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Getting the Deal Through

RISK & COMPLIANCE MANAGEMENT 2023

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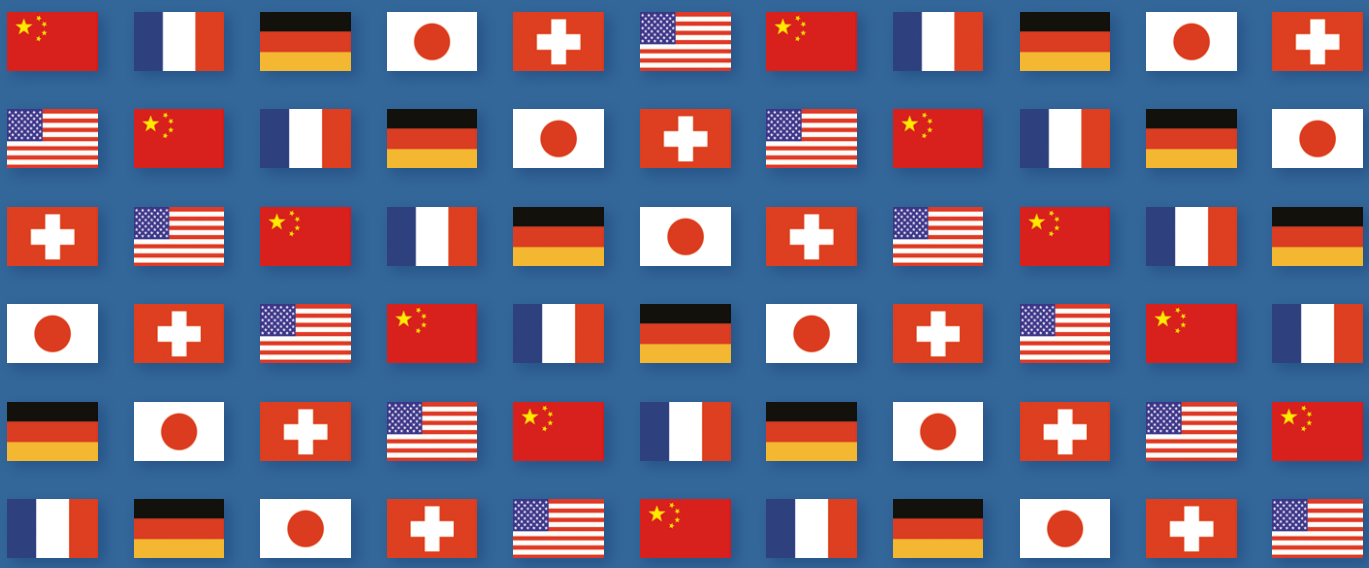

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Last year, I wrote about an utmost fundamental principle of humanity and civil society: leaders must strictly respect international law and ethical principles. Where leaders disregard international law and human rights, every element of humanity is directly and existentially threatened. Of course, these leaders are an ultra-high-risk factor for every state, society and corporation.

Looking at 2022, the world seems more unified than ever in its exposure to existential threats (war, climate change, overstretched world resources, hunger, disrespect for women, inacceptable treatment of all those who use their universal right to freely express their opinion, etc) and more divided than ever with respect to integrity, honesty and accountability, and the commitment to treat humanity's existential threats. Almost all countries are aligned with the rule of international law and acknowledge the existential threats posed to us and all future generations. These countries commit to combatting climate change, poverty, inequality, and corruption. Then there are far too many countries that do not acknowledge the need to act on fundamental threats to humanity and often or even consistently disregard and disrespect international law. The world is more and more split between those who want to construct and build a better future and those who destruct and disrespect to serve dubious and essentially private ends. This world is challenging to navigate for all businesses. Do companies continue doing business in countries that disrespect international law and accountability? Do they invest in countries that do not respect the environment and human rights? How can and shall businesses contribute to a net-zero greenhouse emissions world, if and when some countries engage in wars and repression? These questions are now key topics on the agendas of boards and boards must have clear responses to these questions and communicate them.

We are living in an era of transparency and employees, clients, investors, governments expect clear statements from boards and executive management on environment, including greenhouse gas emission goals, stakeholder participation, (child) labour policies and diligence, human rights compliance and combatting corruption. Companies that want to be successful in the long run will understand that transparency and commitment to the law and stewardship of the needs of future generations are the key differentiating success factor and opportunity. In order to master the sustainability challenges, massive decades long global investments must be made into new sustainable technologies and services. Achieving the UN Sustainable Development Goals, therefore, is humanity's prime goal and for businesses a historic opportunity to contribute to and benefit from the fundamental societal and economic change.

