

Compliance after the convictions

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The compliance obligations that follow from a resolution with the United States Department of Justice are demanding. A company that enters into a plea agreement or a deferred prosecution agreement typically undertakes to maintain a compliance programme that meets the standards of the Department's guidance on the evaluation of corporate compliance programmes, to report any evidence of further violations, to cooperate with ongoing investigations and to accept the oversight of an independent monitor, who reviews the programme, recommends improvements and reports to the Department.¹ A breach of these obligations can lead to the prosecution of the company for the original offences and to additional penalties.

For a company headquartered in Zug, the presence of an American monitor raises questions of Swiss law. The monitor's access to the company's documents and employees in Switzerland, and the transmission of information to the American authorities, must respect the Swiss prohibition of activities for a foreign state on Swiss territory, the Swiss rules on data protection and the rules on business secrecy.² Swiss companies that cooperate with foreign authorities in investigations or under resolutions have developed procedures to reconcile these obligations, often with the involvement of the Swiss authorities, and practitioners in Zug have acquired considerable experience in this field.

The practitioner who advises a trader after a conviction must also consider the consequences in other jurisdictions. A conviction for bribery in the United States or the United Kingdom may lead to debarment from public procurement, to the loss of financing from development banks, to investigations in the countries where the bribes were paid and to civil claims by those countries and by competitors. It may also lead to investigations in Switzerland, as the proceedings of the Office of the Attorney General against Glencore in 2024 show. The coordination of the

defence across several jurisdictions, with the aim of avoiding multiple penalties for the same conduct, is one of the most demanding tasks of the practitioner in this field. The American resolution of 2022 credited about 256 million dollars towards the parallel resolutions in the United Kingdom, Brazil and Switzerland, an example of such coordination.³

1 Notes

1. US Department of Justice, Criminal Division, "Evaluation of Corporate Compliance Programs", updated September 2024, justice.gov: guidance for prosecutors on the design, implementation and effectiveness of corporate compliance programmes; US Department of Justice, Office of Public Affairs, "Glencore Entered Guilty Pleas to Foreign Bribery and Market Manipulation Schemes", 24 May 2022, justice.gov: obligations to retain an independent compliance monitor for three years, to modify the compliance programme where necessary and to continue to cooperate in ongoing investigations and prosecutions. The Criminal Division's separate memorandum on the selection of monitors was not consulted. ↩
2. Lenz & Staehelin, "Art. 271 StGB weiterhin ohne klare Schranken", 3 December 2021, lenzstaehelin.com: Art. 271 StGB penalises acts performed for a foreign state on Swiss territory without authorisation that belong to an authority or official; exemption permits can be requested from the competent federal department, which handles them pragmatically; discusses BGer 6B_216/2020 of 1 November 2021 (transfer of client data to the US Department of Justice). Markus Husmann, "Internationale Kooperation im Spannungsfeld der Staatsschutzbestimmungen", 28 July 2021, contralegem.ch: Arts. 271 and 273 StGB (economic intelligence) operate as blocking statutes against transmission of protected information to foreign authorities outside legal assistance channels; criticises the authorities' practice of issuing authorisations under Art. 271 StGB. Example of a published authorisation: Federal Office of Justice, "Erteilung einer Bewilligung im Sinne von Artikel 271 Ziffer 1 StGB", 25 February 2022, bj.admin.ch. ↩

3. US Department of Justice, 24 May 2022: credit of about \$256 million towards parallel resolutions with UK, Brazil and Swiss authorities. ↩

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