Risk & Compliance Management

in Switzerland

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Switzerland

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LEGAL AND REGULATORY FRAMEWORK

Legal role

What legal role does corporate risk and compliance management play in your jurisdiction?

Since the onset of the financial crisis in 2007, Switzerland has seen many serious shortcomings in organisational governance as well as risk and compliance management, such as certain financial institutions turning a blind eye to foreign law applicable in cross-border transactions or ignoring anti-money laundering weaknesses, organisations not addressing structural conflicts of interest and companies doing business in a manner that distorts the level playing field and violates competition law. These cases have triggered a stream of new regulations in Switzerland over the past decade. Many new regulations address integrity, transparency, governance, risk and compliance management challenges, directly or indirectly. And Switzerland, with its small domestic market surrounded by the European Union, must de facto align its legislation with EU rules and international standards that have over time become broader, more detailed and more obligatory, in particular US laws and regulations, the United States being Switzerland's second-largest export market.

As a result of these national and international legal developments, assuring that an organisation effectively manages risk and meets its compliance obligations has become a key strategic and operational task for which responsibility ultimately lies with the governing body (in many organisations the board of directors).

Law stated - 21 February 2021

Laws and regulations

Which laws and regulations specifically address corporate risk and compliance management?

Many provisions in various Swiss laws require diligent and compliant business management at all levels. The most important statute in this respect is article 716a of the Swiss Code of Obligations (CO), which lists the non-transferable and inalienable duties of the members of a board of directors of a limited stock company. This provision emphasises the board's responsibility for compliance with the law throughout the entire company, globally. In addition, article 102 of the Swiss Criminal Code (SCC) requires corporations to take all necessary and reasonable organisational compliance measures to prevent severe criminal conduct by its employees. And companies must, of course, comply with competition law, the most important statute in this respect being the Federal Act on Cartels (CartA).

With regard to the financial industry, the financial market laws, such as the Swiss Banking Act (BankA), the Federal Act on the Swiss Financial Market Supervisory Authority (FINMASA), the Anti-Money Laundering Act (AMLA), and the Federal Act on Financial Market Infrastructures and Market Conduct in Securities and Derivatives Trading (FinMIA), together with their related ordinances, stipulate a broad range of obligations with regard to risk and compliance management of financial intermediaries.

On 1 January 2020, the Financial Services Act (FinSA) and the Financial Institutions Act (FinIA), together with the Ordinances on Financial Services (FinSO), on Financial Institutions (FinIO) and on Supervisory Organisations (SOO) and the implementation rules, entered into force. Under the FinIA, portfolio managers and trustees (previously unlicensed businesses only subject to anti-money laundering regulation) have to apply for a licence with the Swiss Financial Market Supervisory Authority (FINMA) and are subject to compliance requirements and ongoing prudential supervision by new supervisory organisations, which are authorised and supervised by FINMA. The supervisory organisation must report any serious breaches of supervisory law or other irregularities to FINMA, which it cannot eliminate during routine supervision or for which it does not seem adequate to set a period for regularisation.

FINMA regularly publishes circulars to ensure that the financial market laws are consistently and appropriately applied. For instance, in connection with risk and compliance management measures, FINMA outlines corporate governance requirements for banks and insurance companies, how banks shall manage liquidity risks, etc. FINMA circular 2017/1 on banks' corporate governance is based on ISO (International Organization for Standardization) standards and (Institute of Internal Auditors (IIA) concepts and requires that banks implement independent and separate risk management, compliance management and internal audit functions with direct access to the governing body. And the circular 2015/2 on banks' liquidity risks clarifies the statutory minimum qualitative requirements for the management of liquidity risks and the minimum quantitative financing ratio requirements.

Technological developments have also led to new compliance requirements, for instance, for initial coin offerings and the offering of cryptocurrencies. FINMA issued guidance relating to the regulatory treatment of initial coin offerings (ICOs), guidelines for enquiries regarding the regulatory framework for ICOs, as well as supplement to these guidelines. The Swiss Bankers Association has issued guidelines on opening corporate accounts for blockchain companies. The purpose of these guidelines is to facilitate the opening of bank accounts with Swiss banks by blockchain companies domiciled in Switzerland and at the same time to assist Swiss banks with risk management in their business dealings, in particular regarding the AMLA.

