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Working Group on the issue of human rights and transnational corporations and other business enterprises
Palais de Nations
1211 Geneva

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Call for input: "Connecting the business and human rights and anti-corruption agendas"

Dear Members of the Working Group,

Please receive the input entitled: **Anti-Corruption Due Diligence Requirements for Transnational Corporations in Article 102(2) of the Swiss Criminal Code.** It outlines anti-corruption due diligence requirements for transnational corporations according to Article 102(2) of the Swiss Criminal Code and how this provision is implemented in practice. It aims to show that the due diligence criteria used in Article 102(2) Swiss Criminal Code can inform the literature on business and human rights about how to implement human rights due diligence in practice.

If you are interested in an exhaustive report on the question or have follow-up questions, please do not hesitate to ask.

Sincerely,

Nicolas Bueno

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Input

Anti-Corruption Due Diligence Requirements for Transnational Corporations in Article 102(2) of the Swiss Criminal Code

This input outlines due diligence requirements for transnational corporations to prevent transnational corruption according to Article 102(2) of the Swiss Criminal Code. It also presents the case law on corporate liability for transnational corruption based on Article 102(2) of the Swiss Criminal Code. This input reproduces parts of the article, Nicolas Bueno, *Swiss Multinational Enterprises and Transnational Corruption: Management Matters*, published in *Swiss Review of Business and Financial Market Law*, 2017(2): 199-209.

I. Article 102 Swiss Criminal Code

Title Seven: Corporate Criminal Liability

Art. 102

Liability under the criminal law

[1] If a felony or misdemeanour is committed in an undertaking in the exercise of commercial activities in accordance with the objects of the undertaking and if it is not possible to attribute this act to any specific natural person due to the inadequate organisation of the undertaking, then the felony or misdemeanour is attributed to the undertaking. In such cases, the undertaking is liable to a fine not exceeding 5 million francs.

[2] If the offence committed falls under Articles 260ter, 260^{quinquies}, 305bis, 322ter, 322^{quinquies}, 322^{septies} paragraph 1 or 322^{octies}, the undertaking is penalised irrespective of the criminal liability of any natural persons, provided the undertaking has failed to take all the reasonable organisational measures that are required in order to prevent such an offence.[120]

[3] The court assesses the fine in particular in accordance with the seriousness of the offence, the seriousness of the organisational inadequacies and of the loss or damage caused, and based on the economic ability of the undertaking to pay the fine.

[4] Undertakings within the meaning of this title are:

a. any legal entity under private law;

b. any legal entity under public law with exception of local authorities;

c. companies;

d. sole proprietorships[121].

II. Anti-Corruption Due Diligence in Article 102(2) Swiss Criminal Law

Title seven of the Swiss Criminal Code, which was introduced in 2003, deals with corporate criminal liability. For most offences, corporate liability is subsidiary to individual liability. According to Article 102(1) of the Swiss Criminal Code, a corporation is liable under the conditions that « it is not possible to attribute the offence to any specific natural person. » The corporation is only sanctioned for having inadequate management, rendering it impossible to determine an individual liable within the corporation. In one transnational case, the Swiss Supreme Court was brought to determine whether Nestlé had a subsidiary criminal liability for its inadequate management with regard to the killing of a trade unionist working at a Colombian subsidiary. Although the Court did not decide on the merits of the case, it found that, under Article 102(1) of the Swiss Criminal Code, corporations must clearly define positions, area of competences, and responsibilities as well as hold precise individual working plans, but only in order to make possible the identification of individuals responsible within the corporation.[1]

To the contrary, for corruption offences such as transnational bribery (Article 322septies Swiss Criminal Code) or money laundering (Article 305bis Swiss Criminal Code) corporations have a primary criminal liability. According to Article 102(2) of the Swiss Criminal Code, corporations are criminally liable “irrespective of the criminal liability of any natural persons”. The condition on which to attribute corporate liability is whether the corporation “has failed to take all the reasonable organisational measures that are required in order to prevent such an offence”. Accordingly, Article 102(2) of the Swiss Criminal Code imposes a mandatory due diligence obligation for corporation with regard to transnational corruption. The failure to meet due diligence requirements to prevent transnational corruption offences is sanctioned by a fine defined in Article 102(3) of the Swiss Criminal Code.

According to the literature in Swiss criminal law, the terms “all the reasonable organizational measures” that are required in order to prevent the offence are, among others, to be informed about people or entities hired within the corporation, as well as their instruction and supervision. The extent of the due diligence in a particular case is function of the risks within particular industries.[2] A particular duty of care should be ensured when hiring individuals or entities in regions in which corruption is known to be high.[3] The next section outlines the emerging case law in this regard with a focus on due diligence requirements.

III. Swiss Case Law on Anti-Corruption Due Diligence in Transnational Matters

[1] Swiss Supreme Court, 6B_7/2014, 21 July 2014, at 3.4.4.

[2] Mark Pieth, *Wirtschaftsstrafrecht*, Basel 2016, at 68-70.

[3] Marcel A. Niggli/Diego R. Gfeller, Article 102, in: M. A. Nig-gli/H. Wiprächtiger (eds.), Basler Kommentar: Strafrecht I, Basel 2013, 1996.

***Alstom Schweiz AG*[4]**

In the matter of *Alstom*, the French multinational transport company Alstom appointed foreign consultants to secure and support projects in foreign countries. The Swiss subsidiary Alstom Schweiz AG was responsible within Alstom for the group's compliance with regard to the agreements with foreign consultants. It was supported in its task by the compliance division of Alstom SA at their French headquarters in Paris. Although Alstom group did adopt internal guidelines prohibiting illegal payments of consultants, they did not prevent the foreign consultants using some of the money to illegally influence the awarding of contracts in Latvia, Tunisia, and Malaysia.

