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Preface

Government Investigations 2019
Fifth edition

*Getting the Deal Through* is delighted to publish the fifth edition of *Government Investigations*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

*Getting the Deal Through* provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique *Getting the Deal Through* format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Greece and India.

*Getting the Deal Through* titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

*Getting the Deal Through* gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, David M Zornow and Jocelyn E Strauber of Skadden, Arps, Slate, Meagher & Flom LLP, for their continued assistance with this volume.

GEETING THE DEAL THROUGH

London
August 2018
Enforcement agencies and corporate liability

1 What government agencies are principally responsible for the enforcement of civil and criminal laws and regulations applicable to businesses?

The criminal laws applicable to businesses are enforced by the public prosecutors, who are assisted by the police. Jurisdiction for the prosecution of white-collar crimes lies, in principle, with the cantonal public prosecutors’ offices (PPOs). At the federal level, the Office of the Attorney General (OAG) is responsible for the prosecution of offences that are subject to federal jurisdiction. Generally speaking, these federal offences protect federal interests, such as public order, national security, the interests of the public, and include offences such as espionage, certain cases of corruption, breaches of the War Materials Act and the Goods Control Act, international organised crime and certain white-collar crimes, including insider trading and market abuse.

Government agencies further enforce regulations by means of administrative proceedings. The most important agencies are the Financial Market Supervisory Authority (FINMA) and the Competition Commission (COMCO). The analysis below focuses on these agencies, as well as on criminal enforcement by the PPOs and the OAG. In addition, the State Secretariat for Economic Affairs supervises the enforcement of regulations applicable to businesses, such as economic sanctions regulations, while the Federal Department of Finance enforces the customs and fiscal laws and regulations in particular.

2 What is the scope of each agency’s enforcement authority? Can the agencies pursue actions against corporate employees as well as the company itself? Do they typically do this?

The OAG and the PPOs investigate criminal offences. Typically, criminal prosecution is focused on individuals, not enterprises. However, since 2003, prosecutors can also target companies (see question 4).

FINMA is responsible for enforcing the financial market regulations. In particular, it monitors banks, insurance companies, stock exchanges, securities dealers, collective investment schemes and insurance intermediaries. Along with the public prosecutors, FINMA is also responsible for combating money laundering. FINMA mostly pursues actions against companies under its supervision or operating in the financial markets without the required licences. Where a serious breach of financial market regulations has occurred, it may, in addition or exclusively, initiate proceedings against specific individuals. In the recent past, FINMA has increasingly pursued this path.

FINMA is required to inform the competent criminal prosecution authorities if it becomes aware of behaviour that potentially violates criminal provisions of the financial laws. It may also report any other criminal offence (eg, violations of the Unfair Competition Act or economic sanctions). FINMA is, however, not required to actively pursue mere suspicions or allegations unless there are clear indications of criminal wrongdoing. FINMA has a certain scope of discretion as to when to bring a particular case to the prosecutor’s attention. It may, therefore, decide to report a potential criminal case early on and to gather evidence with the assistance of the criminal enforcement authorities, or to first obtain a better understanding of the overall situation through its own investigation.

Swiss authorities are further required to cooperate with COMCO and to share information as requested. They may also be under a duty to report crimes as provided for in the applicable statutes.

3 Can multiple government entities simultaneously investigate the same target business? Must they coordinate their investigations? May they share information obtained from the target and on what terms?

As long as their investigations do not have the same subject matter, multiple government entities may simultaneously investigate the same business. If appropriate, they may coordinate their actions and may consult with each other to ensure that their investigations do not interfere with each other or duplicate the same enquiries.

All federal and cantonal authorities, including the OAG, are under an obligation to mutually assist each other in the prosecution of criminal offences. In doing so, they regularly share information obtained during an investigation with other government authorities. To the extent that their activities may concern the same or overlapping matters, they must coordinate their proceedings. In practice, FINMA and the OAG also frequently exchange information with SIX Swiss Exchange.

FINMA is required to inform the competent criminal prosecution authorities if it becomes aware of behaviour that potentially violates criminal provisions of the financial laws. It may also report any other criminal offence (eg, violations of the Unfair Competition Act or economic sanctions). FINMA is, however, not required to actively pursue mere suspicions or allegations unless there are clear indications of criminal wrongdoing. FINMA has a certain scope of discretion as to when to bring a particular case to the prosecutor’s attention. It may, therefore, decide to report a potential criminal case early on and to gather evidence with the assistance of the criminal enforcement authorities, or to first obtain a better understanding of the overall situation through its own investigation.

