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Business Crime 2025

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Contributing Editor:
Joel M. Cohen
White & Case LLP

glg Global Legal Group

Expert Analysis Chapters

Q&A Chapters

Switzerland


Dr. Florian Baumann


Dr. Roman Huber


Cristina Ess

Kellerhals Carrard Zürich KlG

1 General Criminal Law Enforcement

1.1 What authorities can prosecute business crimes, and are there different enforcement authorities at the national and regional levels?

Business crimes are generally prosecuted by the police and the public prosecutor (Art. 12 of the Swiss Code of Criminal Procedure (**SCCP**)). The criminal courts are the responsible adjudicating bodies for cases brought forth by the public prosecutor (Art. 13 SCCP). The Confederation and the cantons may delegate the prosecution and adjudication of contraventions to administrative authorities (Arts 17, 357 SCCP). In administrative criminal cases, the competence for prosecution may lie with an administrative authority. For instance, the authority responsible for prosecution and judgment of violations of the criminal provisions of the Financial Market Supervision Act (**FINMASA**) or the financial market acts is the Federal Department of Finance (Art. 50(1) FINMASA).

The cantons are in principle free to determine and regulate the composition and organisation of their criminal justice authorities, including the police and public prosecutor (Art. 14 SCCP). This is the reason why there are quite considerable differences between the cantons with respect to the organisation of the enforcement authorities at the regional level. Some of the larger cantons, such as Bern and Zurich, have implemented specialised public prosecutor's offices responsible for the prosecution of business crimes.

On the federal level, criminal cases are in principle prosecuted by the Office of the Attorney General (**OAG**). The OAG is responsible for the prosecution of all offences in the Swiss Criminal Code (**SCC**), which are subject to federal jurisdiction (Arts 23, 24 SCCP). These offences may include criminal or terrorist organisation, felonies associated with a criminal or terrorist organisation, money laundering and corruption.

The responsibility for the execution of mutual legal assistance requests from foreign prosecution authorities lies with the cantonal or federal authorities, as the case may be.

1.2 If there is more than one set of enforcement agencies, how are decisions made regarding the body that will investigate and prosecute a matter?

Whether an offence is prosecuted by cantonal or federal authorities is determined by the SCCP. The general principle is that the cantons have jurisdiction unless the law specifically stipulates that the offence in question falls under federal jurisdiction. Offences pursuant to the SCC falling under federal jurisdiction are in principle prosecuted by the OAG. However, under certain conditions the OAG can transfer a criminal case that falls under its jurisdiction in accordance with Art. 23 SCCP to the cantonal prosecutor's offices for investigation (Art. 25 SCCP). In cases of multiple jurisdiction, the OAG decides which canton investigates the case (Art. 26(1) SCCP). In the event of conflicts between the OAG and cantonal criminal justice authorities, the Federal Criminal Court shall decide (Art. 28 SCCP).

1.3 Can multiple authorities investigate and enforce simultaneously?

Facts investigated by the cantonal or federal criminal investigation authorities are often simultaneously investigated by administrative bodies such as in particular, the Swiss Financial Market Supervisory Authority (**FINMA**). However, the criminal investigation authorities and the administrative bodies will each investigate for the purpose of its own field of competence.

It is a matter of controversy whether and to what extent information that must be compulsorily provided to an administrative body may also be used for criminal convictions.

1.4 Is there any civil or administrative enforcement against business crimes? If so, what agencies enforce the laws civilly and which crimes do they combat?

There is currently no civil enforcement against business crimes in Switzerland.

As mentioned above in question 1.1, in administrative criminal cases, the competence for prosecution may lie with an administrative authority. A frequent example is prosecution by the Federal Department of Finance in cases of violations of the criminal provisions of the financial market acts. Another example is the Embargo Act (**EmbA**), which refers to the Federal Act on Administrative Criminal Law (**FAACL**). According to the latter, the relevant administrative authority is responsible for prosecution (Art. 20(1) FAACL).

1.5 What are the major business crime cases in your jurisdiction in the past year?

The Federal Supreme Court held, in a decision dated 19 April 2023 (BGE 149 IV 248), that the consumption of assets derived from a crime fulfils the objective elements of money laundering (Art. 305*bis* SCC). According to the Federal Supreme Court, the

consumption of assets prevents confiscation and avoids the need for the money launderer to provide funds of legal origin that would have been necessary to obtain the advantage in question. On the other hand, the destruction of assets derived from a crime is not in itself an act constituting money laundering. Even if the destruction of such assets prevents their confiscation, from an economic point of view there is generally no benefit since the assets are not reintroduced into the economic circuit as having apparently been acquired legally (BGE 149 IV 248 [6.4.2]).

The Federal Criminal Court held, in a decision dated 14 June 2023 (CA.2020.7), that a former bank employee who provides false information about the origin and use of funds within the bank over a period of more than 13 years is guilty of criminal conduct under Art. 305*bis*(2)(b) SCC. The Federal Criminal Court held that if the alleged offender is expected to clarify the background of a high-risk client, he cannot protect himself by invoking the fact that the Compliance Department is in any case responsible for examining the case in its entirety. On the other hand, if the Compliance Department considers that the information it has provided is sufficient, it is difficult to accept that the person concerned acted out of malice aforethought as regards the criminal origin of the funds in question, insofar as it cannot then be definitively demonstrated which department of the bank bore the "ultimate responsibility" for the exchanges between the various internal control mechanisms within the bank. The same applies to the question of whether the defendant deliberately sought to defuse any intervention by the relevant compliance officers. It was established in the case at hand that the bank employee was aware of the criminal origin of the funds, at least from a certain date (CA.2020.7 [2.3.5.2]). The decision has been appealed and is currently pending before the Swiss Federal Supreme Court.

2 Organisation of the Courts

2.1 How are the criminal courts in your jurisdiction structured? Are there specialised criminal courts for particular crimes?

Pursuant to federal law, the Confederation and the cantons shall determine their own criminal justice authorities and regulate the composition, organisation and powers of the criminal justice authorities and the appointment of their members, unless the SCCP or other federal acts regulate the same in full (Art. 14 SCCP). An example of such federal regulation is the provision according to which two court instances must exist in each canton. Due to the freedom of the cantons, the cantonal differences with respect to the structure of criminal courts are quite substantial. While larger cantons have specialised criminal courts of first instance for white-collar crimes, criminal cases in smaller cantons are tried by the general district courts.

On the federal level, the Federal Criminal Court currently consists of three chambers, one for criminal cases and the other two for appeals. The Criminal Chambers of the Federal Criminal Court decide on cases involving federal jurisdiction as a court of first instance unless the OAG has delegated the proceedings to the cantonal authorities. Furthermore, they judge administrative criminal cases that the Federal Council has referred to the Federal Criminal Court (Art. 35 of the Organisation of the Criminal Authorities Act (**OCAA**)). As the second instance in federal criminal cases, the Higher Appeals Chamber – which was only introduced in 2019 – hears appeals against Criminal Chamber judgments that wholly or partially conclude proceedings (Art. 38a OCAA).

2.2 Is there a right to a jury in business crime trials?

There are no jury trials in Switzerland. However, certain cantonal courts of first instance may be constituted of lay judges.

2.3 Where juries exist, are they composed of citizens members alone or also professional jurists?

As stated above, there are no jury trials in Switzerland.

3 Particular Statutes and Crimes

3.1 Please describe the statutes that are commonly used in your jurisdiction to prosecute business crimes, including the elements of the crimes and the requisite mental state of the accused.

· Securities fraud

Under Swiss law, there is no specific statutory provision regarding fraud and misrepresentation in connection with the sale of securities. Rather, the general provision of Art. 146 SCC is applicable.

Pursuant to Art. 146 SCC, any person who, with a view to securing an unlawful gain for himself or another, wilfully induces an erroneous belief in another person by false pretences or concealment of the truth, or wilfully reinforces an erroneous belief, and thus causes that person to act to the prejudice of his or another's financial interests, is criminally liable. Thus, the objective elements of fraud consist of (i) wilful deception by means of false pretences, concealment of the truth, or wilful reinforcement of an erroneous belief, (ii) error, (iii) act of the deceived person to the prejudice of his or another's financial interest, and (iv) damage. The offender acts wilfully, in particular, if he uses forged documents, constructs an entire scheme of lies, prevents the defrauded party from verifying the presented information or knows that the defrauded party will not verify the information due to the relationship of trust between the parties.

