is liable to imprisonment of up to five years or a monetary penalty. In the aggravated cases of these offences, the offender is subject to imprisonment of up to ten years or a monetary penalty.
- *Bankruptcy and Debt collection felonies or misdemeanours (Articles 163 to 170 SCC)*: The offender faces imprisonment of up to three for some, respectively of up to five years for others or a monetary penalty. There is no aggravated version of these offences.
- *Forgery of a document (Article 251 SCC), Financing terrorism (Article 260quinquies SCC), Bribery of foreign or Swiss public agents (Articles 322ter and 322septies SCC)*: The offender faces imprisonment not exceeding five years or a monetary penalty. There are no aggravated versions of these offences.
- *Bribery of private individuals (Articles 322octies-novies SCC)*: The offender faces imprisonment of up to three years or a monetary penalty. There is no aggravated version of these offences.
- *Criminal organisation (Article 260ter SCC)*: The offender is liable to imprisonment of up to ten years or a monetary penalty. In the aggravated case of this offence, the offender is subject to imprisonment of at least three years, which can go up to twenty years.

Violation by financial intermediaries of their duty to report suspicions of money laundering: the offender is subject to a fine of up to CHF 500'000.- (Article 37 AMLA).

### For corporates

As seen above (Question 20), they are subject to a fine which can go up to CHF 5 million.

For both individuals and corporates, it is difficult to set a "typical" sentence imposed by court for each financial crime offense, as it really depends on the facts of each case. This being said, sentences in Switzerland for financial crime offense tend to be in principle rather lenient, especially for first-time offenders where the imprisonment or monetary penalty of maximum two years is generally pronounced but its execution suspended (Articles 42 *et seq.* SCC). Again, this depends on the circumstances of the case, the level of fault of the perpetrator, his/her collaboration with the prosecuting authorities, the potential reparation of the damage, etc.

One must not forget the confiscation of assets or compensation claim in the hands of the perpetrator (individual or corporate) which has to be pronounced along with the sentence.

## 23. What rights of appeal are there?

Generally speaking, there are two types of appeals available. There are objections against decisions of the public prosecutor during the investigative phase, and there are appeals against a judgment of a court on the merits.

Objections must be filed within 10 days to the objection authority. The latter will issue a decision which can then be appealed in certain cases to the Federal Supreme Court within 30 days (there are shorter deadlines for exceptional cases).

An appeal must first be anticipated by a notice of intention to appeal to be filed with the appeal authority within 10 days of the issuing of a first instance judgment on the merits. The first instance court will then issue a detailed motivated judgment, against which the party who had noticed his/her intention to appeal can file his/her appeal within 20 days with the appeal authority. The second instance judgment which will result can also be appealed before the Federal Supreme Court within 30 days (there are shorter deadlines for exceptional cases).

The objection and appeal authorities have full powers to examine an objection/appeal, i.e. violation of the law, incomplete or incorrect assessment of the facts, inequity

(Article 393 para. 2 and Article 398 para. 2 and 3 SCPC).

The Federal Supreme Court has a limited power of cognition, i.e. violation of the law (Article 95 and 96 Federal Supreme Court Act, FSCA) or incorrect assessment of facts on the condition that it amounts to a violation of the law (Article 97 FSCA).

The prosecutor's office (Article 381 SCPC) as well as any party with a legitimate interest in the quashing or amendment of a decision (Article 382 para. 1 SCPC) may object/appeal. A plaintiff can appeal on the question of guilt of the accused but he/she cannot however contest a decision on a sanction that has been imposed on the accused (Article 382 para. 2 SCPC).

Before the Federal Supreme Court, the conditions are more restrictive, as one must have participated in the objection/appeal proceeding before the previous authorities and one must have a judicial interest in the quashing or amendment of a decision (Article 81 para. 1 FSCA). This is usually true for the offender, the prosecutor's office and the plaintiff who however must have filed civil prayers for relief.

#### **24. How active are the authorities in tackling financial crime?**

Because of multiple financial scandals which made a lot noise between the 1970's and 1990's, the reputation of Switzerland's financial place was severely affected on an international level.

