International Strategies Against Corruption: Public-Private Partnership and Criminal Policy

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THE ROLE OF COMPLIANCE PROGRAMS IN DOMESTIC CRIMINAL LAW SYSTEMS
Switzerland

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I. Role of compliance programs in criminal liability of natural persons

- The principle “societas delinquere non potest”, excluding corporate criminal liability (CCL), applied until 2003.

- However, issues relating to corporate governance and risk management were introduced by the Federal Tribunal (Swiss Supreme Court) in cases relating to the criminal liability of the head of a company (“responsabilité du chef de l’entreprise”; “Geschäftsherrenhaftung”):
  - Bührle (1970; ATF 96 IV 155): criminal liability in case of breach of duty to prevent offences committed by subordinates;
  - Von Roll (1996; ATF 122 IV 103): duty to implement safety procedures to prevent any offences typically related to the business activity of the company; duty to implement mechanisms ensuring that any red flags indicating that offences may be committed are reported to the board of directors (negligence).

II. Role of compliance programs in corporate criminal liability

A. Introduction of CCL

- Corporate criminal liability is governed by Article 102 SCC (Swiss Criminal Code), in force since October 1st, 2003.

- The reluctance of Swiss law makers towards CCL was overcome by the pressure of international conventions. However, the reluctance of prosecutors still needs to be overcome. Only a few significant cases: Alstom; PostFinance.

- Article 102 SCC provides for two different models of CCL:
  - Subsidiary corporate liability;
  - Direct corporate liability.

B. Features common to both regimes of CCL

- Broad definition of company.
- Liability for offences committed by any natural persons integrated in the hierarchy of the company within its business activity as defined in the Commercial Register.
- Penalty and other sanctions
  - Fine not exceeding CHF 5 million;
  - Publication of the judgment;
  - Confiscation of profits and other assets replacing the profits; in cases of corruption, this measure applies both to the bribe and to the profits made by the briber, e.g. the payments made under the procurement contract obtained by bribing an official (ATF 137 IV 79 (2011)). Laundering of profits is punishable (Article 305bis SCC) and financial intermediaries must file suspicious activities reports.

C. Distinctive elements of the two regimes of CCL

1. Subsidiary CCL

Art. 102 (1) SCC

"If a felony or misdemeanor is committed in an undertaking in the exercise of commercial activities in accordance with the objects of the undertaking **and if it is not possible to attribute this act to any specific natural person due to the inadequate organization of the undertaking**, then the felony or misdemeanor shall be attributed to the undertaking. In such cases, the undertaking shall be liable to a fine not exceeding 5 million francs."

C. Distinctive elements of the two regimes of CCL

2. Direct (parallel) CCL

Art. 102 (2) SCC

"If the offence committed falls under Articles 260ter, 260^{quinquies}, 305bis, 322ter, 322^{quinquies} or 322^{septies} paragraph 1 or is an offence under Article 4*a* paragraph 1 letter a of the Federal Act of 19 Dec. 1986 on Unfair Competition, the undertaking shall be penalized irrespective of the criminal liability of any natural persons, provided the undertaking *is responsible for failing to take all the reasonable organizational measures that were required in order to prevent such an offence*."

The inadequacy of the preventive measures replaces the notion of "fault" and triggers CCL even if the offence committed requires criminal intent (not mere negligence). There is no reversal of the charge of proof. Nevertheless, companies are encouraged to implement compliance programs in order to avoid liability.

III. The Alstom case

Alstom is a conglomerate headed by the French company Alstom S.A. The Swiss subsidiary Alstom Network Switzerland A.G. was in charge of compliance procedures within the group, in collaboration with the mother company Alstom S.A. Alstom Network Switzerland managed and supervised the relations of all the companies of the group with consultants hired to obtain business abroad. In spite of efforts to regulate and oversee the consultancy agreements, some consultants had forwarded a considerable part of their success fees to foreign decision makers and thereby had influenced the latter in favor of Alstom.

The Swiss Federal Office of the Attorney General brought corruption charges against several natural persons and the companies (Alstom S.A. and Alstom Network Switzerland). After three years, a summary penalty order (Article 352 Swiss Code of Criminal Procedure (SCCP)) was negotiated.

Orders issued by the Office of the Attorney General (OAG) on November 22, 2011

- Summary penalty order ("Strafbefehl"; "decreto d'accusa") against Alstom Network Switzerland

  (unofficial English translation http://fr.scribd.com/doc/73503009/Summary-Punishment-Order)

  Alstom Network Switzerland was convicted for failing to take all necessary and reasonable organizational precautions to prevent bribery of foreign public officials in Latvia, Tunisia and Malaysia. The penalty was a fine of CHF 2.5 million and confiscation of CHF 36.4 million representing the counter-value of illicit profits obtained by all the subsidiaries, estimated on the basis of the operating profit margin.

Orders issued by the Office of the Attorney General (OAG) on November 22, 2011

- Order dismissing the charges ("Einstellungsverfügung", "decreto di abbandono") against Alstom S.A.

  The order affirms Swiss jurisdiction over the French mother company, but the charges were dismissed because the company had made efforts to prevent corruption, although they were not sufficient, and because it had cooperated in the enquiry and made reparations in the form of a payment of CHF 1 million to the Red Cross.

Alstom's compliance policy under the OAG's scrutiny

- The OAG established that the group had implemented a compliance policy that was suitable in principle…
  - A policy prohibiting corruption was in force;
  - Consultants had to give detailed proof of rendered services;
  - Consultants had to be well established in the target country, with office facilities, etc.

- … but it had not enforced it with the necessary persistence and therefore acts of bribery in Latvia, Tunisia and Malaysia were not prevented:
  - The compliance function was insufficiently staffed in number and quality; poor prior experience and training of the compliance personnel;
  - The position of the compliance function within the hierarchy of the group was not sufficiently prominent to successfully enforce compliance regulations;
  - Some of the principles defined regarding the consultancy agreements were disregarded; misconduct was not sanctioned.

Lessons from Alstom and conclusion

- The direct CCL under Article 102 (2) SCC encourages companies to take preventive measures against active bribery.
- However, it is the prosecution who must prove the organizational shortcomings to establish CCL.
- Forms of negotiated justice are a necessary tool. Swiss criminal procedure has been traditionally reluctant towards plea bargains, but the unified Swiss CCP of 2007 has introduced some instruments encouraging negotiation between the prosecution and the defense.
- Discovering corruption remains a challenge. Important role of the financial intermediaries (SARs).
- The insufficient encouragement and protection of whistle blowers remain important shortcomings of Swiss anti-corruption law.

Thank you for listening!

Grazie!

MERCI!

Danke schön!

engraziel!