Subjectively, fraud requires that the offender acts with intent, i.e. the offender must carry out the act in the knowledge of what he is doing and in accordance with his will. Conditional intent (*dolus eventualis*) is sufficient. Thus, if the offender regards the realisation of the act as being possible and accepts this, he acts with conditional intent. Furthermore, the offender must act with the intent to secure an unlawful gain for himself or another person.

Fraud is punishable with a custodial sentence not exceeding five years or a monetary penalty. If the offender acts for commercial gain, he is liable to a custodial sentence not exceeding 10 years or to a monetary penalty of not less than 90 daily penalty units.

In case the offender uses forged documents, the preparation and/or use of such documents may constitute forgery of a document pursuant to Art. 251 SCC. According to Art. 251 SCC, any person who with a view to causing financial loss or damage to the rights of another or in order to obtain an unlawful advantage for himself or another, produces a false document, falsifies a genuine document, uses the genuine

signature or mark of another to produce a false document, falsely certifies or causes to be falsely certified a fact of legal significance or makes use of a false or falsified document in order to deceive, is liable to a custodial sentence not exceeding five years or to a monetary penalty.

With respect to fraud in connection with the sale of securities, forgery of a document may in particular fall into consideration in form of false certification. False certification requires a qualified written lie. Such qualified written lie is accepted by the courts if the document has an increased credibility and the addressee therefore has a special trust in it. This is the case when generally applicable objective guarantees warrant the truth of the statement towards third parties, which precisely define the content of certain documents in more detail.

The Collective Investment Schemes Act (**CISA**) also contains criminal provisions in relation to securities fraud. For instance, any person who, in the annual or semi-annual report, wilfully provides false information, withholds material facts or does not produce all the mandatory information, is liable to a custodial sentence not exceeding three years or to a monetary penalty. Where the offender acts through negligence, the penalty is a fine not exceeding CHF 250,000 (Art. 148 CISA).

Furthermore, misrepresentations in securities trading may fall under the Financial Market Infrastructure Act (**FMIA**), which contains several criminal provisions (Art. 147 *et seqq.* FMIA).

· Accounting fraud

In general, accounting fraud is subsumed under the general statute of fraud (Art. 146 SCC) (see above). In case the accounting fraud is accompanied by preparation and/or use of forged documents, forgery of a document pursuant to Art. 251 SCC falls into consideration (see above).

· Insider trading

The exploitation of insider information trading is punishable under Art. 154 of the FMIA. Art. 154 FMIA distinguishes between three different categories of insiders: (i) the primary insider (Art. 154(1-2) FMIA); (ii) the secondary insider (Art. 154(3) FMIA); and (iii) the tertiary insider (Art. 154(4) FMIA).

The objective elements of the provision in Art. 154(1) FMIA consist of the following: the offender must: (i) be a body or a member of a managing or supervisory body of an issuer or of a company controlling the issuer or controlled by the issuer, or a person who due to his shareholding or activity has legitimate access to insider information; (ii) gain a pecuniary advantage for himself or for another with insider information; and (iii) by (a) exploiting it to acquire or dispose of securities admitted to trading on a trading venue in Switzerland or to use derivatives relating to such securities, (b) disclosing it to another, or (c) exploiting it to recommend to another to acquire or dispose of securities admitted to trading on a trading venue in Switzerland or to use derivatives relating to such securities.

The sanction for a primary insider is a custodial sentence not exceeding three years or a monetary penalty. If he gains a pecuniary advantage exceeding CHF 1 million, he shall be liable to a custodial sentence not exceeding five years or a monetary penalty.

A person is a secondary insider if he gains a pecuniary advantage for himself or for another by exploiting insider information or a recommendation based on insider information disclosed or given to him by a person referred to in Art. 154(1) FMIA or acquired through a felony or misdemeanour in order to acquire or dispose of securities admitted to trading on a trading venue in Switzerland or to use derivatives relating to such securities.

The secondary insider shall be liable to a custodial sentence not exceeding one year or a monetary penalty.

A tertiary insider is a person not falling under the other two categories and who gains a pecuniary advantage for himself or for another by exploiting insider information or a recommendation based on insider information. He shall be liable to a fine of up to CHF 10,000.

· Embezzlement

The main statutory provision pertaining to embezzlement is Art. 138 SCC ("Misappropriation"). The provision requires the offender to appropriate movable property belonging to another but entrusted to him or alternatively to make unlawful use of financial assets entrusted to him, for his own or another's benefit. Subjectively, misappropriation requires that the offender acts with intent. Conditional intent (*dolus eventualis*) is sufficient. Furthermore, the offender must act with the intent to secure an unlawful gain for himself or another person. The offender is liable to a custodial sentence not exceeding five years or a monetary penalty.

If the offender acts in his capacity as a member of a public authority, or as a public official, guardian, adviser, professional asset manager, or in the practice of a profession or a trade or the execution of a commercial transaction for which he has been authorised by a public authority, he is liable to a custodial sentence not exceeding 10 years or to a monetary penalty.

It is worth mentioning in relation to this the related criminal provision of Art. 158 SCC ("Mismanagement"). Pursuant to Art. 158(1) SCC, any person who by law, an official order, a legal transaction or authorisation granted to him, has been entrusted with the management of the property of another or the supervision of such management, and in the course of and in breach of his duties causes or permits that other person to sustain financial loss, is criminally liable.

The sanction is a custodial sentence not exceeding three years or a monetary penalty. If the offender acts with a view to securing an unlawful financial gain for himself or another, a custodial sentence of up to five years may be imposed.

Alternatively, any person who, with a view to securing an unlawful gain for himself or another, abuses the authority granted to him by statute, an official order or a legal transaction to act on behalf of another and as a result causes that other person to sustain financial loss is liable to a custodial sentence not exceeding five years or to a monetary penalty (Art. 158(2) SCC).

· Bribery of government officials

The SCC differentiates between the following categories of bribery:

- Bribery of Swiss public officials.
- Bribery of foreign public officials.
- Bribery of private individuals.

The provisions governing the bribery of Swiss public officials includes the granting to and the acceptance by Swiss public officials of an undue advantage.

· Bribery of public officials and private individuals

The objective elements of Arts 322*ter*, 322*quater*, 322*septies*, 322*octies* and 322*novies* consist of the following: (i) a bribing person; (ii) a bribed person; (iii) an undue advantage; (iv) the offering, promising or giving of an undue advantage (active bribery) or the demanding, the securing of the promise of or the accepting of an undue advantage (passive bribery); and (v) a purpose, i.e. the bribing person offers, promises or gives to the bribed person a bribe to cause the latter to carry out or to

fail to carry out an act in connection with his official activity that is contrary to his duty or dependent on his discretion (principle of equivalence).

Subjectively, all types of bribery require that the offender act with intent. *Dolus eventualis* is sufficient.

The offender of the criminal provisions pursuant to 322*ter*, 322*quater* and 322*septies* is liable to a custodial sentence not exceeding five years or a monetary penalty. Bribery of private individuals is punishable with a custodial sentence not exceeding three years or a monetary penalty.

It is noteworthy that in minor cases, active and passive bribery of private individuals is only prosecuted upon complaint. Minor cases could be held to be established, in particular, in the following circumstances: the sum in tort is not extensive or the security and health of third parties are not affected by the offence.

· Granting and acceptance of an advantage

Pursuant to Arts 322*quinquies* and 322*sexies* SCC, the undue advantage is offered, promised or given in order that the Swiss public official carries out his official duties. Hence, in contrast to active and passive bribery, the offering, promising or giving of an undue advantage is not linked to a concrete or at least determinable consideration of the Swiss public official (principle of equivalence). However, the granting of the undue advantage needs to be suitable for influencing the carrying out of the Swiss public official's official duties.

The granting and acceptance of an undue advantage are sanctioned with a custodial sentence not exceeding three years or a monetary penalty.

