

Corporate criminal liability under Article 102 StGB

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Swiss criminal law has recognised the liability of companies since 2003. Under Article 102 paragraph 1 StGB, a company is liable for a felony or misdemeanour committed in the exercise of commercial activities within its purpose if the offence cannot be attributed to a specific natural person because of the deficient organisation of the company. This subsidiary liability is complemented by a primary liability under paragraph 2. For a closed list of offences the company is punished irrespective of the liability of natural persons if it has failed to take all reasonable and necessary organisational measures to prevent the offence. The list includes bribery of Swiss and foreign public officials, private bribery under Article 322octies StGB, money laundering, the financing of terrorism and participation in a criminal organisation. The maximum fine is five million Swiss francs, to which the confiscation of profits can be added.¹

The cap of five million francs appears modest when compared with the sums that the authorities of the United States impose. In practice, however, the confiscation of profits often exceeds the fine many times over. The Office of the Attorney General of Switzerland has concluded several proceedings against companies by way of summary penalty orders, in which the fine and a compensation claim were combined. Such orders have been issued in cases involving companies from the engineering, commodities and banking sectors. The procedure is efficient, because the company accepts the order and avoids a public trial. Critics argue that it gives the public too little insight into the facts and that Switzerland lacks a formal instrument of deferred prosecution comparable to those of the United States and the United Kingdom.²

For a company headquartered in Basel, Article 102 StGB has a particular consequence. The offence may be committed by an employee of a foreign subsidiary, but the organisational fault may lie with the parent company if it has failed to set up adequate controls for the group. Swiss jurisdiction can

arise if the organisational failure occurred in Switzerland, although the precise reach of Swiss jurisdiction over group structures remains debated. The compliance policies, training programmes and investigation procedures that are designed in Basel are therefore also the parent company's defence against corporate criminal liability. They document that the company has taken the measures that the law requires.³

The case law of the Federal Supreme Court on Article 102 StGB is still limited in volume. Its most cited decision concerned a money laundering case in which the court discussed the requirements for an adequate organisation. In bribery matters most corporate cases end with a summary penalty order, so that the courts have had few opportunities to clarify the standard. Companies therefore orient themselves mainly towards the much more detailed guidance of foreign authorities. This is a typical example of the way in which international standards shape practice in Switzerland even where the Swiss legal basis is formally independent.⁴

1 Notes

1. Article 102 StGB, introduced by the Federal Act of 21 March 2003, in force since 1 October 2003. On the concept of organisational fault and on the interplay of fine and confiscation (Articles 70 et seq. StGB), see the leading commentaries and the decisions of the Federal Supreme Court, for example in the case concerning the Swiss Post (BGE 142 IV 333). To be verified. ↩
2. On the practice of the Office of the Attorney General of Switzerland in corporate bribery cases, including summary penalty orders under Article 352 et seq. of the Swiss Criminal Procedure Code (StPO, SR 312.0), see its annual activity reports. The question of introducing deferred prosecution agreements has been discussed in Parliament and in the literature. Status to be verified. ↩
3. On the territorial scope of Article 102 StGB in group structures and on the place where the organisational deficiency is deemed to occur, see the literature on corporate criminal liability in Switzerland, for example the commentaries by Niggli/Gfeller and Forster on Article 102 StGB. To be verified. ↩

4. See, for example, the Federal Supreme Court decision in the PostFinance money laundering case (BGE 142 IV 333) and the subsequent literature on organisational deficiency. To be verified. ↩

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