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Criminal Liability Of Members Of The Board Of Directors As Well As General Managers In Switzerland *By Dr. Dieter Gessler*



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Company directors and general managers are often confronted with the questions: how to ensure their company does not commit a criminal act, how best to ensure early discovery of criminal acts committed by their company and what is the best behaviour to have towards the law enforcement agencies. In order to best answer these questions, the director or the general manager needs to evaluate which activities are criminal and which are not, of course, this assumes that he or she has a basic idea about the criminal law of the country in which the company has its seat or exercises its activities. With this in mind, the following highlights some important aspects of Swiss Criminal Law.

Numerous breaches of duty can lead to criminal liability of a company director or its general manager. A director or a general manager, acting on behalf of a Swiss limited company, is also liable for certain specific criminal offences committed by

companies (see article 29, letter a, of the Swiss Penal Code, hereafter, "SPC"). Several such criminal offences are in the SPC, for example, the prohibition of bribery of Swiss and foreign government officials (see articles 322ter and 322 septies of the SPC). There are also numerous duties and/or prohibitions that are contained in other Swiss Laws, for example, the Swiss Federal Law of Foreigners (SR 142.20) or the Swiss Federal Stock Exchange Law (SR 954.1) that contains some new rules about insider trading and the manipulation of prices. Should a company director breach one of his/her duties re-



sulting from civil law (article 717, paragraph 1, of the Swiss Code of Obligations) and by doing so cause the company to suffer a financial loss, this can also lead to criminal liability according to article 158 (corporate fraud) of the SPC. If a particular criminal offence cannot be assigned to a particular individual because of the company's faulty organisation, then the company

can be punished with a fine of up to 5 million Swiss francs (article 102, paragraph 1, SPC).

A director can also be criminally liable in the event of the breach of foreign laws. Foreign laws are usually not coordinated with Swiss Criminal Law. Hence, this can cause overlapping procedures and unsolvable conflicts when the criminal laws of different jurisdictions are in contradiction with each other and they are applicable to the same person. In this connection, international mutual assistance in criminal matters, based on numerous international conventions between sovereign states, can sometimes provide a solution.

For most criminal offences, negligence is not enough, it is required that the author of the criminal offence actually intends to commit a crime, knowingly and willingly. Swiss Criminal Law holds that whoever considers the realisation of a criminal offence to be possible and is willing to accept that it happens (article 12, paragraph 2, SPC), is also acting intentionally. This so-

called "*conditional intent*", is given when a company director recognizes the risk of crime but is willing to accept that it takes place.

In so far that a company director is under a contractual or statutory duty to avoid a criminal offence, failure to take action can lead to his/her criminal liability (article 11 of the SPC). This includes the so-called, managerial liability for certain typical dangers tied to the business. This is also called the offence for failure to act ("*Not only those who did mischief are guilty, but also those who did not act to stop the mischief being done*", Erich Kästner, "The flying class room").

The company director can be punished as a co-author, instigator, or an accomplice to a criminal offence. The crime can be directed against the company itself, the employees or the company's business partners.

The law provides for cash punishments with daily amounts of up to 3'000 Swiss francs per day (article 34 SPC) and prison sentences of up to twenty years (article 40



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SPC). The punishment is decided based on the guilt of the author of the crime (article 47 SPC). Besides these punishments, the law also provides for various other measures, for instance, the confiscation of assets that were gained through the criminal activities, used for such, or intended to reward them (article 70, paragraph 1, SPC).

In Swiss Criminal Law, the statute of limitations depends on the gravity of the crime committed. For crimes with a possible prison sentence of three years or more, the statute of limitations is fifteen years, for other crimes, the statute of limitations is seven years (article 97, paragraph 1, SPC). For misdemeanours, or crimes that are only punished with fines, the statute of limitations is three years (article 109 SPC).

A limited company can be involved in different aspects of a criminal procedure: as a witness, part of discovery in connection with a crimi-

nal investigation, as a victim, as a beneficiary, or as an accused. The company is also indirectly involved when its employees or directors are involved in a criminal investigation as witnesses, accused, or victims. Swiss criminal procedural laws allow for numerous duties to cooperate with, or rights to be involved in, a criminal investigation. These include the right to consult the files and the right to be party to the procedure. There are also some obligatory measures connected with criminal investigation such as pre-trial custody, confiscations and secret monitoring. The individuals acting on behalf of the company commit a criminal offence if they hinder or impede the investigations of the law enforcements agencies (“abetment”, see article 305 of the SPC).

There are so many ways in which a company can be confronted with a criminal offence, accordingly the strategy that the company directors

or the general managers choose to adopt will vary from case to case. It is important that the directors recognize the various conflicting interests of the involved parties, oftentimes involving the directors themselves and the company management, and that as soon as possible an adequate solution is found. In choosing the right strategy, not only the financial consequences, but also the reputation risks need to be considered because once the criminal offences become known, these can be quite considerable, especially in the event of an unsuccessful attempt to cover up the crime committed.

Possible strategies include: waiting and delaying, actively hindering criminal offences, actively revealing criminal offences, covering up of criminal offences and also active cooperation with the law enforcement agencies.

Dr. Dieter Gessler, born in 1951, studied law at the University of Zurich. Thereafter, he worked as an assistant of Professor Forstmoser (commercial law). He worked as a law clerk for the District Court of Uster and was elected as a judge of the District Court of Bulach in 1984.

Between 1989 and 2001, he served at the same court as Chief Judge (President) and was at the same time a substitute judge at the Superior Court of the Canton of Zurich. Thereafter, he worked for 10 years for a leading business law firm in Zurich. In 2012, Dieter Gessler joined Stiffler & Partner.

Dieter Gessler is a member of the Zurich Bar Examination Commission as well as a member of the Swiss Arbitration Association ASA. He publishes regularly in his areas of specification. He speaks German, English and French.