To protect the Swiss financial place, Swiss authorities took more and more measures to combat financial crime. In particular, Switzerland adopted a lot of new financial crime offences in the SCC and other laws since the beginning of the 1990's while ratifying the various international multilateral treaties on various financial crimes: offenses of Money laundering and Failure for financial intermediaries to identify the beneficial owner of a business relationship (1990); Offense and various provisions regarding criminal organisations (1994); Anti-Money Laundering Act, including Violation of the duty to report suspicions of money laundering (1998); offense of Active bribery of foreign agents (2001); jurisdiction given to Federal prosecuting and judgment authorities for key financial crime offences (2002/2004); offense of Financing terrorism and creation of corporate criminal liability (2003); offense of Passive bribery of foreign agents and Bribery of private individuals (2006); extension of money laundering to aggravated tax fraud predicate offences (2016).

Generally speaking, prosecuting authorities have always been and are still active in opening investigation for both

old and recent offences and take preventive measures such as seizing assets in view of a future confiscation or compensation claim. Swiss criminal courts tend to adopt large interpretations of the objective and subjective conditions of financial crime offences.

Further, in most of the cases, there is a good "cooperation" between the prosecuting authority and the plaintiff, in particular when it comes to the seizing of assets to secure a future confiscation or compensation claim to be allocated to the plaintiff.

#### **25. In the last 5 years, have you seen any trends or focus on particular types of offences, sectors and/or industries?**

There have been more investigations related to public corruption, especially in the commodity trading industries. There has also been an increase of investigations for money laundering in the banking industry, in particular for criminal administrative offences.

While the offenses of misappropriation, disloyal management and forgery of documents have always represented a significant part of the financial crime offences prosecuted in Switzerland, criminal authorities have also focused in the last ten years, and even more in the last five years, on prosecuting public bribery and the like offences, as well as cyberfraud in a broad sense.

This trend is the result of priorities set by the Swiss Government in relation with these two categories of offences. The reasons are that public bribery and the likes have been detrimental to Swiss financial reputation in the past and that the number and impact of cyberfrauds have raised significantly as a result of cyber-developments in every sector of the economy. The increase in prosecution of public bribery and the likes is also the result of a case law developed by our criminal courts which have set a very low level of suspicion triggering the duty to report to the MROS. It is also a result of the increasing numbers of financial intermediaries prosecuted and sanctioned by both criminal and administrative authorities for violation of their duty to report, which led to a very significant increase of reports to the MROS and thus automatically to an increase of cases handled by criminal prosecuting authorities.

For the above-mentioned reason, the financial sector has been the object of a specific scrutiny by the criminal and regulatory authorities.

As already mentioned, the commodity trading companies have been under more scrutiny from the

Swiss authorities.

## 26. Have there been any landmark or notable cases, investigations or developments in the past year?

### *Landmark and notable cases and investigations*

The Swiss financial crime landscape has been significantly affected by the forced resignation of the OAG in July 2020 in relation with the reproaches made against him in the FIFA case, i.e. that he had “secret” meetings where no notes would have been taken with the representative of the plaintiff FIFA. It took a significant time to the Parliament to find an official replacement. Moreover, the OAG, as well as the Prosecution Offices of the cantons at a lesser level, are more reluctant to maintain contacts with plaintiffs than before the above events.

A judgment was recently issued by the Federal Criminal Appeal Court in the notable case against FIFA’s former Secretary General. Said Court confirmed his conviction for Forgery of Documents and his acquittal for Criminal mismanagement, and further convicted him for Private passive bribery. This judgment is subject to an appeal to the Federal Supreme Court.

- In another FIFA related case, the Federal Criminal First Instance Court recently acquitted the former President of the FIFA and the former President of UEFA from accusations of Fraud and Forgery of Documents.

Landmark decisions have been rendered by the Swiss Supreme Court in relation with confiscation of assets or condemnation to a compensatory claim in relation with the Lava Jato case. In one of these decisions, the Federal Supreme Court retains that the proceeds of a legal transaction obtained through bribery are in principle subject to confiscation, regardless of the objectively legal nature of the service that is the subject of the legal transaction facilitated by bribes. However, various criteria have to be taken into account in determining whether and to what extent the profits of a corrupt contract can be confiscated, such as whether (i) the contract had an illegal content, (ii) the conclusion of the contract was within the discretionary power of the corrupt official, (iii) there was an entitlement to the benefit or (iv) the contract, and thus the resulting benefit, would have been concluded even without the payment of the bribe.