In the health sector, a revision of the Therapeutic Products Act and its accompanying Ordinance on Integrity and Transparency of Therapeutic Products and Their Sale entered into force on 1 January 2020. The Ordinance includes clearly defined transparency provisions, particularly regarding the legitimacy of rebates and other benefits, and delegates their implementation to the cantons and partially to Swissmedic. These sector-specific integrity and transparency rules complement the criminal offences of bribery of public officials and bribery in the private sector.

Further, a proposed amendment CO would have introduced explicit protection for whistle-blowers in the private sector and de facto compliance management obligations for all employers in Switzerland. However, the proposal was rejected by the parliament on 25 March 2020 and many Swiss companies will now align to the EU Whistleblower directive.

Legally non-binding recommendations concerning internal controls and risk and compliance management were issued in 2014 by the Swiss Business Federation in its policy paper 'Fundamentals of Effective Compliance Management'. When the Swiss Code of Best Practice for Corporate Governance (Swiss Code) was revised, this document was updated and referenced as the Swiss Guidelines for Best Practice in Compliance Management.

The Swiss Code is intended as a list of recommendations based on the 'comply or explain' principle for Swiss public limited companies.

In November 2020, Switzerland voted on a Corporate Responsibility Initiative on accountability of Swiss companies and their boards for violations of human rights and environmental standards in Switzerland or abroad. The initiative was accepted by a majority of the voters but rejected by the (required) majority of cantons. The rejection paved the way for the government's counter-proposal to the initiative, which will result in increased reporting and due diligence implications for Swiss multinational companies regarding human rights, anti-bribery measures and environmental standards.

Furthermore, in June 2020, the parliament approved a bill to modernise Swiss corporate law that partly entered into force on 1 January 2021. Companies active in the extractive sector are now required to disclose all payments to public authorities that exceed 100,000 Swiss francs per year.

Law stated - 21 February 2021

Types of undertaking

Which are the primary types of undertakings targeted by the rules related to risk and compliance management?

Compliance and risk management obligations must be fulfilled by all legal entities regardless of their size or business activity. However, larger companies (in terms of revenues, balance sheets and the number of employees) are, in general, subject to stricter statutory compliance and control or audit regulations. The legal entities targeted by statutory risk and compliance obligations are (in order of importance in practice): public limited (stock) companies, private limited companies and foundations (in particular in the area of statutory professional insurance). Listed companies and, in general, companies in the financial sector, are subject to overall stricter risk and compliance management obligations.

Law stated - 21 February 2021

Regulatory and enforcement bodies

Identify the principal regulatory and enforcement bodies with responsibility for corporate compliance. What are their main powers?

The principal regulatory and enforcement bodies for the private sector are FINMA, the Office of the Attorney General (OAG) and the Competition Commission (COMCO). For the public sector, the main controlling body is the Federal Audit Office.

FINMA supervises and regulates the financial industry: banks, insurance companies, brokers and asset managers, among others. It has extensive powers, which it exercises itself or through independent examiners (eg, accredited law firms, auditors and forensic experts) by supervising, monitoring, auditing, investigating and sanctioning financial intermediaries and senior management. Banks, security dealers and insurance companies are required to self-report major legal risks to FINMA, including cross-border legal risks. FINMA issues ordinances and circulars on the standard of professional diligence and best practice risk and compliance management and publishes summaries of its enforcement decisions.

The OAG, cantonal prosecutors and criminal courts enforce article 102 Swiss Criminal Code (SCC), under which a company may be held criminally liable for failing to take all necessary and reasonable compliance measures to prevent certain severe crimes, such as bribery and money laundering. Under the SCC, a company may be fined up to 5 million Swiss francs and illicit gains are (always) seized or disgorged. The cantonal and federal prosecutors play an increasingly significant role as enforcers of adequate corporate compliance standards. With its landmark case against Alstom in November 2011, the OAG developed its practice of prosecuting companies that violate article 102 SCC by failing to prevent corruption or money laundering. In the Alstom case, the Swiss subsidiary of Alstom Group was fined 2.5 million Swiss francs for its lack of adequate compliance measures to avoid the bribery of foreign officials in three countries and was ordered to pay 36.4 million Swiss francs in disgorgement of profits.