Swiss authorities are further required to cooperate with COMCO and to share information as requested. They may also be under a duty to report crimes as provided for in the applicable statutes.

4 In what fora can civil charges be brought? In what fora can criminal charges be brought?

Criminal charges are, in principle, brought at a cantonal level where the criminal act occurred, and are usually investigated by the PPO. When the alleged offence was committed abroad or at an unknown place, charges may also be brought in the canton where the suspect resides.

The subject-matter jurisdiction of the OAG is limited to certain offences, such as crimes against federal officials and counterfeiting of Swiss or foreign currencies. The OAG also has jurisdiction over certain financial crimes, such as money laundering and terrorism financing as well as over organised crime, bribery and corruption, provided in particular that the offence partly occurred in foreign countries or in several cantonal jurisdictions. If several PPOs have jurisdiction over the same offence, the OAG decides which of them will investigate.

Charges by FINMA or other federal administrative authorities are brought at a federal level.

Civil enforcement against business crimes as known in other jurisdictions does not exist under Swiss law.
5 Is there a legal concept of corporate criminal liability? How does the government prove that a corporation is criminally liable for the acts of its officers, directors or employees?

Swiss criminal law is focused on the liability of individuals rather than enterprises. Corporate criminal liability is not based on the concept of attributing individual misconduct to the enterprise, but rather on organisational shortfalls within the enterprise itself.

Corporate criminal liability has two parts. First, an enterprise is liable if a criminal offence was committed within the corporation and in furtherance of its activities, and if such act cannot be attributed to a specific individual owing to the deficient organisation of the enterprise (secondary liability). Second, enterprises may also be held criminally liable independently of the criminal liability of an individual if they fail to take all necessary and reasonable organisational measures to prevent the offence (primary liability). This is, however, only the case regarding certain crimes, such as terrorism financing, money laundering, assistance of organised crimes and bribery of Swiss or foreign public officials, or commercial bribery.

6 Must the government evaluate any particular factors in deciding whether to bring criminal charges against a corporation?

The PPO and the OAG are required to open an investigation as soon as they become aware of a criminal offence that falls within their jurisdiction, or when they have grounds for suspecting that such an offence has been committed.

Similarly, FINMA must act when it has reason to believe that a supervised entity (eg, bank, insurance company, securities dealer, collective investment scheme) is not adhering to the relevant legislation, or that an entity is operating in the financial market without the required licences. However, FINMA is not always required to open formal enforcement proceedings. It can also use alternative, more informal ways to ensure compliance with financial market regulations. According to its enforcement policy, when deciding whether to open an investigation, FINMA will take into account the risks for investors, injured parties, creditors and other supervised institutions, the reputational risk for the Swiss market and the seriousness of the alleged violation of the law. It may also consider the degree of cooperation of the target business. For example, if a supervised entity fully cooperates and instantly implements all necessary remedial measures to ensure compliance with the law, FINMA may refrain from opening formal enforcement proceedings.

COMCO has adopted guidelines to decide under what circumstances it will investigate antitrust violations. It usually opens an investigation when the alleged violation is serious (eg, hardcore cartels) or has a strong impact on the market, or when the case raises a legal question that warrants judicial clarification. COMCO usually declines to investigate complaints when the issue could be better solved through private litigation. The authority can also decline to investigate a complaint when the target business has already changed its policy or when it agrees to adapt its market behaviour or contracts.

Initiation of an investigation

7 What requirements must be met before a government entity can commence a civil or criminal investigation?

The OAG or the PPO opens an investigation if there is a reasonable suspicion that an offence has been committed, or if informed by the police of a criminal offence. When opening criminal proceedings, the OAG or the PPO will issue an order with the name of the suspect and the suspected offence. This order is not public and cannot be challenged. In practice, the PPO will also take into account whether the offence is already being investigated abroad, in which case it will try to coordinate the transnational prosecution with the foreign authorities. Efficiency considerations may be taken into account early on when assessing whether the OAG opens a formal proceeding.

Before opening enforcement proceedings, FINMA will conduct a preliminary investigation to establish whether there are reasonable grounds to believe that an institution or an individual breached the financial market regulations. During the preliminary investigation FINMA will also establish whether there are alternative ways to restore compliance with the law. With supervised entities, FINMA usually enters into a dialogue prior to the opening of formal enforcement proceedings.