· Criminal anti-competition

Criminal unfair competition practices are sanctioned according to the Unfair Competition Act (**UCA**). Pursuant to Art. 23(1) UCA, anyone who wilfully commits unfair competition in accordance with Arts 3 (Unfair advertising and sales methods and other unlawful conduct), 4 (Incitement to breach or termination of contract), 5 (Exploitation of another's work product) or 6 (Breach of manufacturing or trade secrecy) shall be punished upon request with a custodial sentence not exceeding three years or a monetary penalty. The criminal unfair competition offences range from making incorrect, misleading or unnecessarily offensive statements about others, their products, prices or businesses, to impairing the customer's freedom of choice through particularly aggressive sales methods, to failing to observe the notice in the telephone directory that a customer does not wish to receive advertising communications from persons with whom he has no business relationship and that his data may not be disclosed for the purposes of direct advertising. Furthermore, the offender is punishable according to the above-mentioned provision if he, *inter alia*, incites customers to breach of contract in order to conclude a contract with themselves, exploits a work result entrusted to him such as offers, calculations or plans without authorisation or exploits or communicates to others manufacturing or trade secrets that he has sought to obtain or otherwise unlawfully obtained.

Additionally, the failure to comply with certain pricing disclosure obligations *vis-à-vis* consumers is punishable with a fine of up to CHF 20,000 in case the offender acts with intent (Art. 24(1) UCA). *Dolus eventualis* is sufficient. If the offender acts negligently, he is punishable with a fine of up to CHF 10,000.

· Cartels and other competition offences

While administrative sanctions against companies participating in certain anti-competitive behaviour are regulated in Art. 49a *et seqq*. of the Cartel Act (**CA**), criminal sanctions are provided for in Arts 54–55 CA. Pursuant to Art. 49a(1) CA, which according to the Swiss Federal Supreme Court is akin to criminal law in its nature, any undertaking that participates in an unlawful agreement pursuant to Arts 5(3) and (4) (elimination of effective competition through certain agreements between actual or potential competitors) or that behaves unlawfully pursuant to Art. 7 (by abusing position in the market, hindering other undertakings from starting or continuing to compete or disadvantaging trading partners) shall be charged up to 10% of the turnover that it achieved in Switzerland in the preceding three financial years. The amount is dependent on the duration and severity of the unlawful behaviour. Due account shall be taken of the likely profit that resulted from the unlawful behaviour.

Furthermore, any undertaking that to its advantage breaches an amicable settlement, a final and non-appealable ruling of the competition authorities, or a decision of an appellate body shall be charged up to 10% of the turnover it achieved in Switzerland in the preceding three financial years (Art. 50 CA). The involved individual acting with intent is liable to a fine not exceeding CHF 100,000 (Art. 54 CA).

Additionally, an undertaking that implements a concentration that should have been notified without filing a notification, fails to observe the suspension obligation, fails to comply with a condition attached to the authorisation, implements a prohibited concentration, or fails to implement a measure intended to restore effective competition shall be charged up to CHF 1 million (Art. 51(1) CA).

Finally, any undertaking that does not, or does not fully fulfil its obligation to provide information or produce documents shall be charged up to CHF 100,000 (Art. 52 CA). The involved individual acting with intent is liable to a fine not exceeding CHF 20,000. The same sanction is imposed on a person who wilfully implements a concentration that should have been notified without filing a notification, or who violates rulings relating to concentrations of undertakings (Art. 55 CA).

· Tax crimes

Intentional or negligent tax evasion is punishable with a fine, which is usually the simple amount of the evaded tax. It can be reduced to one third in the case of slight culpability, and increased up to three times in the case of serious culpability (see Art. 175 *et seqq*. of the Direct Federal Tax Act (**DFTA**) and Art. 56 *et seqq*. of the Tax Harmonisation Act (**THA**)).

Tax fraud is punishable with a custodial sentence not exceeding three years or a monetary penalty. The punishment for tax evasion is reserved (Art. 186 DFTA and Art. 59 THA). Tax fraud requires that the offender, for the purpose of tax evasion, uses forged, falsified or untrue documents such as business records, balance sheets, income statements or wage statements and other certificates issued by third parties for the purpose of deception.

As of 2016, an aggravated tax misdemeanour as set out in Art. 186 DFTA and Art. 59(1)(1st clause) THA, if the tax evaded in any tax period exceeds CHF 300,000, is a predicate offence to money laundering according to Art. 305*bis* SCC.

The assistance of foreign tax evasion is not punishable under Swiss law unless the assisting act itself, such as fraud or forgery of a document, constitutes an offence.

· Government-contracting fraud

There is no specific statutory provision regarding government-contracting fraud. However, the above-mentioned provisions regarding fraud (Art. 146 SCC), bribery (Art. 322*ter et seqq*. SCC) and/or anti-competitive behaviour may be applicable.

· Environmental crimes

The Environmental Protection Act (**EPA**) contains criminal provisions addressing environmental offences. These offences range from failing to take the safety measures prescribed for the prevention of disasters or failing to comply with the prohibition of certain production methods or the keeping of certain stocks, to putting organisms into circulation without providing recipients with the required information and instructions, to infringing regulations on the movement of special waste. If the offender acts wilfully, he is liable to a custodial sentence not exceeding three years or a monetary penalty (Art. 60(1) EPA). If he acts negligently, he is liable to a monetary penalty not exceeding CHF 540,000 (Art. 60(2) EPA).

Furthermore, the EPA contains contraventions that are punishable with a fine not exceeding CHF 20,000 if the offender acts wilfully, or respectively with a fine not exceeding CHF 10,000 if the offender acts negligently (Art. 61 EPA).

Finally, offences against the regulations on incentive taxes and on biogenic motor and thermal fuels are also punishable (Art. 61a EPA).

· Campaign-finance/election law

Under Swiss law, disruption and obstruction of elections and votes (Art. 279 SCC), attacks on the right to vote (Art. 280 SCC), corrupt electoral practices (Art. 281 SCC), electoral fraud (Art. 282 SCC), vote catching (Art. 282*bis* SCC) and the breach of voting secrecy (Art. 283 SCC) are punishable. With the exception of vote catching (fine of up to CHF 10,000), these offences are punishable with a custodial sentence not exceeding three years or a monetary penalty.

There are no federal criminal provisions with respect to campaign financing.

· Market manipulation in connection with the sale of derivatives

Pursuant to Art. 155(1) FMIA, any person who (a) disseminates false or misleading information against his better knowledge, or (b) effects acquisitions and sales of securities admitted to trading on a trading venue in Switzerland directly or indirectly for the benefit of the same person or persons connected for this purpose is liable to a custodial sentence not exceeding three years or a monetary penalty. The offender must act with the intent to substantially influence the price of such securities and to gain a pecuniary advantage for him or for another. If the offender gains a pecuniary advantage of more than CHF 1 million, he shall be liable to a custodial sentence not exceeding five years or a monetary penalty (Art. 155(2) FMIA).

· Money laundering or wire fraud

Under Swiss law, any person who carries out an act that is aimed at frustrating the identification of the origin, the tracing or the forfeiture of assets that he knows or must assume originate from a felony, i.e. an offence that carries a custodial sentence of more than three years, or from a qualified tax offence, shall be punishable with a custodial sentence not exceeding three years or a monetary penalty (Art. 305*bis*(1) SCC).

The criminal offences under Art. 186 DFTA and Art. 59(1) (1st clause) THA shall be deemed to be qualified tax offences if the evaded taxes exceed CHF 300,000 per tax period (Art. 305*bis*(1*bis*) SCC).

According to the Swiss Federal Supreme Court, and regardless of the clear wording of Art. 305*bis*(1) SCC, the actions described as "frustrating the identification of the origin and the tracing of assets" shall not have any independent significance in comparison to "frustrating the forfeiture". Also, according to the Swiss Federal Supreme Court, a financial intermediary may be liable for money laundering by omission.

In serious cases, the penalty is a custodial sentence not exceeding five years or a monetary penalty. A custodial sentence is combined with a monetary penalty not exceeding 500 daily penalty units.

The Anti-Money Laundering Act (**AMLA**), which is currently under revision, contains due diligence obligations for financial intermediaries, including the obligation to file a report with the Money Laundering Reporting Office Switzerland if they have reasonable grounds to suspect that assets involved in the business relationship are, *inter alia*, connected to an offence in terms of Art. 305*bis* SCC or are the proceeds of a felony or an aggravated tax misdemeanour under Art. 305*bis*(1*bis*) SCC (Art. 9(1) AMLA). Any person who fails to comply with the duty to report in terms of Art. 9 AMLA shall be liable to a fine not exceeding CHF 500,000. If the offender acts through negligence, he shall be liable to a fine not exceeding CHF 150,000 (Art. 37 AMLA).

Swiss law does not know a specific provision for wire fraud. However, Art. 146 SCC may be applicable.