On 1 January 2016, a memorandum of understanding on cooperation between FINMA and the OAG came into force, based on article 38 FINMASA. This memorandum highlights the growing importance for Swiss enforcement agencies to exchange information and cooperate to combat corruption. FINMA's main task is the prudential supervision of institutions it has authorised to engage in financial market activities. The OAG, on the other hand, is the federal agency competent for prosecuting criminal acts with an inter-cantonal or cross-border dimension.

The OAG and cantonal prosecutors are responsible for conducting criminal investigations and bringing charges of money laundering. Financial intermediaries and traders that suspect assets stem from a felony or misdemeanour or belong to a criminal organisation must notify the money laundering reporting office (MROS), which may, in turn, notify the criminal prosecutor, which happens in about 46 per cent of cases. In the past years, The OAG has opened an important number of criminal investigations against Swiss banks for violating anti-money laundering and anti-bribery regulations.

With regard to COMCO, businesses are sanctioned (under administrative law) if they engage in cartels or illicit vertical restraints, abuse a dominant market position or jump the gun to bypass merger control regulations. For example, one of COMCO's recent high-profile probes concerned around 5 international banks for manipulating foreign exchange spot markets regarding certain G10-currencies, with the banks ultimately fined a total of approximately 90 million Swiss francs in June 2019. Other COMCO activities include fining one of Switzerland's largest telecommunications companies in connection with live sports broadcasting on pay television and fining a number of construction companies for tender fraud.

In 2018, the Federal Audit Oversight Authority (FAOA) investigated KPMG's professional conduct as statutory auditor of Swiss Post. The FAOA found significant shortcomings in the audit practices of KPMG and subsequently reprimanded the firm. It also opened investigations into the professional conduct of two KPMG auditors. KPMG cooperated with the FAOA and took corrective action, in particular with a view to avoiding conflicts of interest resulting from parallel audit and (tax) advisory mandates.

Law stated - 21 February 2021

Definitions

Are 'risk management' and 'compliance management' defined by laws and regulations?

Risk management and compliance management techniques are not explicitly defined in Swiss statutory law. However, international standards are accepted as soft law benchmarks. For instance, COMCO, in its public presentations, refers to ISO Standard 19600 – Compliance Management Systems as one of its benchmarks should a company raise the compliance defence against a sanction. Also, the Swiss Confederation requires all state-owned entities to follow ISO 31000 on risk management and ISO 19600 on compliance management.

FINMA circular 2017/1 defines 'risk management' as comprising the methods, processes and organisational structures used to define risk strategies and risk management measures in addition to the identification, analysis, assessment, management, monitoring and reporting of risks. FINMA further defines 'compliance' as abiding by the relevant statutory, regulatory and internal rules and observing generally accepted market standards and codes of conduct. This authority also gives a definition of 'internal control system', consisting in particular of an independent risk management and an independent compliance function, both reporting to the governing body. Essentially, this follows the respective ISO Standards.

Law stated - 21 February 2021

Processes

Are risk and compliance management processes set out in laws and regulations?

Swiss statutory law does not describe risk and compliance management processes specifically. There are, however, certain provisions that stipulate the precautions to be taken in that regard. For instance, article 728a CO states that the external auditor must examine whether an internal control system exists and must take it into account when determining the scope of the audit and during the audit procedure. Furthermore, the external auditor must ensure that the internal control system includes an adequate risk management system.

Law stated - 21 February 2021

Standards and guidelines

Give details of the main standards and guidelines regarding risk and compliance management processes in your jurisdiction.

Risk and compliance management processes are outlined in non-binding soft law international standards such as ISO

Standard 31000 – Risk Management and ISO Standard 19600 – Compliance Management Systems, which are used by most international companies as benchmarks. Few (mainly large international) corporations also follow the enterprise risk management framework of the Committee of Sponsoring Organizations of the Treadway Commission or the Institute of Internal Auditors' three lines model (revised in June 2020; this is a basic risk governance concept, not a standard).