Similarly, when COMCO suspects an antitrust violation, it will open a preliminary investigation. Once it has gathered enough information, it will decide whether a violation of the antitrust law is likely and whether a formal investigation should be opened in view of its enforcement priorities.

8 What events commonly trigger a government investigation? Do different enforcement entities have different triggering events?

The OAG and the PPO can start an investigation on their own initiative or in response to reports from the public or other authorities, including foreign authorities.

FINMA will initiate an investigation if it has grounds to suspect violations of the financial market regulations. These suspicions are often based on reports from individuals, from the public or from other authorities, including foreign authorities. Supervised entities and individuals have an obligation to self-report any incident that is of importance to FINMA’s supervision.

COMCO regularly receives reports from whistle-blowers, competitors, consumers, professional or consumer associations and other government entities that lead to investigations. It can also open an investigation if it becomes aware that foreign competition authorities are investigating antitrust offences that could affect the Swiss market.

9 What protections are whistle-blowers entitled to?

There is comparatively little protection for whistle-blowers under Swiss law; employees are bound by a duty of loyalty towards their employers. If they report the wrongdoings of their companies to government authorities they may, under certain circumstances, breach their contractual duties, risking legal consequences. Under Swiss law, even an unlawful termination does not make the dismissal void and may at most entitle the employee to financial compensation of up to six months’ salary if the termination was abusive. A termination of contract based on whistle-blowing is deemed abusive only if the employee first attempted to report the offence internally, and subsequently reported the case to the authorities because the management did not take appropriate remedial measures.

COMCO has adopted a ‘leniency policy’ that closely follows the model of the European Commission’s programme. It offers companies involved in cartels either total immunity from fines or a reduction of fines that would have otherwise been imposed on them, provided that they self-report, hand over all available evidence and fully cooperate with the investigation. Only the company that first reports the cartel may benefit from full immunity. Companies reporting subsequently may receive a reduction of their fine if they provide significant additional evidence.

10 At what stage will a government entity typically publicly acknowledge an investigation? How may a business under investigation seek anonymity or otherwise protect its reputation?

Government entities must treat as confidential information that comes to their attention during an investigation. They must also respect personal privacy and the presumption of innocence. Accordingly, they will not usually disclose the opening of an investigation or information about pending proceedings. Exceptionally, the police or the prosecutors may, however, inform the public about pending proceedings if this is necessary to locate a suspect, warn or reassure the public, correct inaccurate media reports or rumours, or in general if a case is of particular importance to the public.

If a business under criminal investigation has reason to think that information about the proceedings might be disclosed, it can ask the police or the prosecutor to require private claimants, their legal counsel or other persons involved in the proceedings to keep confidential the information. Any information obtained through the proceedings and the identity of the persons subject to the investigation. The prosecutors may order these persons to keep such information confidential for a certain period. In practice, however, these measures frequently have only limited success in preventing leaks to the public or other parties with an interest in the proceedings.
Once a criminal case proceeds to the trial stage, the proceedings usually become public.

FINMA does not usually inform the public about pending investigations. It only publishes information when this is necessary to protect market participants or the reputation of the Swiss marketplace, to correct wrong or misleading media reports or upon request of the parties. In any case, FINMA publications must respect privacy rights and data protection laws. Names of individuals and companies are usually redacted, except when a serious breach of the law has occurred.

COMCO often issues press releases when opening a formal investigation against a corporation or publishing a decision. It usually names the offenders, but protects trade secrecy. Enterprises named in the decision receive the draft that will be published and can ask COMCO to redact further information if it is necessary to protect trade secrecy or personal privacy.

### Evidence gathering and investigative techniques

#### 11 Is there a covert phase of the investigation, before the target business is approached by the government? Approximately how long does that phase last?

The OAG and the PPO can investigate, even for long periods, without informing the target business. There are no limits ruling the length of the covert phase of the investigation.

Administrative agencies such as COMCO and FINMA usually contact the target business early on in the investigation, asking it to provide information and documents on the subject matter and thus disclosing the investigation. FINMA generally informs supervised entities that it has opened an investigation, although it will more likely keep the first steps of an investigation against a company operating without the required licence confidential. Exceptionally, COMCO may conduct a secret investigation, which can be followed by a dawn raid of the target company.

