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Update

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Leading case on the criminal liability of corporations for money laundering

The Swiss Federal Supreme Court clarified in a recent landmark decision that the criminal liability of enterprises is not a strict liability, but rather requires proof of a criminal offence in any case. This applies also to the criminal liability of an enterprise due to failure to implement organizational measures to prevent certain white collar crimes from being committed. The decision defines the limits of Swiss criminal law applicable to enterprises, in particular with respect to money laundering.

Basics of Swiss criminal law applicable to enterprises

Since 2003, enterprises can be held liable under Swiss law for criminal offences which are committed in the exercise of commercial activities in accordance with the objects of the enterprise (art. 102 SCC). The enterprise may be fined up to CHF 5 million.

On the one hand, criminal liability of an enterprise is triggered if an offence cannot be attributed to a specific natural person due to the inadequate organization of the enterprise (so-called second-degree liability, art. 102(1) SCC). The enterprise is charged for the organizational shortcomings that prevent the detection of the criminal offence (the so-called underlying offence).

On the other hand, an enterprise may be held criminally liable for specific white collar crimes if it has failed to take all reasonable organizational measures that are required in order to prevent such an offence from being committed (so-called genuine, cumulative, or concurrent liability, art. 102(2) SCC). In this case, the enterprise is charged for the organizational shortcomings which allow the offence being committed. The criminal code sets forth an exhaustive list of white collar crimes which an enterprise has the duty to prevent. The list comprises the following offences: criminal organization, financing of terrorism, money laundering, bribery of or granting an advantage to Swiss public officials, bribery of foreign public officials, and bribery of private individuals (which is prosecuted *ex officio* since 1 July 2016).

Landmark Supreme Court Decision

As regards the criminal liability of an enterprise for money laundering (art. 102(2) SCC in connection with art. 305bis SCC), the Swiss Federal Supreme Court issued a landmark decision on 11 October 2016 which defines the limits of criminal law applicable to enterprises (decision 6B_124/2016, awaiting official publication). The decision's gist is the following:

The criminal liability of an enterprise always requires that the underlying offence has been committed, i.e., that the objective and subjective elements of a particular crime are fulfilled. In other words, an enterprise cannot be convicted based only on the fulfillment of the objective elements of the offence (i.e., in case of money laundering the frustration of the identification of origin, of the tracing, or of the forfeiture of assets which originate from a felony or an aggravated tax misdemeanour). In addition, it is mandatory to establish that one or several (possibly unknown or unidentified) employees acted with the required intent and fulfilled the subjective elements of the offence (i.e., in case of money laundering, that they knew or had reason to believe that the assets originate from a felony or an aggravated tax misdemeanour). The Supreme Court expressly rejected the notion that proof of the subjective elements was not necessary and that it would suffice if the objective and subjective elements of the offence could be attributed only to the enterprise itself.

Summary of facts

The decision's factual background is the following: A person was paid out CHF 4.6 million in cash at a counter of a financial intermediary. This cash payment fulfilled the objective elements of money laundering because the assets originated from a felony and their withdrawal in cash not only interrupted the paper trail but also frustrated their confiscation. However, the prosecutor took the view that the employees involved in the transaction did not fulfill the subjective elements of money laundering. Therefore, the prosecutor did not start an investigation against the compliance officer who had authorized the payment, and terminated the investigation against the main teller without filing charges. Instead, the prosecutor filed charges against the financial intermediary on the basis of criminal liability as an enterprise for money laundering (art. 102(2) SCC in connection with art. 305bis SCC). The court of first instance found the financial intermediary guilty, but the court of second instance acquitted the enterprise. In its recent decision, the Supreme Court upheld this acquittal.

Summary of the reasoning

According to the Supreme Court's reasoning, both alternatives of an enterprise's criminal liability require that a criminal offence has been committed in the exercise of commercial activities in accordance with the objects of the enterprise. The committing of this underlying offence is an objective prerequisite for the enterprise's criminal liability. Therefore, it is mandatory to establish that the objective and the subjective elements of this offence are fulfilled. If this cannot be proven, the enterprise must not be held liable under criminal law. Otherwise this would result in a strict liability which the legislator expressly wanted to avoid.

The genuine or cumulative criminal liability of enterprises for specific white collar crimes according to art. 102(2) SCC arises *"independently of the criminal liability of natural persons"*. This means that (unlike for the second-degree criminal liability according to art. 102(1) SCC) the enterprise may also be held liable if the natural person who committed the underlying offence can be identified and proven to be the offender. In turn, it is at the same time not necessary to detect or punish the actual offender in order to hold the enterprise liable. What is required, however, is that a (possibly unknown or unidentified) natural person acted in a manner which fulfills the objective and the subjective elements of the offence.

In addition, the genuine or cumulative criminal liability of an enterprise requires a connection between the underlying offence and the enterprise's organizational shortcomings. The mere fact alone that one of the white collar crimes listed in art. 102(2) SCC has been committed is not sufficient proof that the enterprise has violated its duty to prevent such offence from being committed. It must rather be established that specific organizational measures had been necessary and were in fact not put in place.

As regards the facts in the case at hand, the Supreme Court found that the underlying offence, i.e., money laundering, was not established. The Supreme Court stated that the subjective elements of money laundering were not fulfilled by the employees involved in the

transaction, and that these subjective elements could not be attributed to a *"generic natural person"*. Under these circumstances the mere charge of an organizational shortcoming is not sufficient to hold the enterprise criminally liable according to art. 102(2) SCC.

Relevance of the decision for enterprises, in particular for financial intermediaries

The Supreme Court decision clarifies that the genuine or cumulative criminal liability of enterprises according to art. 102(2) SCC is not a strict liability for organizational deficiencies. An enterprise cannot be held criminally liable only because one of the white collar crimes listed in this provision has been committed in the exercise of commercial activities. In particular, it is not sufficient if the objective elements of the offence are fulfilled and if the information that was necessary to fulfill the subjective elements of the offence had been available within the enterprise. It is rather absolutely necessary that one or several (possibly unknown or unidentified) employees actually had this knowledge, and that it is established that the subjective elements of the offence are fulfilled.

The Swiss Supreme Court's decision is of considerable relevance in particular for financial intermediaries if they face money laundering charges as an enterprise. The objective elements of money laundering (i.e., the frustration of the identification of the origin, of the tracing, or of the forfeiture of assets which originate from a felony or an aggravated tax misdemeanour) may well be fulfilled in cases in which no employee fulfilled the subjective elements, i.e., no employee knew or had reason to believe that the assets in question originated from a felony or an aggravated tax misdemeanour. By clarifying that it is not sufficient if based on the information available within the enterprise one may assume such knowledge, the Supreme Court rejected a broad notion of criminal liability as an enterprise for money laundering.

Please do not hesitate to contact us in case of any questions.

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