· Cybersecurity and data protection law

There are multiple statutory criminal provisions pertaining to data protection. The main statute is the offence of unauthorised obtaining of data (Art. 143 SCC). Pursuant to Art. 143(1) SCC, any person who obtains for himself or another data that is stored or transmitted electronically or in some similar manner and which is not intended for him and has been specially secured to prevent his access is liable to a custodial sentence not exceeding five years or to a monetary penalty. The offender must act with the intent to obtain an unlawful gain for himself or for another.

Furthermore, any person who obtains unauthorised access by means of data transmission equipment to a data processing system that has been specially secured to prevent his access is liable on complaint to a custodial sentence not exceeding three years or to a monetary penalty (Art. 143*bis*(1) SCC). In addition, any person who markets or makes accessible passwords, programs or other data that he knows or must assume are intended to be used to commit an offence under Art. 143*bis*(1) SCC is liable to the same sanction (Art. 143*bis*(2) SCC).

Finally, any person who without authority alters, deletes or renders unusable data that is stored or transmitted electronically or in some other similar way is liable on complaint to a custodial sentence not exceeding three years or to a monetary penalty (Art. 144*bis*(1) SCC). If the offender has caused major damage, a custodial sentence of one to five years may be imposed. The offence is prosecuted *ex officio*. Any person who manufactures, imports, markets, advertises, offers or otherwise makes accessible programs that he knows or must assume will be used for the purposes described in Art. 144*bis*(1) SCC, or provides instructions on the manufacture of such programs, is liable to a custodial sentence not exceeding three years or to a monetary penalty (Art. 144*bis*(2) SCC). If the offender acts for commercial gain, a custodial sentence of one to five years may be imposed.

· Trade sanctions and export control violations

The Goods Control Act (**GCA**) and the EmbA contain different criminal provisions regarding export restrictions (Art. 14 *et seqq*. GCA) and breaches of embargoes (Art. 9 *et seqq*. EmbA). The EmbA is supplemented by ordinances issued by the federal government.

A breach of the GCA, e.g. producing, storing, passing on, using, importing, exporting, transporting or brokering goods without the required licence, or failing to comply with the conditions and requirements of a related licence, is sanctioned with a custodial sentence not exceeding three years or a fine

not exceeding CHF 1 million if the offender acts wilfully. In serious cases, the penalty is a custodial sentence not exceeding 10 years, which may be combined with a fine not exceeding CHF 5 million. If the offender acts negligently, the penalty is a custodial sentence not exceeding six months or a fine not exceeding CHF 100,000 (Art. 14 GCA). Certain contraventions and administrative offences are also punishable (Arts 15 and 15a GCA). For instance, anyone who wilfully refuses to provide information, documents or access to business premises in accordance with Arts 9 and 10(1) GCA or provides false information in this connection is liable to a fine not exceeding CHF 100,000 (Art. 15(1)(a) GCA).

With respect to breaches of embargoes, anyone who wilfully violates any provision of an ordinance regarding compulsory measures (Art. 2(3) EmbA), provided such violation is declared to be subject to prosecution, is liable to a custodial sentence of up to one year or a fine of a maximum of CHF 500,000 (Art. 9(1) EmbA). In serious cases, the penalty is a custodial sentence of up to five years. The custodial sentence may be combined with a fine of a maximum of CHF 1 million. If the offender acts negligently, the penalty is a monetary penalty of up to CHF 270,000 or a fine of a maximum of CHF 100,000. Certain contraventions are also punishable (Art. 10 EmbA). For instance, anyone who wilfully refuses to provide information, to hand over documents, or to permit access to business premises in terms of Arts 3 and 4(1) EmbA, or who provides false or misleading information in this connection, is liable to a fine not exceeding CHF 100,000 (Art. 10(1)(a) EmbA).

· Any other crime of particular interest in your jurisdiction

Statutes that are of particular interest are the offences of unlawful activities on behalf of a foreign state (Art. 271 SCC) and industrial espionage (Art. 273 SCC).

Pursuant to Art. 271(1) SCC, any person who carries out or facilitates activities on behalf of a foreign state, a foreign party or organisation on Swiss territory without lawful authority, where such activities are the responsibility of a public authority or public official, is liable to a custodial sentence not exceeding three years or to a monetary penalty. In serious cases, the offender is liable to a custodial sentence of not less than one year. See above question 1.4.

According to Art. 273 SCC, any person who (i) seeks to obtain a manufacturing or trade secret in order to make it available to a foreign official agency, a foreign organisation, a private enterprise, or the agents of any of these, or (ii) makes a manufacturing or trade secret available to the above-mentioned addressees, is liable to a custodial sentence not exceeding three years or to a monetary penalty. In serious cases, the offender is liable to a custodial sentence of not less than one year. Any custodial sentence may be combined with a monetary penalty.

Both offences require intent. *Dolus eventualis* is sufficient. In case of Art. 273(1) SCC, the intent to make available the secret to the above-mentioned addressees is additionally required.

3.2 Is there liability for inchoate crimes in your jurisdiction? Can a person be liable for attempting to commit a crime, whether or not the attempted crime is completed? Can a person be liable for "misprision" by helping another avoid being located or discovered?

Under Swiss law, there is criminal liability for attempted felonies and misdemeanours. If the offender does not complete the criminal act or if the result required to complete the act is not or cannot be achieved, the court may reduce the penalty (Art. 22(1) SCC). If he of his own accord does not complete the criminal act or if he assists in preventing the completion of the act, the court may reduce the sentence or waive any penalty (Art. 23(1) SCC). No penalty is imposed in case the offender fails to recognise through a serious lack of judgment that the act cannot under any circumstances be completed due to the nature of the objective or the means used to achieve it (Art. 22(2) SCC).

Attempted contraventions (acts punishable by fine) are offences only in the cases expressly mentioned in the SCC (Art. 105(2) SCC).

If the threshold required for an attempt pursuant to Art. 22 SCC has not been reached, the act is, in principle, not punishable. However, preparatory acts for certain offences of particularly serious nature are subject to punishment themselves (Art. 260*bis* SCC). Likewise, the participation in and the support of a criminal or terrorist organisation is a separate criminal provision (Art. 260*ter* SCC).

Pursuant to Art. 305 SCC, any person who assists another to evade prosecution, the execution of a sentence, or the execution of any of the measures provided for in Arts 59–61, 63 and 64 SCC shall be liable to a custodial sentence not exceeding three years or to a monetary penalty.

4 Corporate Criminal Liability

4.1 Is there entity liability for criminal offences? If so, under what circumstances will an employee's conduct be imputed to the entity? Are there ways in which an entity can avoid criminal liability for the acts of its employees or agents?

Since 2003, corporate criminal liability exists for (a) any legal entity under private law, (b) any legal entity under public law with the exception of local authorities, (c) companies, and (d) sole proprietorships (Art. 102(4) SCC).

Currently, two different statutory norms exist for corporate criminal liability:

- The first circumstance in which an entity can be held criminally liable is regulated in Art. 102(1) SCC. Pursuant thereto a corporation may be held liable if a felony or misdemeanour is committed in an entity, in the exercise of the duties of the entity and it is not possible to attribute the criminal act to any specific natural person, due to the inadequate organisation of the entity, then the felony or misdemeanour shall be attributed to the entity.
- The second circumstance in which an entity can be held criminally liable is regulated in Art. 102(2) SCC. If the offence committed falls under the catalogue of offences, e.g. money laundering or bribery, then the entity is held liable regardless of whether an individual can be identified as responsible and punished. The punishment does not pertain to the inability to attribute the crime to an individual but rather for failing to prevent the circumstances of the commission of the crime.

In both circumstances, the entity is liable to a fine not exceeding CHF 5 million. In addition, the confiscation of criminally obtained assets can be ordered, which has no upper limit. See also question 1.4 above.

The implementation of an effective compliance programme, the setup of an effective internal whistleblower system and eventually conducting internal corporate investigations is the best way to detect compliance violations and thus avoid criminal liability for the acts of companies' employees or agents.

4.2 Is there personal liability for managers, officers, and directors if the entity becomes liable for a crime? Under what circumstances?

Criminal liability of an entity does not *per se* lead to the personal liability of managers, officers, and directors of the entity but rather their criminal liability is dependent on their own conduct and whether criminal acts can be attributed to them.