ISO Standard 31000 provides senior management with a framework for designing and implementing an effective risk management system that fosters risk identification, risk analysis and risk evaluation (which, taken together, constitute the risk assessment process) and risk treatment. ISO Standard 19600 sets out the principles of good compliance governance, the roles responsibilities at all levels of an organisation, the procedures for planning, implementing and monitoring, measuring and continually improving a compliance management system.

In 2002, Switzerland's economic association Economiesuisse introduced the Swiss Code of Best Practice for Corporate Governance (Swiss Code). This recommendation refers to corporate governance of stock corporations listed on the Swiss Exchange. In 2014, a new edition of the Swiss Code was published adding, in particular, an annex with recommendations on compensation systems for the board of directors and executive management. Given the age of the Code, it may be superseded by the forthcoming ISO Standard on governance of organisations (ISO 37000).

Law stated - 21 February 2021

Obligations

Are undertakings domiciled or operating in your jurisdiction subject to risk and compliance governance obligations?

Yes, businesses domiciled or operating in Switzerland are subject to statutory risk and compliance governance obligations. For instance, article 102 Swiss Criminal Code (SCC; the corporate criminal offence of failing to employ all necessary and reasonable compliance measures to prevent bribery, money laundering, etc) applies to all businesses domiciled in Switzerland and to any businesses operating in or from Switzerland if they have legal or compliance functions located in Switzerland. In both cases, the company is liable for its global business conduct.

Swiss law also sets out the duties that are specific to the board and inalienable. Under article 716a CO, the board's inalienable duties are the leadership and oversight of the company, including compliance with applicable laws (worldwide). A practical case is FINMA's investigations of the interaction between the board and the former CEO of Swiss banking group Raiffeisen in 2018. In its enforcement decision, FINMA outlined multiple governance and oversight weaknesses at Raiffeisen and ordered corrective actions.

Law stated - 21 February 2021

What are the key risk and compliance management obligations of undertakings?

Under article 102 Swiss Criminal Code (SCC; the corporate criminal offence of failing to prevent criminal offences), if a felony or a misdemeanour is committed in the company in the exercise of its business and in accordance with its purpose, the felony or misdemeanour is attributed to the company if it is not possible to attribute this act to any specific natural person as a result of inadequate (compliance) organisation by the company. In the case of serious felonies (such as bribery or money laundering), the company is criminally liable irrespective of the liability of any natural person, if the company has failed to take all necessary and reasonable organisational measures required to prevent such an offence.

In the banking sector, article 3(2)(a) and (c) BankA and article 12 BankO explicitly require banks to implement an effective internal control system with an independent internal audit function and proper risk management to identify, treat and monitor all material risks. For insurance companies, these risk and compliance governance requirements are set out in articles 4, 14, 22, 27, and 28 Insurance Supervision Act.

Law stated - 21 February 2021

LIABILITY

Liability of undertakings

What are the risk and compliance management obligations of members of governing bodies and senior management of undertakings?

Article 716a Swiss Code of Obligations (CO) lists the non-transferable and inalienable duties of the members of the board of directors, highlighting their responsibility for the overall management, organisation and (global) compliance of the company. On this statutory basis, the external auditors must provide the board of directors with a comprehensive report on the financial statements and the internal control system of the company (article 728b CO).

Under articles 717 and 754 CO, the members of the board of directors and the members of the executive board are required to manage the company with all diligence (the highest diligence standard under Swiss law). This standard specifically requires the members of the board of directors and the members of the executive board to implement effective risk management and compliance management systems, and the board of directors must oversee the work of the executive board. Recently, the enforcement environment further developed, and these supervisory responsibilities are increasingly audited and assessed, and top managers are more and more held accountable by the companies and regulators. The board of directors of Swiss Post and Raiffeisen Bank are considering claiming damages from their former board and executive committee members for lack for diligence in exercising oversight and in managing the companies.

Law stated - 21 February 2021

Do undertakings face civil liability for risk and compliance management deficiencies?

