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Newsletter – December 2016

Corporate criminal liability: Clarification by the Federal Tribunal

Introduction

The Swiss Federal Tribunal, the country's highest court, recently had the opportunity to give some guidance as to the scope of the Swiss Criminal Code (SCC) provision governing the criminal liability of corporate entities. In its decision 6B_124/2016 of October 11, 2016, the court issued important clarification under which circumstances a company could become criminally liable for acts performed within its sphere of influence. The findings should put some fears of corporate counsel to rest.

Factual background

The matter before the Federal Tribunal turned on whether the Swiss Post Office, which also offers banking services, could be held criminally liable under art. 102 para. 2 SCC which deals with the primary liability of companies for an enumerated list of serious crimes (inter alia the support of a criminal organisation, financing terrorism and money laundering). In the case at hand, in February 2005, a cashier of a local post office branch, had handed to the representative of a trust company CHF 4.6 million in cash over the counter. This, after the trust company's employee had informed the post office beforehand that it would be receiving EUR 5 million into its account, from which it intended to withdraw the said Swiss Franc amount, allegedly to purchase a gem stone. The tail unravelled as follows: the client's representative travelled to Rome, handed over the money to a third party and the funds have never been seen since.

Legal denouement

The Federal Tribunal was seized with the matter twice. In 2013, it confirmed sentences against the employees of the trust company for money laundering since the funds deposited in its account originated from a fraud scheme abroad. The employees of the Swiss Post Office were not charged. The case leading cantonal state prosecutor however charged the Swiss Post Office itself for corporate liability under art. 102 para. 2 SCC claiming that only because of the insufficient organisational measures implemented at the Swiss Post Office had it been possible for the money laundering to occur. The prosecution authority thus charged the Swiss Post Office for not preventing the money laundering offence and applied for a CHF 250,000 fine (the maximum fine under the provision is CHF 5 million).

The lower cantonal court in 2011 upheld the charges against the Swiss Post Office whilst the cantonal High Court overturned the decision in 2015 on appeal. The state attorney took the matter on review to the Federal Tribunal claiming that art. 102 para. 2 SCC was tailored towards sanctioning criminal behaviour committed within a company exactly in instances where no sanction had been or could be ordered against the natural persons employed in the entity.

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Legal reasoning by the Federal Tribunal

In its decision, the Federal Tribunal held that it had been ascertained that neither the cashier of the post office branch, nor the compliance officer whom the cashier had approached before paying out the funds, had knowledge of or should have assumed the illicit origin of the money and thus not shown any intent to commit a crime. Both employees had followed the internal policies in force at the time (which were limited to securing that sufficient funds were in the account before making a pay-out). The Federal Tribunal also excluded *dolus eventualis* on the level of the individuals with regard to their inner constitution, since the prosecuting authorities had never instituted proceedings for money-laundering against either of them.

The Federal Tribunal went on to find that art. 102 para. 2 SCC requires, as in ordinary cases, all objective elements as well as the subjective elements (intent) of the crime (as listed in art. 102 para. 2 SCC) to be fulfilled in order to hold that such a crime had actually been committed. Only then could the liability of the company arise under the primary liability provision.

The Federal Tribunal supported this reading of the statutory provision by explaining the legislative intent of parliament when introducing the provision of art. 102 para. 2 SCC. The revision aimed at filing a lacuna that could arise when, despite the proof that a crime had been committed in a company, the exact perpetratorship could not be attached to an individual and this was due to the lacking organisational measures in the company. In its nature, the provision stipulated an obligation by companies to prevent crimes, so the Federal Tribunal. The court concluded that a sanction under para. 2 of the provision always required a crime having been committed since parliament had deliberately chosen not to introduce blanket criminal responsibility of legal entities for crimes perpetrated in their spheres. Therefore, prosecutors have to be able to prove in court that both the objective and the inner elements of a crime have been fulfilled by individuals in order to secure a conviction against a company under art. 102 para. 2 SCC. The Federal Tribunal confirmed the acquittal of the High Court.

Conclusion

The decision underlines that despite the legislative aim to facilitate convictions for crimes committed under the guise of corporate structures, art. 102 para. 2 SCC still requires full proof of a committed crime by an individual working in the company. Negligence will not suffice. As the distinction between gross negligence and dolus eventualis is not always easily drawn, companies are well advised to maintain high levels of attention to employee dealings and document their respective efforts to prevent criminal activities within their organisations. This should ensure compliance by employees and will assist companies in demonstrating that they instituted adequate measures in this regard.

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