4.3 Where there is entity liability and personal liability, do the authorities have a policy or preference as to when to pursue an entity, when to pursue an individual, or both? Has the preference changed in recent years? How so?

Where both entity and personal liability is given, the authorities have a general duty to pursue and prosecute both (Art. 7 SCCP).

In case of Art. 102(1) SCC, it is required that the act cannot be attributed to an individual in order for the entity to be criminally liable. In practice, this generally implies that the authorities were unsuccessful in pursuing and attributing the act to a responsible individual.

While, in the past, the Swiss authorities have almost always focused their prosecution on individuals, there is a trend whereby an increasing number of corporate entities are facing prosecution.

4.4 In a merger or acquisition context, can successor liability apply to the successor entity? When does successor liability apply? When does it not apply?

There is no specific regulation regarding successor liability within Swiss criminal law; however, the general civil law legal principles regarding successions of entities are applicable within criminal law. Criminal liability therefore may exist where companies acquire targets that have been engaged in conduct that violates criminal law, such as anti-corruption laws or economic sanctions law. This reinforces the need to understand a target's potential criminal liability and taking steps to minimise the risk, such as pre-acquisition due diligence and timely post-acquisition review. For entities in the context of a merger, the status of the injured party and therefore that of the plaintiff in criminal proceedings does not pass on to the acquiring company according to case law (BGE 140 IV 162). For entities as perpetrators, the question is debated amongst scholars and there is no case law as yet.

5 Statutes of Limitations

5.1 How are enforcement-limitations periods calculated, and when does a limitations period begin running?

The statute of limitation period begins on the day on which the offender committed the offence, in the case of a series of acts, on the day on which the final act was carried out. If the criminal conduct continues over a period of time, the statute of limitations begins on the day on which the criminal conduct ceases (Art. 98 SCC).

The right to prosecute is subject to a time limit of 30 years if the offence carries a custodial sentence of life. For offences carrying a custodial sentence of more than three years, the offence becomes time barred after 15 years, and for offences carrying a sentence up to three years, the offence is time barred after 10 years. Offences carrying different penalties are time barred after seven years (Art. 97 SCC). Administrative criminal law may also carry other limitation periods.

According to recent case law, in cases of corporate criminal liability based on Art. 102 SCC, the limitation period for the criminal liability of the company is the same as the limitation period of the offence that was presumably committed within the entity.

5.2 Can crimes occurring outside the limitations period be prosecuted if they are part of a pattern or practice, or ongoing conspiracy?

The possibility has in principle been rejected by the Swiss Federal Supreme Court.

5.3 Can the limitations period be tolled? If so, how?

Statutes of limitations under the SCC cannot be tolled; however, the Administrative Criminal Law Act (**ACLA**) does allow for it (Art. 11 ACLA). In administrative criminal proceedings, the statute of limitations is tolled during certain court or appeal proceedings, or as long as the perpetrator is carrying out a prison sentence abroad.

6 Initiation of Investigations

6.1 Do enforcement agencies have jurisdiction to enforce their authority outside your jurisdiction's territory for certain business crimes? If so, which laws can be enforced extraterritorially and what are the jurisdictional grounds that allow such enforcement? How frequently do enforcement agencies rely on extraterritorial jurisdiction to prosecute business crimes?

Swiss authorities' jurisdiction is generally limited to crimes committed within Swiss territory. This includes acts perpetrated within Switzerland, or when the effects of the crime unfolded in Switzerland (Arts 3 and 8 SCC). In cross-border white-collar offences, the place of commission is rather broadly interpreted. This results in a relatively broad interpretation of Swiss jurisdiction. For example, bribery offences are considered to be committed in Switzerland as long as the bank account of a Swiss bank has been used to pay or receive the bribe. Finally, crimes against Switzerland that were committed abroad also fall under the jurisdiction of the SCC (Art. 4 SCC).

Jurisdiction to prosecute crimes committed abroad is also given in cases of adherence to an international convention mandating the prosecution of the offence, requiring, amongst others, however, that the act committed is also punishable at the place of its commission (Art. 6 SCC).

While there is a certain amount of jurisdiction given to the authorities to prosecute offences committed abroad, there are often negating factors, such as drawn out judicial assistance proceedings for the acquisition of evidence, which lead to stronger selectivity when pursuing crimes committed abroad. Often the courts will instead try to indict the offenders for offences in Switzerland related to those committed abroad.

6.2 How are investigations initiated? Are there any rules or guidelines governing the government's initiation of any investigation? Can third parties learn how the investigation began or obtain the initial file documents? If so, please describe them.

The public prosecutor generally initiate investigations and proceedings on their own initiative or upon the filing of a complaint by a victim or a third party. While any person is entitled to report an offence to a criminal justice authority in writing or orally (Art. 301 SCCP), criminal justice authorities have a duty to report all offences that they become aware of within their official capacity (Art. 302 SCCP).

The MROS is the most frequent source of information leading to criminal proceedings for white-collar crime matters, in particular in cases of international corruption, followed by international mutual legal assistance. Swiss anti-money laundering legislation contributes to the detection of these offences in so far as all Swiss financial intermediaries are required to inform the MROS immediately when they are aware or have "reasonable grounds" to suspect that assets involved in a business relationship fall under at least one of the criteria set out in the AMLA, including if they originate in a predicate offence to money laundering (Art. 9 AMLA). The MROS communicates these reports to the public prosecutor for follow-up action upon conclusion that there are reasonable grounds to suspect that an offence has been committed.

Proceedings are initiated by investigatory activity by the police or the opening of an investigation by the public prosecutor (Art. 300 SCCP). If the offence is only prosecuted upon complaint, an investigation is only opened once such a complaint is filed (Art. 303 SCCP).

6.3 Do the criminal authorities in your jurisdiction have formal and/or informal mechanisms for cooperating with foreign enforcement authorities? Do they cooperate with foreign enforcement authorities?

The International Legal Assistance in Criminal Matters Act (**ILACMA**) regulates international cooperation in criminal matters. Switzerland is also a member state of the European Convention on Mutual Assistance in Criminal Matters, the European Extradition Treaty and other treaties regulating legal assistance in criminal matters.

According to the annual activity report on international legal assistance, in 2021 Switzerland dealt with more than 35,000 legal assistance cases. This included 1,375 requests to Switzerland for criminal evidence, and 995 from Switzerland to foreign countries for criminal evidence.

The investigative authorities may also, under certain circumstances, provide foreign authorities with information outside of a formal legal assistance request proceeding (Art. 67a ILACMA). This was done 116 times by Switzerland in 2021.

7 Procedures for Gathering Information from a Company

7.1 What powers does the government have generally to gather information when investigating business crimes?

The Swiss authorities possess a varied range of legal measures to establish the truth. The catalogue of available measures includes the right to question the accused (Art. 157 *et seqq.* SCCP), potential witnesses (Art. 162 *et seqq.* SCCP), and informants (Art. 178 *et seqq.* SCCP). Experts may be consulted (Art. 182 *et seqq.* SCCP), inspections may be conducted and authorities may obtain access to objective evidence, including documents, and electronic data (Art. 192 *et seqq.* SCCP). The use of coercion, violence, threats, promises, deception and methods that may compromise the ability of the person concerned to think or decide freely are prohibited when taking evidence (Art. 140 SCCP).

When necessary, the authorities may also obtain access to objective evidence through the coercive measures permitted by law. Such coercive measures must be necessary and proportionate, and there must be a reasonable suspicion that an offence has been committed. These include, amongst others: the power to summon a person for a deposition, if necessary under the threat of sanctions or with the help of the police (Art. 201 *et seqq.* SCCP); the right to detain a suspect in pre-trial custody as long as the relevant requirements are met (Art. 212 *et seqq.* SCCP); the power to conduct searches of premises (Art. 244 *et seqq.* SCCP), to undertake searches of records and recordings, including all information recorded on paper, audio and video as well as electronic recordings (Art. 246 *et seqq.* SCCP) or to seizure objects or assets (Art. 263 *et seqq.* SCCP); and the power to conduct covert surveillance measures, including the surveillance of post and telecommunication (Art. 269 *et seqq.* SCCP) and surveillance using technical surveillance devices (Art. 280 *et seqq.* SCCP).

Document Gathering:

7.2 Under what circumstances can the government demand that a company under investigation produce documents to the government, and under what circumstances can the government raid a company under investigation and seize documents?

