

Corporate criminal liability: Article 102 SCC

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The second pillar of an institution's exposure is its own criminal liability. The Federal Council had refused in 1989 to make companies criminally liable for money laundering and had referred the question to the revision of the general part of the Criminal Code.¹ The rule came with effect from 1 October 2003, first as Article 100quater and from 2007 as Article 102 SCC.² Under paragraph 1, a felony or misdemeanour committed in an undertaking in the exercise of commercial activities in accordance with its objects is attributed to the undertaking if it cannot be attributed to any specific natural person because of inadequate organization. Under paragraph 2, for a list of offences that includes participation in a criminal organization (Art. 260ter SCC), financing of terrorism (Art. 260quinquies SCC), money laundering (Art. 305bis SCC) and bribery (Art. 322ter, 322quinquies, 322septies(1) and 322octies SCC), the undertaking is liable irrespective of the liability of natural persons if it failed to take all reasonable and necessary organizational measures to prevent the offence. The fine can reach CHF 5 million and is assessed according to the seriousness of the offence, the organizational deficiencies, the damage caused and the economic capacity of the undertaking.³

For a bank in Lugano, Article 102(2) SCC is the provision that turns compliance from a regulatory matter into a criminal defence. The question in proceedings is whether the institution had the organization that could reasonably be expected of it: a risk analysis, clear rules on the acceptance of clients and transactions, training, monitoring systems, escalation to compliance and management, and an internal culture in which reports are made. The bank that can show this organization has a defence. The bank that cannot show it is liable even if no individual employee can be convicted. Chapter G.III describes the proceedings against banks under Article 102 SCC before the Federal Criminal Court in Bellinzona, which have turned the provision into a practical risk.

1 Confiscation: Articles 70 to 72 SCC

The third pillar is the law of confiscation, which descends from the revision of 1994. Under Article 70 SCC the court orders the forfeiture of assets acquired through an offence or intended to be used for an offence, unless they are returned to the injured party. A third party who acquired the assets in ignorance of the grounds for forfeiture and gave adequate consideration is protected, and the right to order forfeiture is subject to a limitation period of seven years unless the prosecution of the offence is subject to a longer period.⁴ Where the assets are no longer available, the court orders a compensatory claim of the State in the same amount (Art. 71 SCC).⁵ Under Article 72 SCC the court orders the forfeiture of all assets subject to the power of disposal of a criminal or terrorist organization. For the assets of a person who participated in or supported such an organization, it is presumed that they are subject to that power until the contrary is proven.⁶ Through Article 74a IMAC, Swiss forfeiture law is linked to foreign proceedings, so that assets seized in Lugano at the request of Milan or Palermo can be handed over to Italy.

For the practitioner. The defence of a financial institution in Ticino against the risks described in this chapter rests on a few verifiable elements: - identification of the contracting party and of the beneficial owner under Arts. 3–4 AMLA and the banks' due diligence agreement, documented so that an authority can reconstruct it (Art. 7 AMLA; Art. 305ter(1) SCC), - a written risk analysis that addresses the specific Ticino exposures: Italian cash history, domiciliary companies, fiduciaries as introducers, cross-border relationship management and politically exposed persons, - clarifications under Art. 6 AMLA whenever a transaction or relationship appears unusual, with the result recorded, - a clear internal process for reports under Art. 9 AMLA and for the use of the right to report under Art. 305ter(2) SCC, including the freeze under Art. 10 AMLA and the prohibition of tipping off, - board-level ownership of the organization that Art. 102(2) SCC requires, with regular review, - a protocol for requests for mutual assistance and production orders, so that the institution executes them correctly and informs its clients only as the law allows.

2 Lessons for Lugano's financial centre

The history of the 1980s offers three lessons for the modern financial centre. The first is that reputation is a legal asset. The Pizza Connection and the Lebanon Connection were investigated in Ticino, and the money laundering law of 1990 was in large part a response to them. A financial centre that is seen as a laundromat for organized crime will sooner or later

be regulated from outside, by foreign legislators, international bodies or the loss of correspondent banking relationships. Lugano's interest in a strict regime against criminal money is therefore its own interest. The Federal Council recognized as early as 1989 that the theme of money laundering had become fixed in international opinion about the Swiss financial centre.⁷

The second lesson concerns the border between criminal money and undeclared money. For two decades after 1990, Swiss law treated the two categories differently, and Lugano's business model rested on that difference. The extension of the predicate offences to aggravated tax misdemeanours in 2016, together with the automatic exchange of information with Italy from 2017, has largely removed the distinction. Chapters E.II and G.IV describe the consequences. The third lesson concerns cooperation. The cases of the 1980s were solved because prosecutors in Lugano, Bellinzona, Milan and Palermo worked together across the border, in the same language and often in person. The institutions that today carry this cooperation, from the Swiss–Italian agreement of 1998 to the Federal Criminal Court in Bellinzona and the MROS, are the legacy of that experience.

3 Notes

1. Botschaft of 12 June 1989 (as above). ↩
2. Source as cited in the printed edition. ↩
3. Art. 102 SCC, <https://www.droit-bilingue.ch/en-de/3/31/311.0-102-133.html> (para. 2 as amended by the Federal Act of 25 September 2015, in force since 1 July 2016, AS 2016 1287). ↩
4. Art. 70 SCC, <https://www.droit-bilingue.ch/en-de/3/31/311.0-70-95.html>. ↩
5. Art. 71 SCC, <https://www.droit-bilingue.ch/en-de/3/31/311.0-71-96.html> (para. 1: claim of the State "in respect of a sum of equivalent value"). ↩
6. Art. 72 SCC, <https://www.droit-bilingue.ch/en-de/3/31/311.0-72-97.html> (as amended by the Federal Decree of 25 September 2020, in force since 1 July 2021, AS 2021 360). ↩

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7. Botschaft of 12 June 1989 (as above), 1066 (the theme had become fixed in international opinion "seit den Affären <Banco Ambrosiano> und <Pizza-Connection>"). ↩

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