#### 12 What investigative techniques are used during the covert phase?

Public prosecutors can monitor mail or electronic communications of a suspect or a suspect company if there is a strong suspicion that an offence has occurred, if the offence is serious enough and if investigatory activities carried out so far have been unsuccessful or other inquiries would likely be unsuccessful or unnecessarily complicated. They can only order surveillance during the investigation of certain criminal offences, including fraud, money laundering, bribery, insider trading or terrorism financing. They can use other surveillance devices (eg, GPS monitoring) if there is serious reason to believe that a crime was committed and that other inquiries would likely be unsuccessful or unnecessarily complicated. Further, public prosecutors or investigators may also conduct undercover investigations, which are subject to similar requirements.

In practice, however, prolonged covert investigations by means of wiretapping, secret surveillance, etc, are rare in white-collar matters, in particular owing to the high costs they generate and the limited resources of the authorities.

#### 13 After a target business becomes aware of the government’s investigation, what steps should it take to develop its own understanding of the facts?

If a business becomes aware of a government investigation, it should initiate an internal investigation to determine its own understanding of the facts and to assess whether any breaches of the law or internal regulations have occurred. This allows the business to better understand its facts and to assess whether any breaches of the law or internal regulations have occurred. Further, public prosecutors or investigators may also conduct undercover investigations, which are subject to similar requirements.

In practice, however, prolonged covert investigations by means of wiretapping, secret surveillance, etc, are rare in white-collar matters, in particular owing to the high costs they generate and the limited resources of the authorities.

#### 14 Must the target business preserve documents, recorded communications and any other materials in connection with a government investigation? At what stage of the investigation does that duty arise?

Companies are legally obliged to preserve documents for specified periods (usually 10 years). As soon as they know that a government investigation has opened, companies should refrain from destroying relevant information, as this could constitute a criminal offence.

#### 15 During the course of an investigation, what materials – for example, documents, records, recorded communications – can the government entity require the target business to provide? What limitations do data protection and privacy laws impose and how are those limitations addressed?

Criminal enforcement authorities can require the target business to disclose documents, audio or video records, or any other data if there is reason to believe that these documents or materials could provide evidence relevant to the case. If documents are not disclosed upon request, they can be seized by the authorities. When seizing documents or letters containing personal data, investigators must balance the public interest in investigating the crime and the privacy interests at stake.

During administrative proceedings (including FINMA or COMCO proceedings), corporations have a duty to cooperate. Hence, they are required to disclose any relevant materials upon request of a government entity. For example, FINMA can ask for detailed information about a supervised entity’s business model, its financial results and other information deemed relevant in order to ascertain that the company is compliant with with the relevant financial regulations.

#### 16 On what legal grounds can the target business oppose the government’s demand for materials? Can corporate documents be privileged? Can advice from an in-house attorney be privileged?

A target business can resist a demand by invoking legal privilege. In civil, criminal or administrative proceedings, documents do not have to be disclosed, and cannot be seized, if they are part of the communication between the target business and its external counsel, irrespective of their location. Lawyers may also refuse to testify. Based on the wording of the statutory law, this protection applies only to Swiss attorneys or EU lawyers authorised to practise in Switzerland. It has not yet been decided by the Supreme Court whether documents that contain advice from other external counsel are protected by the same legal privilege or not.

The legal privilege extends only to external counsel. Documents or communications from in-house counsel are not privileged under Swiss law, making it advisable to involve external counsel early on. A further limitation was recently introduced by Supreme Court case law holding that documents prepared by external counsel are only privileged if counsel acted in their capacity as attorneys, and that this is not the case in internal investigations to the extent that such investigations are already part of the of anti-money laundering compliance obligations incumbent on the client, and could thus be performed by the client or non-privileged advisers to the client, such as audit firms.

The right against self-incrimination provides a further ground for refusing to cooperate in an investigation, although doing so may trigger compulsory measures against the enterprise or the individuals involved.

In administrative proceedings, it is generally accepted that a target business can also refuse to disclose documents if this would expose it to a criminal penalty or jeopardise its position in a pending criminal investigation. However, the governmental agency can take this refusal into account when assessing the facts. Legal entities cannot decline to produce information if this would incriminate their directors, officers or employees. These individuals can, however, invoke their own privilege against self-incrimination and decline to answer questions.