The authorities have a general right to seize objects and assets of the accused or a third party that are of relevance, including documents (Art. 263 SCCP). Those in possession of such documents may be obliged to release them. The accused, any other persons who have the right to remain silent or refuse testimony to the extent the right applies to them, and entities who could by handing over the documents incriminate themselves, may refuse to hand over documents and assets (Art. 264 SCCP). Those who are not exempt may be forced to hand over objects and assets under the threat of a fine (Art. 265 SCCP).

The authorities may raid a company (Art. 244 SCCP) and are authorised to search a company with a written warrant (Art. 241 SCCP). Documents and records that, according to the proprietor, may not be searched and are protected under the right to remain silent or refusal of testimony or other relevant reasons, are to be sealed and cannot be used or inspected by the authorities. Sealing must be requested immediately, or, at the latest, at the end of the raid. The authorities may request for the removal of the seal of the documents within 20 days; if not, the sealed documents will be returned to the owner. The removal of the seal will be decided upon by the court (Art. 248 SCCP).

According to the new Art. 248a para. 3 SCCP, the court shall set the authorised persons a non-extendable time limit of 10 days, not only to present their objections to the unsealing request, but also to substantiate the extent to which the sealing should be maintained. Silence is deemed a withdrawal of the sealing request. Depending on the quantity of documents concerned, this (short) period of 10 days may be challenging for the party concerned and not in the interests of equality of arms (provided that the deadline for the unsealing request is

20 days). Hence, the revised law makes the sealing more difficult for the defence by imposing very short time limits and it remains to be seen whether the goal of the legislator, to have accelerated seals removal, may actually be achieved.

7.3 Are there any protections against production or seizure that the company can assert for any types of documents? For example, does your jurisdiction recognise any privileges protecting documents prepared by in-house attorneys or external counsel, or corporate communications with in-house attorneys or external counsel?

The accused's right to remain silent (Art. 158 SCCP), the catalogue of persons who have a right to remain silent (Art. 168 SCCP) as well as a corporation's right against criminal self-incrimination and (limited) civil incrimination (Art. 265 SCCP) extend to the right to refuse the provision of documents.

The owner or proprietors of the company have a right to comment before the documents and records are searched and indicate which documents are protected (Art. 247 SCCP). This is in particular the case for the following documents and records, which cannot be seized (Art. 264 SCCP): documents and records covered by legal privilege (which includes communications between the company and its external counsel (the Federal Supreme Court confirmed that correspondence and documents with lawyers admitted to practise in jurisdictions outside of the EU, EFTA, and the UK, are not protected by the attorney-client privilege and can be seized)); purely private documents and records that do not contain information for the investigation; documents and records outside of the authorities' legitimation; and, to some extent, documents and records containing business secrets. The contesting of the seizure of such documents follows the above-mentioned procedure for the sealing of evidence; see question 7.2.

7.4 Are there any labour or privacy laws in your jurisdiction (such as the General Data Protection Regulation in the European Union) that may impact the collection, processing, or transfer of employees' personal data, even if located in company files? Does your jurisdiction have blocking statutes or other domestic laws that may impede cross-border disclosure?

The collection, processing, and transfer of employee's personal data is regulated under the Swiss Federal Act on Data Protection (**FADP**) and within the Swiss Code of Obligations (**CO**). The restrictions on data processing and other acts pertaining to employee data is dependent upon the type of data, the purpose for which the data is gathered, as well as the recipient's jurisdiction.

The assertion of foreign jurisdiction within Swiss sovereign territories is penalised under the SCC. To prevent foreign authorities or private individuals who act for the benefit of such authorities from performing on Swiss soil procedural acts without Swiss governmental authorisation, Swiss law provides that whoever, without being authorised, carries out activities on behalf of a foreign state or a foreign party or organisation on Swiss territory, where such activities are the responsibility of a public authority or public official and whoever encourages, or aids or abets such activities shall be liable to imprisonment or to a monetary penalty (Art. 271 SCC). Thus, Art. 271 SCC prevents an "official act" from being performed on behalf of a foreign authority on Swiss soil and can have the effect of blocking the collection of evidence located in Switzerland, if it is intended for the use in foreign proceedings. In addition, espionage, both political (Art. 272 SCC) as well as industrial (Art. 273 SCC), are penalised under the SCC as well. Banking customer secrecy and restrictions are to be found within the Swiss Banking Act (BA).

7.5 Under what circumstances can the government demand that a company employee produce documents to the government, or raid the home or office of an employee and seize documents?

There are no regulations specifically pertaining to company employees. The document procurement and seizure regulations set out above (see question 7.3) are applicable. The role of certain employees within criminal proceeding and their questioning is set out below in questions 7.7 and 7.9.

7.6 Under what circumstances can the government demand that a third person or entity produce documents to the government, or raid the home or office of a third person or entity and seize documents?

See the answers to questions 7.3 and 7.5 above.

Questioning of Individuals:

7.7 Under what circumstances can the government demand that an employee, officer, or director of a company under investigation submit to questioning? In what forum can the questioning take place?

In principle, anyone can be questioned that is considered to have knowledge of facts that may assist in establishing the truth. The rights and obligations of these persons depend on their status. Employees or any other persons suspected to have committed the crime are questioned as accused and they have accompanying rights, in particular the right against self-incrimination and the right to refuse to collaborate in the criminal proceedings. Employees or any other persons who are not accused but who cannot be excluded as having committed or participated in the crime are heard as informants. Informants, in principle, do not have an obligation to testify and may refuse to collaborate in the criminal proceedings (Art. 178 *et seqq.* SCCP). Other employees or any other persons who can make a statement that may assist in the investigation are heard as witnesses. They are bound by the duty to testify truthfully (Art. 162 *et seqq.* SCCP).

There are no specific regulations regarding the forum; the standard procedure is the office of the authorities.

7.8 Under what circumstances can the government demand that a third person submit to questioning? In what forum can the questioning take place?

See above, question 7.7.

7.9 What protections can a person assert upon being questioned by the government? Is there a right to be represented by an attorney during questioning? Is there a right or privilege against self-incrimination that may be asserted? If a right to assert the privilege against self-incrimination exists, can the assertion of the right result in an inference of guilt at trial?

The accused has a right to be informed that an investigation

is being conducted against them, the offences that are under investigation, their right to remain silent, and to legal representation (Art. 158 SCCP). Evidence obtained at an examination hearing conducted without the foregoing caution is inadmissible. The accused may exercise his right to refuse to testify without suffering any disadvantage as a result. In particular, the silence of the accused shall not be considered proof of his guilt.

While witnesses, and in certain cases informants, are required to testify, they may also have the right to refuse testimony, which may be asserted if the specific grounds therefor are given (Art. 168 *et seqq*. SCCP). Any person involved in criminal proceedings has the right to legal representation to safeguard their interests. The defence of the accused is reserved to lawyers licensed to represent parties in court (Art. 127 SCCP).

In criminal proceedings against a corporate undertaking, the undertaking shall be represented by a single person who has unlimited authority to represent the undertaking in private law matters (Art. 112 SCCP). Said person is treated as an informant and retains the right to remain silent (see above). The enterprise itself as an entity possesses the rights granted to an accused natural person. Employees who have been or could be designated as the representative of the company in the criminal proceedings against it, as well as their close employees, are heard as informants with the rights attached to this status (Art. 178 letter g SCCP).

8 Initiation of Prosecutions / Deferred Prosecution / Civil Dispositions

8.1 How are criminal cases initiated?

See question 6.2 above

8.2 What rules or guidelines govern the government's decision to charge an entity or individual with a crime?

See question 7.9 above.

8.3 Can a defendant and the government agree to resolve a criminal investigation through pretrial diversion or an agreement to defer prosecution? If so, please describe any rules or guidelines governing whether pretrial diversion or deferred prosecution agreements are available to dispose of criminal investigations.

Criminal authorities have a duty to investigate and prosecute if they become aware of a crime (Art. 7 SCCP). The *dubio pro reo* principle is not applicable at this stage, but rather it is for the trial judge to decide on the accused's culpability, if the factual situation is not clear.

The authorities may, however, renounce the opening of an investigation and issue a no-proceeding order if the offence's elements are clearly not fulfilled, if there are procedural impediments or if: the level of culpability and consequences of the offence are negligible (Art. 52 SCC); the offender has repaired the loss, damage or injury, or made all reasonable efforts to compensate for the damage caused by him, provided that a limited penalty is suitable, the interest in prosecution of the general public and of the persons harmed are negligible and the offender has admitted the offence (Art. 53 SCC); or the offender is so seriously affected by the immediate consequences of his act that a penalty would be inappropriate (Art. 54 SCC). This allows for a potential resolution of a criminal investigation without it going to trial.