Yes. On an extracontractual basis, third parties are entitled to claim civil damages from companies if the damage has been caused by employees or other auxiliaries who were not diligently selected, instructed and supervised, or if the company does not prove that the employer took all the necessary precautions to prevent the harmful conduct (article 55 CO). In such tort claims, the claimant must prove a breach of an absolute right or of a protective statutory provision. A similar provision exists regarding causal contractual liability (article 101 CO). Within the context of contractual liability, the claimant must prove that a breach of contract, respectively a violation of contractual obligations occurred that resulted in damage. Contractual obligations arise from legal provisions or result from the specific contractual agreements.

Law stated - 21 February 2021

Do undertakings face administrative or regulatory consequences for risk and compliance management deficiencies?

Yes. One example of administrative consequences for risk and compliance management deficiencies is the sanctions set out in article 49a Federal Act on Cartels (CartA). In the case of infringements against the CartA, companies can raise the compliance defence; in other words, they can produce evidence that the infringement occurred despite the company's best practice risk and compliance management. The Competition Commission (COMCO) refers to a number of international standards and best practice guidelines as a benchmark for state-of-the-art compliance management (eg, ISO 19600 and the Organisation for Economic Cooperation and Development and International Chamber of Commerce guidelines). When enforcing the CartA, COMCO may apply administrative sanctions. Administrative fines against companies may amount up to 10 per cent of the turnover the undertaking achieved in Switzerland in the preceding three financial years. If a company successfully raises the compliance defence, the sanction may be reduced. However, to date no undertaking was able to successfully raise the compliance defence in proceedings under the cartel act.

Institutions that are subject to Financial Market Supervisory Authority (FINMA)'s financial market supervision may face specific regulatory consequences in the case of risk and compliance management deficiencies. FINMA has a broad range of tools to enforce its regulations such as:

- precautionary measures;
- orders to restore compliance with the law;
- declaratory rulings;
- directors' disqualification;
- cease-and-desist orders and bans on trading;
- publication of decisions;
- confiscation of profits; and
- revoking of licences and compulsory liquidation.

In the application of these regulatory enforcement measures, FINMA is guided by the aims of Swiss financial market laws, namely the purposes of protecting creditors and investors, ensuring fair market conduct and maintaining the good standing, reputation and stability of the (Swiss) financial system.

Law stated - 21 February 2021

Do undertakings face criminal liability for risk and compliance management deficiencies?

Pursuant to article 102 Swiss Criminal Code (SCC), businesses face corporate criminal liability for organisational weaknesses (the failure to prevent criminal conduct by employees). Under paragraph 1, if a felony or a misdemeanour is committed by employees in the exercise of the company's business in accordance with its purpose, the felony or misdemeanour is attributed to the company if it is not possible to attribute the offence to a specific employee as a result of inadequate organisation of the company.

In addition, the company can be convicted under paragraph 2 if the offence committed falls under a list of serious criminal offences, such as bribery, money laundering, criminal organisation and financing of terrorism. According to the clear text of the statute, there is no need for a conviction of an employee regarding a predicate offence. However, a violation of criminal law by an individual must be evident under the circumstances. If in such a situation the company failed to employ all necessary and adequate measures to prevent criminal conduct, it is itself criminally liable for its organisational failure. Fines can amount to a maximum of 5 million Swiss francs and the company is obliged to disgorge all illicit profits.

Law stated - 21 February 2021

Liability of governing bodies and senior management

Do members of governing bodies and senior management face civil liability for breach of risk and compliance management obligations?

Under article 754 CO, the members of the board of directors, senior management and all persons engaged in the management or liquidation of a limited company face civil liability towards the company, the shareholders and creditors for any loss or damage arising from any intentional or negligent breach of their duties. One of their key statutory duties is to ensure compliance with the law by all employees (for recent case law, see the cases of Swiss Post and Rai eisen). It is not only the members of the company's formal governing bodies (ie, the members of the board of directors and the members of the executive board) that can be held liable, but also factual members of governing bodies who have not been formally appointed, yet exercise significant influence over the company's management. That standard of diligence required by senior managers is 'all diligence', which is the highest standard under Swiss law.

Law stated - 21 February 2021

Do members of governing bodies and senior management face administrative or regulatory consequences for breach of risk and compliance management obligations?

Senior members of management only face administrative or regulatory consequences for these breaches in regulated industries, such as the financial industry. Senior members of management at financial institutions regulated by FINMA can face administrative and regulatory consequences should they fail in their duty of diligence. And the Federal Department of Finance is competent to conduct administrative criminal proceedings against individuals who failed to file a suspicious activity report.