In this 2023 issue, the changing risk and compliance world is evident. The risks related to the Russian war against Ukraine are outlined as are climate risks to humanity and – looking

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at it also from a narrow accounting perspective – to the balance sheets of every single entity, public or private. From a risk and compliance perspective, 2022 taught us a very tough lesson. Lessons are about learning and improving, and I hope that 2022 sets a historic low mark for the rule of international law and humanity and that all those who matter on this planet draw the lessons and engage for a sustainable, peaceful, constructive, open, fair and humane world order that cares about our children and their children. Effective risk and compliance management will play a key role in achieving this existential goal.

I hope you remain confident and enjoy the 2023 edition of *LexGTDT Risk & Compliance Management*.

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Summary

LEGAL AND REGULATORY FRAMEWORK

Legal role

1 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).

Laws and regulations

2 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 undertakings 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 organisations 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. The newest circular is

FINMA circular 2023/03 on operational risks and resilience of banks, which will enter into force on 1 January 2024. It adopts the revised principles for managing operational risks and the new principles on operational resilience published by the Basel Committee of Banking Supervision and will replace the Swiss Bankers Association's 'Recommendations for Business Continuity Management'. The currently applicable FINMA circular 2017/1 on banks' corporate governance is based on standards as well, in this case on international standards (eg, 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. 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. All FINMA Circulars will remain applicable in 2024.

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 conditions and limits for rebates and other benefits, and delegates their implementation to the cantons and partially to the federal agency 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 whistleblowers 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 have now aligned to the EU Whistleblower Directive. In the meantime, some cantons such as Geneva and Basel-Stadt started to introduce their own whistleblowing regulations. In Geneva the whistleblowing Act (LPLA) grants the anonymity of whistleblowers (article 5, paragraph 1 LPLA) and protects whistleblowers against economical disadvantages (article 7, paragraph 1 LPLA). In the canton of Basel-Stadt state-employed whistleblowers are protected from economical disadvantages as well (article 19a paragraph 4 of the Act of State Employees, Personalgesetz BS). While some cantons focus on establishing a legal framework, some cities aim to provide the tools to facilitate whistleblowing. The cities Berne, Winterthur and Zurich have opened reporting offices and introduced anonymous online reporting forms.

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

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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 listed 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 for 2023 and 2024 regarding human rights, anti-bribery measures and environmental standards. The requirements include a report on non-financial matters, which shall allow the reader to understand the course of business, the results of operations, the state of the company and the effects of its activities on the non-financial matters (article 964b paragraph 1 CO) The stand-alone report has to describe its business model and the concepts (ie, methods or standards) adopted in relation to the management of the non-financial matters (including the due diligence applied) present the measures taken to implement these standards and an evaluation of their effectiveness, describe the identified material risks in relation to the non-financial matters and the treatment of these risks. Furthermore, all Swiss companies must comply with supply chain due diligence obligations on conflict materials and child labour. If a company is under the due diligence obligations regarding conflict materials the audit has to be conducted by an external third party (article 964k paragraph 3 CO) (cf LexGTDT Risk & Compliance Management 2023 – LALIVE Specialist Topic). The non-financial reports must be signed by all board members and approved by the board and the shareholders (at the general assembly). Intentional or negligent non- or false reporting by board members qualifies as a criminal offence under article 325ter SCC.

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. As of 1 January 2020, the remaining revisions to the corporate law entered into force. Of general interest from a governance perspective is article 717a, which obliges Board and Executive Committee members to immediately and completely disclose conflicts of interest. In case of disclosures, the Board must take adequate measures to protect the interests of the company.

Given the new sustainability reporting obligations of the European Union, the Federal Council decided to draft an updated law in this respect. The first draft is expected in July 2024.

Since 1 January 2023 the amendments regarding over-indebtedness in the Code of Obligations (article 725 et seq CO) are in force. If the assets less the liabilities of a company no longer cover half of the sum of the share capital, the statutory capital reserve not be repaid to the shareholders and the statutory retained earnings, a company is in a situation of capital loss. If the company does not have an auditor, the last financial statement of the company must undergo a limited audit by a licensed auditor before their approval by the general meeting (article 725a paragraph 1 CO). In case of over-indebtedness the Board of Directors shall immediately prepare an interim account at going concern and sales values.