#### 17 May the government compel testimony of employees of the target business? What rights against incrimination, if any, do employees have? If testimony cannot be compelled, what other means does the government typically use to obtain information from corporate employees?

Employees can be required by the government to testify. All government agencies regularly ask to interview employees of target businesses.
Employees may only refuse to testify or to answer particular questions if they would expose themselves to criminal liability. Invoking this right against self-incrimination does not prevent the authorities from obtaining the information by other means—for example, from the corporation.

18 Under what circumstances should employees obtain their own legal counsel? Under what circumstances can they be represented by counsel for the target business?

Employees are at all times entitled to retain their own legal counsel. This may, for example, be advisable if a government investigation directly targets employees, or if they could be held liable in criminal or other proceedings.

From a legal point of view, attorneys can represent both the target business and employees, provided that there is no conflict of interest. From a practical perspective, however, this is usually discouraged and rarely done, since conflicts can arise at a later stage of the investigation, potentially requiring counsel to discontinue one or even both representations.

19 Where the government is investigating multiple target businesses, may the targets share information to assist in their defence? Can shared materials remain privileged? What are the potential negative consequences of sharing information?

Target businesses are, in principle, allowed to share information. In some circumstances, the investigating authority can, however, order a company not to disclose information to other target companies or individuals or to potential witnesses, including employees.

Legal privilege fully applies to documents sent to or from external counsel, provided that these documents were created by Swiss attorneys or EU lawyers authorised to practise in Switzerland in their capacity as attorneys. Sharing information with another target does not, in principle, amount to a waiver of legal privilege. Depending on the circumstances, however, there is a risk that the transmission of legally privileged documents to other parties could be interpreted as a waiver of privilege. Even where this is not the case, the potential loss of control over the privileged information may jeopardise privilege as a matter of fact. Also, sharing information may affect privilege in other jurisdictions and should thus be carefully assessed up front.

Before sharing information, target businesses should consider the extent to which they and other targets intend to cooperate with the investigation. They should assess the likelihood that the shared information will be disclosed at a later stage of the proceedings.

20 At what stage must the target notify investors about the investigation? What should be considered in developing the content of those disclosures?

Publicly traded companies must inform the market of any price-sensitive facts that have arisen in their sphere of activity. A fact is price-sensitive when it is capable of triggering a significant change in market prices. Disclosure must be made as soon as the issuer becomes aware of the personality rights of its employees. Therefore, it may not ask an employee to receive a fine reduction. Businesses can also be rewarded for reporting the existence of other cartels (‘amnesty plus’).

While FINMA does not have a formal voluntary disclosure programme, it nonetheless rewards cooperative behaviour in the investigation. A target business is more likely to be able to negotiate an alternative resolution and might avoid an investigation altogether by agreeing to take remedial measures. FINMA also takes the degree of cooperation of the target business into account when deciding whether to open formal enforcement proceedings and when imposing sanctions.

In criminal proceedings, the potential benefits and downsides of a cooperation should be assessed on a case-by-case basis. In the first case of an enterprise self-reporting foreign bribery, the OAG granted a very substantial reduction of the sanction owing to the self-reporting, full cooperation and far-reaching remedial actions taken by the enterprise.

21 Is there a mechanism by which a target business can cooperate with the investigation? Can a target notify the government of potential wrongdoing before a government investigation has started?

Target businesses can cooperate in any investigation by voluntarily disclosing information, answering specific questions, making employees available for questioning or sharing information by other means. Such cooperation may be beneficial to the outcome of the proceedings.

Cooperation is required in all administrative proceedings. FINMA regularly asks supervised entities to report on, and to evaluate the risks of, their activities in Switzerland or abroad. Supervised entities are required to self-report when they discover possible violations of financial market regulations.

Further, COMCO has adopted a formal self-disclosure programme (leniency policy; see question 22).

22 Do the principal government enforcement entities have formal voluntary disclosure programmes that can qualify a business for amnesty or reduced sanctions?

As mentioned in question 21, COMCO has a formal leniency programme with regard to serious antitrust offences (see question 9). A company can report the existence of a cartel and benefit from immunity. Other offenders may also cooperate with the investigation in order to receive a fine reduction. Businesses can also be rewarded for reporting the existence of other cartels (‘amnesty plus’).

