

Legal News from Switzerland

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Deputy Sheriff or Delinquent: The Company's New Role in Criminal Matters

Presumably mid-next year, Switzerland will add to the growing number of countries having introduced **corporate criminal liability** as a means of law enforcement.

Firstly, the corporation (as distinguished from the direct perpetrator) will be punishable if a felony or misdemeanour is committed in the ordinary course of its business and, due to **lack of proper organisation**, the criminal act cannot be attributed to its direct perpetrator. The corporation can be fined up to **CHF 5 Million**.

Secondly, this **subsidiary criminal liability** - the corporation can only be convicted if the actual perpetrator cannot be determined - becomes a **primary criminal liability** in respect of certain serious offences, notably and primarily money laundering and corruption. If the corporation is found lacking for not taking all expected reasonable measures and precautions to prevent such offences, then it may be convicted even when the direct perpetrator is identified (Article 100^{quarter} and 100^{quinquies} of the Swiss Penal Code).

This is a novelle in the Swiss legal system, both as regards to corporate criminal liability (it already exists in the US and France, among other countries) and also, to some

extent, to the objectivisation of such liability. It is probably fair to say that the latter is a universal trend. Corporate criminal liability on its part is the result of the 1999 UN-Convention for the Suppression of the Financing of Terrorism.

How can such corporate liability be avoided?

It is a difficult undertaking, although the purpose of the new law is relatively clear. Corporations must stop any failing in their organisation preventing the identification of the perpetrator of a crime. Additionally they must take all possible actions to prevent serious crimes. Therefore, clear structures, responsibilities, delegations and an efficient control are required.

Is this sufficient? It is often many years after the commission of the acts and a lengthy investigation that a judge determines whether or not there was a flaw in the organisation of a corporation and holds the corporation liable and punishes it. But the heat will be on the corporation very much during the investigation already. It is the obligation of the prosecutor to identify the suspects and, eventually, the perpetrator. Corporate criminal liability will expose corporations in a new potentially very serious way. In order to avoid being blamed

for a failing in its organisation, a corporation will find itself unwittingly in the role of the *deputy sheriff* stretching itself to support the investigating magistrate in his efforts looking for the direct perpetrator.

Not co-operating will not be without consequences. As charges of lacking organisation could be raised quite lightly, the result of the new law might in effect bring about an **inversion of the burden of proof**. It will be up to the corporation to establish that there was no flaw in its organisation; and such proof can be difficult and cumbersome.

Given the chronically overloaded investigation authorities, there might be a temptation, in cases of corporate primary criminal liability, to neglect a thorough investigation and go directly against the corporation. This risk was indeed addressed by Justice Minister Ruth Metzler during the parliamentary debate, though not to much avail.

In today's increasingly unpredictable and electronically-netted business world and given the high specialisation of work, a corporation could quite easily be faced with a criminal investigation and accusations of lacking organisation, particularly in the financial services and industry. Whether or not such charges can be successfully defended will depend very much on **evidence**, of course, and espe-

cially **documentary evidence** of adequate organisational precautions.

Corporations in Switzerland need to make an assessment of their organisation. They will have to make sure that clear systems and procedures are in place, under continuous supervision, and that the same are adjusted and improved whenever possible. Organisations will have to be checked for their vulnerability to unlawful acts, any weak spots will have to be detected and appropriate remedy taken. And that, in many instances, much beyond today's standards. Mostly, this new responsibility will have to be attended to by a new dedicated officer.

Obviously in cases of potential primary corporate criminal liability (money laundering and corruption) special attention is warranted.

From now on, risk management must include the avoidance of criminal liability as such.

Corporations need to have a fresh and serious look at their organisation, systems and procedures and take all required actions, and that very soon, in order to steer away from this new serious business risk. And more often than to their liking, they might find themselves called upon to assist the criminal investigating magistrate.

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