FINMA can take administrative or regulatory measures against managers, such as disqualifying a director, adding a manager to a watchlist, publish a decision mentioning their names (naming and shaming) and issuing a business conduct letter. FINMA can enter an individual's information in a database known as the watchlist if the individual's business conduct is questionable or does not meet the legal requirements.

The watchlist is used for assessing relevant information for compliance prerequisites, namely personal details; excerpts from commercial, debt enforcement and bankruptcy registers; criminal, civil and administrative court decisions; and reports by auditors and third parties appointed by FINMA.

Furthermore, under specific circumstances, FINMA can send a business conduct letter to those registered in the watchlist. A business conduct letter does not qualify as a decision; it merely states that FINMA reserves the right to review compliance with the diligence requirements should the manager change position.

In the event of a disqualification, FINMA may disqualify individual directors responsible for serious violations of supervisory law from acting in a senior function at a supervised institution for up to five years. FINMA has issued around 60 such disqualifications since 2014.

In January 2021, FINMA decided to initiate proceedings against Julius Baer with the purpose of reviewing the conduct of four high-ranking managers in connection with corruption allegations.

In two cases, however, the Swiss Federal Administrative Court lifted these disqualifications imposed by FINMA. In connection with the 1MDB case, FINMA disqualified a former compliance executive of Falcon Private Bank from practicing his profession for a period of two years. However, the Swiss Federal Administrative Court decided that the former compliance executive had violated reporting obligations but had no decision-making authority and, thus, was only culpable of simple negligence that would render such a two-year ban disproportionate.

In a similar case, FINMA expressed temporary disqualifications against seven UBS employees based on a fine that was rendered against UBS for market manipulation. FINMA concluded from its final decision against the bank that the employees violated regulatory duties. However, the Swiss Federal Administrative Court decided that the individual responsibility cannot be simply derived from a decision regarding the bank but must be established against the employees individually and specifically.

Law stated - 21 February 2021

Do members of governing bodies and senior management face criminal liability for breach of risk and compliance management obligations?

Individuals are criminally liable if they fail to implement effective risk and compliance management and turn a blind eye on mismanagement (article 158 SCC), embezzlement (article 138 SCC), money laundering (article 305-bis SCC) or bribery (article 322-ter et seq SCC). Failure to prevent serious criminal offences, such as bribery, is a corporate criminal offense. In a recent case, the Swiss Supreme Court found a chairman of a bank guilty of criminal mismanagement because he was aware of certain irregularities committed by an employee and failed to take corrective action.

Additionally, articles 37 and 38 AMLA provide strict provisions and stipulate high fines in cases of a violation of the anti-money laundering reporting obligations and duties to verify set out in articles 9 and 15 AMLA, respectively.

Law stated - 21 February 2021

CORPORATE COMPLIANCE

Corporate compliance defence

Is there a corporate compliance defence? What are the requirements?

Under article 102(2) Swiss Criminal Code (SCC), a company is criminally liable for certain felonies committed by its employees if it has not implemented the necessary and adequate (compliance) measures to prevent them. The burden of proof for the inadequacy of the compliance measures rests with the prosecutor and court. Nevertheless, the defendant company will want to establish that it has implemented all necessary and adequate compliance measures. To do this, the company will de facto need to submit evidence regarding its compliance policy, its good compliance governance (including adequate compliance resources), the overall compliance management system, the procedures involved in the compliance management system, the measurement of the system's effectiveness, regular reporting to senior management and continual improvement.

In competition law cases, the Competition Commission (COMCO), when determining a sanction, also takes the company's (competition) compliance management system into account. The burden of proof rests with the company.

Law stated - 21 February 2021

Recent cases

Discuss the most recent leading cases regarding corporate risk and compliance management failures.

Recent years have seen a number of high-profile governance, risk and compliance cases.