In addition, at any time prior to bringing charges, the accused may request the public prosecutor to conduct accelerated proceedings provided the accused admits the matters essential to the legal appraisal of the case and recognises, if only in principle, the civil claims (Art. 358 *et seqq*. SCCP). Accelerated proceedings are not an option in cases where the public prosecutor requests a custodial sentence of more than five years. If the public prosecutor accepts accelerated proceedings, the prosecutor will prepare an indictment to which the accused has to consent. Subsequently, the court will only conduct a hearing to establish whether the accused admits the matters and whether the conditions of the accelerated proceedings are met. The court does not conduct any investigations (Art. 361 SCCP). It either confirms the indictment or sends it back to the public prosecutor to start an ordinary procedure (Art. 362 SCCP).

Criminal proceedings against a corporation on the basis of Art. 102 SCC are sometimes settled by means of a summary penalty order (Art. 352 *et seqq*. SCCP). Such a summary penalty order is issued by the public prosecutor's office and becomes a judgment in the absence of an appeal. In addition to a fine, not exceeding CHF 5 million, the public prosecutor's office may also order the confiscation of criminally obtained assets in such a summary penalty order, with no upper limit. Informal agreements regarding criminal consequences may occur as part of this process. In the proceedings against a corporation, in addition to the summary penalty order proceedings, accelerated proceedings (see the paragraph above) are also common.

8.4 If deferred prosecution or non-prosecution agreements are available to dispose of criminal investigations in your jurisdiction, must any aspects of these agreements be judicially approved? If so, please describe the factors that courts consider when reviewing deferred prosecution or non-prosecution agreements.

Neither deferred nor non-prosecution agreements currently exist under Swiss law. The OAG has, however, discussed the introduction of a deferred prosecution mechanism in Switzerland. However, this proposal was rejected by the Federal Council and the introduction of such mechanisms is therefore off the table for the time being.

8.5 In addition to, or instead of, any criminal disposition to an investigation, can a defendant be subject to any civil penalties or remedies? If so, please describe the circumstances under which civil penalties or remedies may apply.

Matters regarding economic loss to the state caused by an enterprise are matters of civil law in Switzerland.

Civil claims may be filed by the injured party within criminal proceedings. These will be adjudicated upon, if the offender is convicted or if the offender is acquitted of the criminal charges and the court is in a position to pass judgment on the civil matter (Art. 122 *et seqq*. SCCP).

8.6 Can an individual or corporate commence a private prosecution? If so, can they privately prosecute business crime offences?

Law enforcement is strictly in state hands. Private individuals

may not prosecute business crime offences. However, companies may conduct an internal investigation if they suspect a criminal act within their company. Such internal investigations are not necessarily linked to an official procedure, but may lead to the initiation of such proceedings (e.g. through criminal charges against an employee, self-reporting or filing of a criminal complaint by the company).

9 Burden of Proof

9.1 For each element of the business crimes identified above in section 3, which party has the burden of proof? Which party has the burden of proof with respect to any affirmative defences?

Under Swiss law, any person or enterprise is presumed to be innocent until they have been convicted in a judgment that is final and legally binding. The criminal court is free to assess the evidence in accordance with the views that it forms over the entire proceedings. Where there is insurmountable doubt as to whether the factual requirements of an alleged offence are established, the court shall proceed on the assumption that the circumstances more favourable to the accused occurred (presumption of innocence, Art. 10 SCCP).

During the investigative phase, it is thus for the criminal authorities to investigate *ex officio* all facts respectively constituting elements of the crime at stake. Incriminating and exculpating circumstances must be investigated with the same level care (Art. 6 SCCP).

In the trial phase, the burden of proof lies with the public prosecution office, which has to prove the relevant facts beyond reasonable doubt. Once this degree of certainty is met, the accused person, in order to avoid conviction, must submit counterevidence casting doubt on the public prosecution office's case. The accused person thus has the right to make motions during the investigation but also at court level to have further evidence taken (Arts 318, 331(2) and 345 SCCP).

9.2 What is the standard of proof that the party with the burden must satisfy?

See question 9.1 above.

9.3 In a criminal trial, who is the arbiter of fact? Who determines whether the party has satisfied its burden of proof? If a jury or group of juries determine the outcome, must they do so unanimously?

In Switzerland, the courts are the arbiters of fact. In particular, they decide if the facts alleged by the prosecution have been proven beyond reasonable doubt.

Depending on the offence, the court will be composed of a single judge or a panel of judges (Art. 19 SCCP).

The entry into force of the SCCP in January 2011 ended the possibility for Swiss cantons to have trials held by jury.

10 Conspiracy / Aiding and Abetting

10.1 Can a person who conspires with or assists another to commit a business crime be liable? If so, what is the nature of the liability and what are the elements of the offence?

Any person who commits a crime in collaboration with other offenders is criminally liable as the offender, provided the criminal act was committed based on a joint plan and jointly executed.

Furthermore, a person may be charged as the instigator of a crime if he wilfully incites another person to commit an offence. The punishment applying to the perpetrator is applicable also to the instigator. The same applies to the attempt to incite (Art. 24 SCC).

Finally, aiding and abetting is also punishable under Swiss law. Any person who wilfully assists another to commit a felony or a misdemeanour is liable to a reduced penalty (Complicity, Art. 25 SCC). The act of aiding or abetting requires that the perpetrator intentionally and causally advances the main offence. Both physical as well as psychological assistance may be qualified as aiding and abetting.

Aiding and abetting a contravention, i.e. acts punishable by a mere fine (Art. 103 SCC), is only punishable where expressly mentioned in the law (Art. 105(2) SCC). For example, in administrative criminal law, aiding and abetting a contravention is always punishable (Art. 5 ACLA).

Finally, it should be noted that certain forms of assisting a perpetrator are punishable as separate crimes. For example, assisting a perpetrator to avoid the confiscation of criminal proceeds may be punishable as money laundering (Art. 305*bis* SCC). Furthermore, participating in or supporting a criminal or terrorist organisation is punishable in itself (Art. 260*ter* SCC).

11 Common Defences

11.1 Is it a defence to a criminal charge that the defendant did not have the requisite intent to commit the crime? If so, who has the burden of proof with respect to intent?

A perpetrator must act with intent, unless the law expressly states that the offence may be committed through negligence, which, as a rule and with the exception of administrative criminal law, is not the case with business crimes. A person acts with intention if he wilfully carries out the act in the knowledge of what he is doing and in accordance with his will. A person acts wilfully as soon as he regards the realisation of the act as being possible and accepts this (*dolus eventualis*, Art. 12(2) SCC).

Where the objective elements of the offence are proven, a perpetrator will often deny that he subjectively acted with intent. The prosecuting authorities bear the burden of proof regarding all elements of the crime, including subjective elements such as the intent to commit the crime. The state of mind of the perpetrator is more difficult to prove than objective facts. However, where no other evidence is available, the courts frequently infer from the objective circumstances that the perpetrator must have acted with intent.

As for corporate criminal liability, the existence of an effective compliance programme may be an efficient defence. It will prove a certain degree of organisation within the company's structure and may thus support the company's assertion that it did take all the reasonable organisational measures required to prevent such an offence; in other words, that one of the constituent elements of Art. 102 SCC – the lack of an adequate organisation – is lacking.

11.2 Is it a defence to a criminal charge that the defendant was ignorant of the law, i.e., that he did not know that his conduct was unlawful? If so, what are the elements of this defence, and who has the burden of proof with respect to the defendant's knowledge of the law?

Art. 21 SCC provides that a person who is not and cannot be aware that, by carrying out an act he is acting unlawfully, does not commit an offence. If the error was avoidable, the courts will reduce the sentence (error of law).

While this defence exists, it is rarely successful as the courts set a very high standard of what should be known. As a general rule, not knowing the law is not a defence. Also, there is no error of law if the perpetrator had a vague feeling that the intended act might be contrary to what is right.

11.3 Is it a defence to a criminal charge that the defendant was ignorant of the facts, i.e., that he did not know that he had engaged in conduct that was unlawful? If so, what are the elements of this defence, and who has the burden of proof with respect to the defendant's knowledge of the facts?