The target business should be assessed on a case-by-case basis. In the first case of an enterprise self-reporting foreign bribery, the OAG granted a very substantial reduction of the sanction owing to the self-reporting, full cooperation and far-reaching remedial actions taken by the enterprise.

23 Can a target business commence cooperation at any stage of the investigation?

Cooperation may be beneficial at all stages of the investigation, but is often most so if initiated at the very beginning of the investigation. In particular, administrative and criminal authorities take the degree of cooperation of the target business into consideration when determining the sanction.

In criminal proceedings, cooperation may result in much shorter proceedings and in a lower sentence. In addition, it may result in a penalty order that is issued without publicity.

In administrative proceedings, the government may be more inclined to terminate the investigation if the target business fully cooperates and voluntarily adopts remedial measures. Cooperation may also lead to lower fines, less risk of having a licence revoked and less publicity about the case.

24 What is a target business generally required to do to fulfil its obligation to cooperate?

The target business should share all relevant information with the investigating authority by disclosing documents, giving the names of potential witnesses, allowing its employees to be interviewed, answering questionnaires and attending hearings. It may be asked to conduct an internal review, possibly under the lead of external counsel or another service provider, and to disclose the results of this review to the government agency.

25 When a target business is cooperating, what can it require of its employees? Can it pay attorneys’ fees for its employees? Can the government entity consider whether a business is paying employees’ (or former employees’) attorneys’ fees in evaluating a target’s cooperation?

Employees have a duty of loyalty towards their employer and must comply with the employer’s instructions within the boundaries of the employment relationship. This includes a duty to provide information upon request of the employer to external counsel conducting an internal review at the target business or to the authorities.

However, employees also have the right not to incriminate themselves before authorities. Moreover, the employer must also respect the personality rights of its employees. Therefore, it may not ask an employee to lie or to distort facts in order to protect the company.

Government entities usually do not take into account whether a business is paying the legal costs of its employees.

26 What considerations are relevant to an individual employee’s decision whether to cooperate with a government investigation in this context? What legal protections, if any, does an employee have?

Employees have a duty of loyalty towards their employer that requires them to cooperate in internal investigations and, at least in principle,
in government investigations. They may also be required to report any potential wrongdoing to their employer, and should do so in particular before contacting any governmental authority. If a company asks its employees to be available for interviews, employees are required to comply with the instructions received. Like anyone, employees have the right to refuse to testify before government authorities, to the extent that by doing so they would risk incriminating themselves. However, depending on the circumstances, employees who refuse to testify may suffer adverse consequences in their employment, since they will be breaching their legal obligations towards their employers. Depending on the specific circumstances, this may lead to the termination of their employment.

27 How does cooperation affect the target business’s ability to assert that certain documents and communications are privileged in other contexts, such as related civil litigation?

Cooperation in a government investigation does not necessarily waive privilege with regard to other contexts or proceedings. However, voluntary disclosure may nonetheless potentially affect legal privilege. It is therefore advisable to obtain legal advice before disclosing privileged documents in an investigation. Obtaining legal advice is also particularly advisable whenever privilege needs to be ensured in multiple jurisdictions.

Resolution

28 What mechanisms are available to resolve a government investigation?

In criminal investigations, the public prosecutor decides at the conclusion of the investigatory stage whether there is sufficient evidence to proceed to trial. If this is questionable, the PPO is under an obligation to demand a trial. If there is insufficient evidence, the investigation is closed without trial. If the case proceeds to trial, the criminal courts will eventually either acquit or convict the accused and issue the appropriate sentence in the case of a conviction. In the case of minor offences, and if the facts are clearly established, the prosecutor may issue a penalty order that, if not challenged by the accused, becomes a binding judgment. The accused may also enter a guilty plea, acknowledging the offence and accepting any related claims by private parties. In such a case, the prosecutor and the accused may obtain a summary judgment in an abbreviated proceeding. This possibility only exists if the prosecutor demands a sentence of five years or less. Whether or not an abbreviated proceeding is conducted is at the public prosecutor’s discretion. A court hearing is still required and the court must establish, in particular, whether the right charges were brought and whether the sentence is appropriate. Penalty orders and criminal judgments may be appealed before the ordinary courts. In practice, penalty orders and abbreviated proceedings play a very important role in white-collar matters. FINMA can decline to open a preliminary investigation or, having conducted one, to open formal enforcement proceedings. If a formal investigation takes place, FINMA will eventually issue an order with its decision and determination of any sanctions. COMCO can decline to investigate a business further in order to reward cooperation. Once a formal investigation is opened, it will be resolved when COMCO issues its order deciding the matter. The orders of both FINMA and COMCO can be appealed before the Federal Administrative Court.