With regard to Alstom's due diligence requirements under Article 102(2) of the Swiss Criminal Code, the Office of the Attorney General of Switzerland found that:

- Neither the director nor the two other Alstom Schweiz AG employees had relevant professional experience in the compliance sector at the time they assumed their positions.
- Even though Alstom in 2003 until 2008 offered its employees regular education on compliance issues, this training now may be described as inadequate.
- The overall composition of the compliance department at Alstom during the relevant period of 2003-2008 has been insufficient in both quantity and quality, for a worldwide payroll of over 75,000 people.
- Alstom had internal guidelines for selecting and using consultants that Alstom Schweiz AG disregarded. Despite these regulations, Alstom Schweiz AG failed to impose suitable organizational measures against consultants or its own employees whose actions had not respected them.

Based on these management failures, the Office of the Attorney General decided in summary punishment order that the Swiss subsidiary triggered its corporate liability according to Article 102(2) of the Swiss Criminal Code for its inadequate management, which enabled bribes to be paid in Latvia, Tunisia, and Malaysia. Alstom Schweiz recognized the fact, which enabled the Attorney General to render a summary punishment order. According to the settlement deal, the Attorney General sanctioned the Swiss subsidiary to a criminal sanction of 2.5 million CHF joint with a civil compensation of 36.4 million CHF but closed the proceedings against the French parent company.

Ameropa[5]

In May 2016, the Office of the Attorney General convicted the Swiss subsidiary of the Swiss agro-business multinational enterprise Ameropa to a criminal fine of 750.000 CHF. It found that, in 2007, the subsidiary paid 1.5 million USD to the then Libyan Oil Minister for ensuring the entrance to the Libyan fertilizer market.

[4] Office of the Attorney General of Switzerland, Summary Punishment Order, 22 November 2011, EAII.04.0325-LEN.

[5] Office of the Attorney General of Switzerland, Einstellungsverfügung/Strafbefehl, 31 Mai 2016, SV.12.0120-DCA.

With regard to due diligence requirements under Article 102(2) of the Swiss Criminal Code, the Office of the Attorney General of Switzerland found that a subsidiary of Ameropa:

- acted in violation of internal regulations, directives and codes of conduct;
- did not hire a compliance officer;
- lacked implementing a specific training program.

Based on these management failures, the Office of the Attorney General of Switzerland concluded that it failed to take all necessary and reasonable organisational measures, according to Article 102(2) of the Swiss Criminal Code to prevent the bribery in Libya.

Gunvor

The Office of the Attorney General is conducting criminal proceedings in connection with the Geneva-based commodities trader GUNVOR Group. The investigations began in January 2012 against persons unknown on suspicion of money laundering in connection with acts of bribery believed to have been committed between 2010 and 2012 in order to secure oil deliveries from the state petroleum company in the Republic of the Congo. The main proceedings were extended in May 2017 to include two companies in the Group on suspicion of bribery of foreign public officials.[6]

With regard to Gunvor due diligence requirements under Article 102(2) of the Swiss Criminal Code, the investigations revealed that in the period under investigation, Gunvor had done nothing at an organisational level to prevent corruption in the company's business operations. In particular, that:

- it did not have a code of conduct, which would provide a clear signal and set of guidelines to its employees;
- it did not have a compliance programme;
- it had also failed to try to reduce the risk of corruption in dealings with agents for oil shipments, who were paid several dozen million US dollars in commission between 2009 and 2012, and that;
- Gunvor had neither selected nor supervised the agents used.[7]

In a summary penalty order dated 14 October 2019, the OAG convicted several companies in the Gunvor Group, ordering them to make payments of around CHF 94million, including CHF 4 million as a fine.

Swiss financial institutions involved in the Petrobras case

The Office of the Attorney General is investigating the conduct of Swiss multinational corporations in the semi-state-owned Brazilian company Petrobras corruption case. In 2018, two separate proceedings were opened against financial institutions in Switzerland.[8] The

[6] Office of the Attorney General of Switzerland, Annual Report 2018, p. 20.

[7] Office of the Attorney General of Switzerland, Annual Report 2019, p. 20.

[8] Office of the Attorney General of Switzerland, Annual Report 2018, p. 19.

investigation is pending. Those cases will also provide guidance on anti-corruption due diligence requirements under Article 102(2) Swiss Criminal Law

IV. Assessment: Anti-Corruption and Human Rights Due Diligence

Swiss criminal courts are increasingly developing criteria within Article 102(2) of the Swiss Criminal Code to assess whether transnational corporations in Switzerland conducted anti-corruption due diligence. Criteria used are, for example, whether a compliance office is in place, whether employees in the compliance office are experienced, whether internal guidelines have been respected and implemented, or whether employees have been trained on bribery prevention policies.

Most of the criteria used to establish whether corporations are carrying out anti-corruption due diligence remain process-oriented and not outcome oriented. As a result, they could lead to a box-checking exercise by companies. This would be the case, for example, if companies would simply need to invest in compliance offices, hire experienced staff, and trained employees to avoid being criminally liable. Prosecuting authorities should make clear that this is not *per se* enough to escape liability.

Swiss criminal cases on anti-corruption due diligence show nevertheless that it is possible for public authorities to assess and implement mandatory anti-corruption due diligence provisions in transnational matters. In this regard, the due diligence criteria used in Article 102(2) Swiss Criminal Code are informative for the current literature on mandatory human rights due diligence legislation.