### *Legal developments*

Reinforcements of the anti-terrorism legislation have been adopted by the Federal Parliament and accepted by the Swiss people by vote in 2021. Recruiting, training and travelling with a view to committing a terrorist offence, as well as financing one of these behaviours, is punishable under Article 260 SCC as from 1st July 2021. Sanctions related to organised crime in general have been significantly reinforced. At the same time, Switzerland ratified the Council of Europe Convention on the Prevention of Terrorism and its Additional Protocol of 22 October 2015 (effective 1 July 2021).

## 27. Are there any planned developments to the legal, regulatory and/or enforcement framework?

### *Legal and enforcement framework*

Minor amendments of the SCPC are to be addressed by the Federal Parliament. One suggested amendment might affect financial crime proceedings: it aims at allowing the prosecuting authorities to include in a summary penalty order civil claims of the victim, at certain restricted conditions though (i.e. agreement of the accused or clear case with litigation value of maximum CHF 30'000.-).

Amendments regarding the sanctions for various criminal offenses are to be addressed by the Federal Parliament. For some financial crime offences, it means that aggravated cases where the perpetrator earns revenues from his wrongdoings as if it was a professional occupancy could be punished by a minimal sentence of 6 months (instead of only 90 days today).

### *Regulatory framework*

Amendments of the AMLA have been discussed before the Swiss Parliament during 2020/2021 in order to address few criticisms made by the FATF in its last evaluation:

- The most significant one aimed at submitting the persons/entities who/which provide professional services related to the creation, management or administration of companies (called “advisors”) – including lawyers and public notaries within their typical activity – to the various AML obligations including the duty to report suspicions of money laundering to the MROS, i.e. the Swiss Financial Unit. The Federal Parliament refused to apply the AMLA to advisors.
- Further, in the same AMLA reform, an interesting debate was held between the two Chambers of the Parliament in relation with

the level of suspicion required to trigger a duty to report suspicion of money laundering to the MROS. While Swiss courts have for years interpreted the notion of “reasonable grounds to suspect” in a very broad manner, our High Chamber adopted a more restrictive definition, which was in the end abandoned in favour of the very broad interpretation of the Swiss courts. This choice has a significant impact on the prosecution of financial crime offences since reports by financial intermediaries to the MROS are often the cause for initiating a criminal proceeding.

- Measures have been adopted to make associations, which collect or distribute funds outside Switzerland for various purposes (charity, religion, culture, social), more transparent, as well as to strengthen the supervision and controls in the field of precious metals. The importance of ongoing verifications about the beneficial owner and the currency of client data is specifically underlined. These amendments are expected to come into force on January 2023.

## 28. Are there any gaps or areas for improvement in the financial crime legal framework?

The length of the criminal proceedings, especially in

complex financial matters, is the main current issue and area for improvement.

Many factors can contribute to such length, which according to our experience are not specific to Switzerland, such as: the workload of the financial crime authorities, especially of the prosecuting authorities; multiple charged/accused persons or plaintiffs; multiple possibility to object/appeal against incidental decisions of the prosecuting authorities; length of the foreign mutual assistance in criminal matters proceedings; priority given by the cantonal criminal authorities to proceedings where the charged/accused person is in preventive jail (which is rarely the case in financial crime); reluctance of the prosecuting authorities to close cases where they do not have sufficient charges; etc.

Mainly because of their heavy workload, prosecuting authorities have a tendency to investigate much more incriminating elements against the accused rather than exculpating ones in his/her favour, despite their duty to investigate both of them.

Further, the heavy workload and/or the limited resources make it difficult for prosecuting authorities to conduct certain very complex financial crime cases with the necessary means.

Investigations against corporates are scarce, even if their number increases, because of additional procedural and evidence hurdles compared to investigations against natural persons (such as directors or officers).

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## Contributors

**Christophe Emonet**  
Partner

[christophe.emonet@pestalozzilaw.com](mailto:christophe.emonet@pestalozzilaw.com)



**Nicolas C. Herren**  
Partner

[nicolas.herren@pestalozzilaw.com](mailto:nicolas.herren@pestalozzilaw.com)