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It shall have them audited by the external auditor or if there is none by a licensed auditor (article 725b paragraphs 1 and 2). In a next step the Board of Directors has to notify the court unless the company's creditors subordinate their claims to those of all other company creditors to the extent of the over-indebtedness, provided the subordination of the amount due and the interest claims apply for the duration of the over-indebtedness; or provided there is a reasonable prospect that the over-indebtedness can be remedied within a reasonable period, but no later than 90 days after submission of the audited interim accounts, and that the claims of the creditors are not additionally jeopardised (article 725b paragraphs 3 and 4 CO). It is, therefore, strongly recommended to keep a close eye on the financial situation of the company and to immediately take the necessary steps once the financial situation of the company becomes dire.

Types of undertaking

3 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.

Regulatory and enforcement bodies

4 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 50 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 five 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.

Definitions

5 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 (now ISO 37301) 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 37301 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. In FINMA circular 2023/1 reference is made to FINMA circular 2017/1 and it is stated that the board of directors is responsible for confirming the management of the operational risks and supervising the compliance with the same. Furthermore, the risk control function will have to report at least annually to the board of directors and every six months to the executive board. This FINMA circular will enter into force on 1 January 2024.

Processes

6 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.

For certain enterprises specific obligations with respect to internal control system apply. For insurance companies it is required that internal control systems are established (article 27 of the Insurance Supervisory Act (ISA)). Furthermore, FINMA Circular 2017/06 sets out that all FINMA supervised entities must send their reports on the evaluation of the existing internal control system to FINMA. As of 1 January 2024 FINMA Circular 2023/01 will oblige banks to periodically monitor and control their service providers as part of their internal control system.

Standards and guidelines

7 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 37301 – 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 37301 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. In 2023 another edition was published adapting the amendments of the Swiss Code of Obligations and recommending the reporting on non-financial matters to go beyond the legal requirements and to have the report reinforced by an independent, external audit.

In September 2021 a panel of experts from 70 countries published the ISO Standard on governance of organisations (ISO 37000). ISO 37000 sets out 11 core principles of good governance and the role of senior business and public management leaders around the world in defining and upholding standards relating to purpose, values, performance, and social responsibility. ISO Standard 37000 requires the governing bodies of all public and private organisations to employ a duty of care, not only to their own organisation, but also to all their stakeholders and future generations. The governing bodies of businesses, public organisations and NGOs are expected to ensure ethical and effective leadership, as well as effective oversight through an internal control system and assurance processes. For the first time, the internal control system and the assurance processes are defined at a global level.

Obligations

8 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.

9 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.

Following the entry into force of the counter-proposal to the Corporate Responsibility Initiative some 250 companies will be subject to non-financial reporting obligations regarding environmental, social, labour, human rights and anti-corruption issues. For this purpose, the companies must prepare an annual stand-alone report providing information required for the understanding of the course of business, the results of operations, the position of the company and the effects of its activities on the non-financial matters. Furthermore, companies with their registered office, head office or principal place of business in Switzerland that freely put into circulation certain quantities of specific minerals or metals are under specific due-diligence obligations in the areas of conflict minerals (article 964j paragraph 1 no. 1 CO). Companies with their registered office, head office or principal place of business in Switzerland that offer products or services for which there is a reasonable suspicion that they have been manufactured or provided using child labour must apply due diligence as well (article 964j paragraph 1 no. 2 CO). These provisions are effective since 1 January 2022 and the obligations will apply as of business year 2023.

LIABILITY

Liability of undertakings

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

Article 716a of the 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 under article 717a regarding conflicts of interest and under article 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 and Raiffeisen Bank are considering claiming damages from their former board and executive committee members for a lack of oversight and in managing the companies. Raiffeisen was awarded a total of over 50,000 Swiss francs for compensation of damages but announced it would appeal this decision as it sought 25 million Swiss francs in damages.

11 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.

12 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.

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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.

13 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. In case of a violation of the obligations set out in the counter-proposal, the directors may be punished with a criminal fine of up to 100,000 Swiss francs.

Liability of governing bodies and senior management

14 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 *Raiffeisen*). 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.

15 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. The investigation is ongoing.

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

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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.

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

Top managers 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 offence. 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. In case of a violation of the obligations set out by the new transparency and due-diligence obligations in the Swiss Code of Obligations, the directors may be punished with a fine of up to 100,000 Swiss francs or 50,000 Swiss francs in case of negligence.

CORPORATE COMPLIANCE

Corporate compliance defence

17 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.