Credit Suisse

In December 2020, the Office of the Attorney General (OAG) indicted Credit Suisse and an ex-Credit Suisse executive in connection with a failure to prevent money laundering related to a Bulgarian organised crime syndicate. The bank is accused of having been aware of the deficiencies, but maintaining the client relationship for several years. In doing so, it allegedly failed to take all the organisational measures that were reasonable and required to prevent the laundering of assets belonging to and under the control of the criminal organisation. The facts of the case date back 12 years (the limitation period under article 102(2) SCC is 15 years).

Steinmetz

In January 2021, Benny Steinmetz, a mining magnate was found guilty by a Geneva court of paying bribes to secure mining rights in Guinea. Steinmetz received a five-year prison sentence and a fine of 50 million Swiss francs. Steinmetz has indicated that he will appeal the ruling. This decision shows that Swiss courts, also at a cantonal level, are willing to take on 'Swiss' undertakings in the fight against corruption.

Raiffeisen

In October 2017, the Financial Market Supervisory Authority (FINMA) opened an investigation into Raiffeisen bank group and its former chief executive officer for suspected conflicts of interest and mismanagement. The investigation was concluded in June 2018. FINMA closed the investigation against the former CEO (because he committed to not engage any more in the financial services industry) and found that the bank had insufficiently managed conflicts of interest. Additionally, the board of directors of the bank neglected the supervision of the former chief executive and, thus, made it possible for him to achieve financial advantages to the detriment of Raiffeisen. FINMA assessed the measures taken by Raiffeisen in the meantime to improve its corporate governance and ordered further measures to restore proper and diligent management. A later internal investigation confirmed FINMA's regulatory assessment. Raiffeisen published the internal 'Gehrig' report in January 2019, outlining the lack of oversight and controls by the former board members. The bank has been assessing whether to claim damages from the former board members and executive directors, in particular, from the former chief executive, but the bank has not initiated proceedings so far. There are also criminal proceedings pending against the former chief executive after the Zurich public prosecutor's office filed charges in November 2020. The criminal case is likely to be pleaded at court in 2021.

Glencore

In June 2020, the OAG initiated a criminal investigation into Swiss-based mining and trading company Glencore for failure to prevent alleged corruption in Congo. Glencore has been publicly criticised for its former mining activities in Congo. It was in particular criticised for buying shares in mines worth billions of Dollars at a price far under their market value. The investigations are ongoing.

Odebrecht SA und Braskem

Further to the substantial number of Petrobras/Lava Jato -related investigations that are still not completed, the OAG convicted Brazilian company Odebrecht SA and its subsidiary Braskem in December 2016 for organisational failure to prevent the bribery of foreign officials and money laundering under article 102(2) Swiss Criminal Code (SCC). Since 2018, there are two ongoing proceedings against financial institutions in Switzerland in relation to these proceedings. In 2019, the number of requests for judicial assistance that the OAG, more specifically the competent task force, treated, increased. Until the end of 2019, over 400 million francs have been reimbursed to the Brazilian authorities.

Law stated - 21 February 2021

Government obligations

Are there risk and compliance management obligations for government, government agencies and state-owned enterprises?

When it comes to corporate criminal liability, the Swiss Criminal Code (SCC) does not differentiate between private and public companies. Within the meaning of article 102(4) SCC, the German term Unternehmen includes entities under both private and public law. Swiss state-owned companies – such as cantonal banks, hospitals, telecommunications providers, energy suppliers, railways, defence companies, certain insurance companies and airports – must employ best practice risk and compliance management to meet their compliance obligations and avoid criminal liability in the event of employee misconduct.

The government and all government agencies are required to meet their compliance obligations and all federal state-owned companies must implement risk management systems on the basis of ISO 31000 – Risk management and compliance management systems on the basis of ISO 19600/37301.

Law stated - 21 February 2021

DIGITAL TRANSFORMATION

Framework covering digital transformation

Please provide an overview on the risk and compliance governance and management framework covering the digital transformation (machine learning, artificial intelligence, robots, blockchain, etc).

There are no legal provisions that explicitly regulate risk and compliance aspects of the digital transformation. Rather, it remains to be tested whether the existing legal framework is adequate to deal with the new legal challenges.

The new regulatory framework of the Financial Services Act and the Financial Institutions Act requires safeguards regarding crowdfunding, crowd-lending, electronic payment services, robo advice and cryptocurrencies. Among other measures, the framework introduces a new Fintech licence, which has more lenient requirements than the full banking licence.