29 Is an admission of wrongdoing by the target business required? Can that admission be used against the target in other contexts, such as related civil litigation?

In principle, an admission of wrongdoing is not required for the authorities to take remedial action against a business. An admission of wrongdoing is, however, required for an abbreviated proceeding. Civil claimants may also rely on an order of COMCO finding a corporation guilty of an antitrust offence to claim compensation. In order to benefit from the leniency rules, businesses also must have acknowledged being part of a cartel and have fully cooperated in the investigation. It depends on the individual circumstances whether civil claimants can access the file of COMCO and the documents that were part of the leniency application. COMCO must balance the interests of the civil claimants in accessing the file and the interests of the competition authorities in preserving the efficiency of their leniency policy.

30 What civil penalties can be imposed on businesses?

Civil penalties as a sanction for business crimes as known in other jurisdictions do not exist under Swiss law. Some administrative laws provide for monetary sanctions that may be imposed on businesses. Whether such sanctions qualify as administrative or as criminal penalties needs to be determined in the specific case.

31 What criminal penalties can be imposed on businesses?

For a violation of the Swiss Criminal Code (see question 5), enterprises may be ordered to pay a fine of up to 3 million Swiss francs. Further, the breach of many administrative and regulatory duties is sanctioned by administrative criminal law. Under certain circumstances, financial penalties for such breaches can also be imposed on the business. For example, the Federal Department of Finance can prosecute and find businesses that violate the criminal provisions of the financial market regulations (see question 5). Any business that does not respect an order of FINMA can be prosecuted and ordered to pay a fine of up to 100,000 Swiss francs. Finally, COMCO can impose fines of up to 10 per cent of the turnover of the corporation in Switzerland during the past three years.

32 What is the applicable sentencing regime for businesses?

Where corporate criminal liability for a business crime is established, a sanction is usually mandatory. However, the authorities have some discretion to discontinue criminal proceedings if any injury caused has been redressed and if the public and private interests in a prosecution are low. Such closure of the investigation may involve the payment of compensation to the injured party or a donation to a charity. The OAG has recently stated that it will no longer make use of this option in international bribery cases, whereas several PPOs have indicated that they will continue using it.

In determining a penalty, the judge will consider the seriousness of the offence and of the organisational deficiencies of the corporation, any damage caused and the financial capacity of the enterprise. While there is a considerable discretionality element, the courts strive to take precedents in similar cases into account when determining the amount of a fine. There are, however, no binding sentencing guidelines.

Update and trends

Switzerland continues to deal with the local ramifications of various recent transnational fraud and corruption investigations (eg, FIFA, 1MDB, Odebrecht and the diesel emissions cases affecting certain car producers). Important domestic cases include an investigation of the former chief executive of Raiffeisen Bank for potential wrongdoing related to certain private and business dealings. Also, the national PostBus company drew attention when incorrect accounting practices came under scrutiny, concerning state subsidies exceeding 100 million Swiss francs.

An Organisation for Economic Co-operation and Development (OECD) country review shows that Switzerland has made further progress in the areas of mutual legal assistance and asset forfeiture, for which it has received corresponding praise. On the other hand, the OECD was more critical of the lack of transparency related to the widespread use of abbreviated proceedings and penalty orders to conclude bribery investigations. The closure of proceedings without prosecution after reparatory payments was a further point of criticism; as was the generally low level of prosecution activity and the mild penalties imposed in cases that resulted in a conviction.

On the legislative side, a number of revisions are pending in the area of financial regulations, where Switzerland is finalising its overhaul of the institutional framework, and aiming to improve its anti-money laundering provisions. Further proposed changes concern more restrictive public procurement laws, providing for stricter anti-bribery provisions.

Further, the OAG has recently proposed the introduction of deferred prosecution agreements into Swiss law. While the proposal has been widely welcomed, the details of such new rules still need to be discussed and agreed.
What does an admission of wrongdoing mean for the business’s future participation in particular ventures or industries?

Federal and local authorities may consider whether a business has been implicated in criminal offences before signing government procurement agreements. A conviction for bribery, in particular, may also lead to debarment from public procurement under applicable international agreements.