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Recent cases

18 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). The Federal Criminal Court held that Credit Suisse conducted business relationships with organised crime syndicates and stated that Credit Suisse has deficiencies regarding its hierarchical structure, its legal department and its compliance department, which lead to a violation of the banks ALMA regulations. As a result, a fine of 2 million Swiss francs was imposed on Credit Suisse. Furthermore, a former employee was sentenced to prison for 20 months. The Federal Criminal Court reduced the sentence as well as the fine as the facts of the case date back to 2007/2008. The Court also ordered the confiscation of assets worth more than 12 million Swiss francs, that were held in the accounts of the criminal organisation at Credit Suisse. Credit Suisse appealed this decision at the Federal Supreme Court. A final decision is expected in 2023.

In February 2022 FINMA started an investigation into Credit Suisse in connection with the 'Suisse Secrets', a research conducted by multiple media companies that discovered that Credit Suisse holds accounts of politicians accused of corruption. The investigations are ongoing.

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 appealed 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 former chief executive was found guilty and sentenced to prison for three years and nice months. The decision has been appealed by him as well as the public prosecutor. The final decision is, therefore, outstanding.

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 investigation is 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. By the end of 2019, over 400 million francs had been reimbursed to the Brazilian authorities.

SBM Offshore

In November 2021 the OAG sentenced three Swiss subsidiaries of the multinational group SBM Offshore to payment of over 7 million Swiss francs. The OAG's investigation into these subsidiaries concluded that the three companies had not taken all necessary and reasonable organisational precautions under article 102(2) SCC to prevent bribery of foreign officials in their ranks in Angola, Equatorial Guinea and Nigeria. The conviction was preceded by another investigation conducted by the OAG, which resulted in the conviction of a former executive of one of the companies concerned for bribery of foreign public officials in Angola (article 322 septies SCC) before the Federal Criminal Court in July 2020. The OAG's investigation revealed systemic corruption within the companies that was not sufficiently prevented by internal measures.

Falcon Bank

In December 2021 Falcon Private Bank was ordered by the Federal Criminal Court to pay a fine of 3.5 million Swiss francs as it had not prevented money laundering in connection with

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the corruption scandal surrounding the Malaysian sovereign wealth fund 1MDB through inadequate control mechanisms under article 102(2) SCC. A former executive of the bank was acquitted of money laundering charges. However, a five-year professional ban imposed by the Financial Market Supervisory Authority (FINMA) was confirmed by the Federal Criminal Court.

CSS Insurance

In August 2022 CSS Versicherungen AG was ordered to pay back 129 million Swiss francs to supplementary health insurance costumers because it had allegedly passed on commission fees to these clients. The terms were, according to FINMA, economically unjustified and the risks involved working with the commissioner in question were not adequately monitored. CSS appealed this decision. The Federal Administrative Court will now have to decide on the legality of passing on commission fees only to supplementary health insurance costumers and the compliance measurements insurance companies have to implement in regard to commissioners.

ABB

In December 2022, the OAG resolved its investigation against ABB Management Services Ltd and sentenced ABB to pay 4 million Swiss francs for corruption in South Africa. The OAG concluded that ABB did not take all necessary and reasonable organisational measures in order to prevent bribery payments to South African officials. The aim of the payments was to obtain a multi-million-dollar contract in relation with the construction of a power plant in South Africa. ABB accepted this judgment.

Government obligations

19 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 37301.

DIGITAL TRANSFORMATION

Framework covering digital transformation

20 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 new Federal Act on the Adaptation of Federal Law to Developments in Distributed Ledger Technology (DLTA) entered 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.

UPDATE AND TRENDS

Key developments of the past year

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

The trial against a former Raiffeisen CEO was conducted in April 2022. The court of the first instance, the District Court of Zurich, sentenced him to three years of prison and ruled him to pay back a total amount of 50,000 Swiss francs to Raiffeisen. The reasoned judgement was

1,200 pages long and was released to the parties in January 2023. Mr Vincenz announced he would appeal this decision before the Court of second Instance.

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 Bank CIC (mortgage payments) and Credit Suisse (Suisse Secrets).

After reaching a record level in 2019, the number of suspicious activity reports increased in 2020 by another 25 per cent and in 2021 by another 12 per cent.

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.

The new articles in the Code of Obligations regarding non-financial reporting have entered into force on 1 January 2022. For 2023 the stand-alone reports will have to be produced and published by 30 June 2024 at the latest. The key challenges will be that the reports will have to cover multiple non-financial matters including environmental, social, labour, human rights and combatting corruption and will not only have to be published by listed companies and FINMA regulated companies, but also by issuers of bonds if they have 500 or more full-time employees (in two consecutive financial years) and a balance sheet of 20 million Swiss francs or more or a turnover of 40 million Swiss francs or more (in two consecutive financial years).

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