Moreover, the Swiss parliament passed the new Federal Act on the Adaptation of Federal Law to Developments in Distributed Ledger Technology (DLTA) that is expected to enter into force on 1 August 2021. The DLTA entails various improvements to the Swiss legal framework in connection with the use of decentralised technologies and blockchain.

Furthermore, Financial Market Supervisory Authority (FINMA) has consistently applied the Anti-Money Laundering Act to blockchain service providers since their emergence. In its guidance 2019/02, FINMA provides information about this technology-neutral application of the regulation to payment transactions on the blockchain. Institutions supervised by FINMA are only permitted to send cryptocurrencies or other tokens to external wallets belonging to their own customers whose identity has already been verified and are only allowed to receive cryptocurrencies or tokens from such customers. FINMA has also published a regulatory framework for initial coin offerings.

The Federal Council adopted the guidelines for artificial intelligence on 25 November 2020. These guidelines provide the federal administration and the bodies responsible for administrative tasks of the Confederation with a general framework for guidance and must ensure a coherent policy on AI. The guidelines set forth the framework conditions and principles; conditions to the development and use of AI; transparency, traceability and explicability of AI's decisions; liability and security.

Law stated - 21 February 2021

UPDATE AND TRENDS

Key developments of the past year

What were the key cases, decisions, judgments and policy and legislative developments of the past year?

The year 2020 will be remembered for the allegations of misconduct against the former federal Attorney General. He was in charge of conducting investigations into alleged corruption at the International Federation of Association Football (FIFA). Despite this, the former federal Attorney General took part in three informal meetings with the president of FIFA. In July 2020, the federal administrative court found that he committed serious breaches of his duties and that a reduction of his salary by 5 per cent was justified. Following this decision, the former federal Attorney General handed his resignation.

From an operational white-collar crime perspective, the need for independent internal investigations was, again, a topic in the Swiss media, mainly relating to investigations mandated by the boards of Credit Suisse (Spygate), Swiss Post (Postal Car) and Raiffeisen (governance failures).

The number of suspicious activity reports increased in 2019 to record levels and international cooperation also increased. Many banks are still in the process of reviewing their client portfolios for anti-money laundering risks. As a consequence of the growing number of international bribery and anti-money laundering scandals, the Financial Market Supervisory Authority has also continued to investigate, sanction and monitor a rapidly growing number of financial institutions.

At the same time, 2020 saw several initiatives to hold multinational companies responsible for the violations of human rights and environmental laws. The Corporate Responsibility Initiative was only narrowly rejected by majority of cantons (though adopted by a majority of voters). Nonetheless, a parliamentary counter proposal will introduce increased reporting and due diligence implications for Swiss based multinational companies. Moreover, the revised company law introduced stricter monitoring requirements for companies active in the exploitation of natural resources. A key challenge in the next years will be that companies will be required to make statements about their compliance measures, for instance, with regard to bribery risks. Companies and senior management will be held to their public statements.

Law stated - 21 February 2021

Coronavirus

What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

The pandemic has led to some emergency legislation, in particular government guarantees for bank loans to companies and suspension of the obligation to notify the judge in the case of over-indebtedness.

Notwithstanding the extraordinary circumstances, Swiss companies remain bound by the general corporate duties applicable in times of distress. The boards of directors of companies are as always advised to act in the best interest of the company. In doing so, they are required to constantly analyse and, if necessary, amend the company's strategy, if the circumstances change. Therefore, proper due diligence is required even more due to the ever-changing economic situation due to the pandemic. Breach of obligations relating to a company's financial distress may have both civil and criminal consequences for board members and executive management.

The Federal Council has also temporarily implemented special measures to facilitate general meetings in compliance with the rules on social distancing. These allow for voting rights to be exercise in writing, electronically or through an independent proxy. It is also noteworthy that companies that have received state-backed emergency loans are not allowed to distribute dividends or repay intragroup loans, whether within Switzerland or cross-border.

Law stated - 21 February 2021

LAW STATED DATE

Correct on

Give the date on which the information above is accurate.

21 February 2021.

Law stated - 21 February 2021