According to Art. 13 SCC, if the perpetrator acts under an erroneous belief as to the factual circumstances, the court shall judge the act according to the circumstances as the perpetrator believed them to be (error of facts).

If the error had been avoidable under the exercise of due care, the perpetrator is liable for negligently committing the act, provided the negligent commission of the act is punishable. The standard rules regarding the burden of proof apply.

12 Voluntary Disclosure Obligations

12.1 If a person or entity becomes aware that a crime has been committed, must the person or entity report the crime to the government? Can the person or entity be liable for failing to report the crime to the government? Can the person or entity receive leniency or "credit" for voluntary disclosure?

As a general rule, a person or entity is not obliged to report crimes in Switzerland. Only the criminal authorities, or other authorities pursuant to specific legal provisions, have an obligation to report crimes they have become aware of (Art. 302 SCCP). In these cases, the wilful failure to report may in itself constitute a crime (Art. 305 SCC).

In the realm of business crimes, duties to report are often contained in specific acts, such as, in particular, the AMLA, which stipulates reporting duties for financial intermediaries in case of suspected money laundering (Art. 9 AMLA). Failure to report is a criminal offence in itself and fined with CHF 500,000 in case of intent and, respectively, CHF 150,000 in case of negligence (Art. 37 AMLA). More importantly, failure to report may also be qualified as money laundering by omission (see above question 3.1, money laundering and wire fraud).

Leniency will be discussed below.

13 Cooperation Provisions / Leniency

13.1 If a person or entity voluntarily discloses criminal conduct to the government or cooperates in a government criminal investigation of the person or entity, can the person or entity request leniency or "credit" from the government? If so, what rules or guidelines govern the government's ability to offer leniency or "credit" in exchange for voluntary disclosures or cooperation?

A confession may lead to a reduced penalty if the perpetrator proves genuine remorse, compensates for the financial damage caused and thereby facilitates the criminal prosecution (Art. 48 lit. d SCC).

Furthermore, a perpetrator can apply for accelerated proceedings if he is prepared to admit the relevant facts (see below question 14.1). In this case, it is not relevant whether the admission is made at a relatively late stage of the proceedings and without remorse only under the pressure of the criminal proceeding. Typically, the penalty negotiated and imposed in accelerated proceedings will be of a lesser severity.

In case of criminal organisations, the court has the discretion to mitigate the penalty imposed if the perpetrator makes an effort to foil the criminal activities of the organisation by cooperating with the criminal authorities (Art. 260*ter*(4) SCC).

Furthermore, Swiss antitrust law and Swiss tax law contain detailed provisions regulating to what extent voluntary cooperation or voluntary disclosure mitigates or even excludes punishment.

Apart from this, Swiss law does not contain specific provisions to reward voluntary reports of irregularities or cooperation by natural persons or corporations. However, in practice self-reporting or cooperation during proceedings is generally taken into account by the criminal authorities when determining a sentence. Since voluntary cooperation usually leads to a facilitation of prosecution, the procedural costs imposed on the perpetrator may be lower.

13.2 Describe the extent of cooperation, including the steps that an entity would take, that is generally required of entities seeking leniency in your jurisdiction, and describe the favourable treatment generally received.

Except for Swiss antitrust law and Swiss tax law, there are no strict guidelines regarding the extent of the cooperation required. In practice, it can generally be said that full cooperation in all aspects during the entire investigation process and the voluntary disclosure or confession of any relevant offences, including disclosure of documents, will contribute towards leniency.

The courts may, however, only exercise discretion in determining the extent of the sanction and may not waive the sanction in its entirety. Exceptions and deviating circumstances can be seen above.

See question 13.1.

14 Plea Bargaining

14.1 Can a defendant voluntarily decline to contest criminal charges in exchange for a conviction on reduced charges, or in exchange for an agreed-upon sentence?

While the concept of plea bargaining as known in other

jurisdictions does not *de facto* exist, Swiss law provides for three procedures that allow a certain level of negotiations between the prosecution authorities, the civil claimant and the accused:

First, according to Art. 53 SCC, if the offender has made reparation for the loss, damage or injury or made every reasonable effort to right the wrong that he has caused, the competent authority shall refrain from prosecuting him, bringing him to court or punishing him if:

- a suspended custodial sentence not exceeding one year, a suspended monetary penalty or a fine are suitable as a penalty;
- the interest in prosecution of the general public and of the persons harmed are negligible; and
- the offender has admitted the facts essential to the legal appraisal of the relevant offence.

Typically, the exemption from punishment based on Art. 53 SCC is preceded by settlement discussions for which the accused can apply (Art. 316(2) SCCP). Such discussion will in particular relate to the facts to be admitted by the accused and the form and amount of reparation required.

Second, the public prosecutor might issue a summary penalty order, provided:

- the accused admitted the facts in the preliminary proceedings or if his responsibility has otherwise been satisfactorily established; and
- the sanction decided on by the public prosecutor is limited to a fine, a monetary penalty of no more than 180 daily penalty units or a custodial sentence of no more than six months (Art. 352 SCC).

Unless it is challenged by a party within 10 days, the summary penalty order becomes a final judgment and the case does not reach the trial phase before a court. Although not specifically mentioned in the law, the issuance of a summary penalty order is sometimes preceded by discussions between the public prosecutor and the accused. And even where this is not the case, the accused person is free to challenge or accept the summary penalty, which thus becomes, so to speak, a plea agreement offer by the prosecution authorities.

Third, the accused may request the public prosecutor to conduct accelerated proceedings (Art. 358 *et seqq*. SCCP) if the following conditions are met:

- the accused admits the facts essential to the legal appraisal of the relevant offence;
- the accused recognises, if only in principle, the civil claims (if any); and
- the prosecutor requests a custodial sentence below five years.

If the request is accepted by the prosecutor, he will discuss with the parties the charges, the sentence and the civil compensation. If an agreement is reached, the prosecutor will submit an indictment containing the offences, the requested punishment or measures and the recognition of the civil claims (if any), amongst other elements. All involved parties are given 10 days to oppose the indictment. If any party opposes the accelerated proceedings, ordinary proceedings must be conducted. Otherwise, a short court hearing will take place in which the court freely decides whether (i) the conduct of accelerated proceedings is lawful and reasonable, (ii) the charge corresponds to the result of the main hearing and the files, and (iii) the requested sanctions are equitable. The court does not conduct any investigations (Art. 361 SCCP). It either confirms the indictment or sends it back to the public prosecutor to start an ordinary procedure (Art. 362 SCCP). The sole grounds for appeal against a judgment in accelerated proceeding are that a party did not agree to indictment or that the judgment passed does not correspond to the indictment submitted.

All three options discussed above are available not only in criminal proceedings against natural persons but also in proceedings against corporate entities.

14.2 Please describe any rules or guidelines governing the government's ability to plea bargain with a defendant. Must any aspects of the plea bargain be approved by the court?

See question 14.1 above.

15 Sealing

15.1 Are there instances where the court proceedings or investigation files are protected as confidential or sealed?

Criminal proceedings before the court of first instance and the court of appeal, together with the oral passing of judgments and decrees of these courts, are principally to be conducted in public (Art. 69(1) SCCP). However, there are a few exceptions: preliminary proceedings; proceedings before the compulsory measures court; proceedings before the objection's authority; and, in cases where they are conducted in writing, proceedings before the court of appeal as well as summary penalty order proceedings (Art. 69(2) SCCP).

If the proceedings are to be conducted in public, the court may exclude the public if public safety or interests of a person involved (in particular, the victim) requires it or if too many members of the public wish to access the court (Art. 70 (1) SCCP). In such cases, the court may still grant admissions to court reporters and persons with a legitimate interest, if necessary, under restrictions (Art. 70(3) SCCP). In practice, however, the hurdles for excluding the public are set quite high.

During criminal proceedings, all parties have a right to access the investigation files, at the earliest after the first hearing by the prosecutor (Art. 101(1) SCCP). According to Art. 108 SCCP, the criminal justice authorities may restrict access to the files for a limited time or to specific documents in the investigation files if:

- there is a specific suspicion that a party is abusing his rights; or
- it is required for the safety of persons or to safeguard public or private interests in preserving confidentiality.

Private secrecy interests include, in particular, banking, manufacturing, business and patent secrets, while public secrecy interests focus on military and national security secrets.

Uninvolved third parties may have access to investigation files if they claim to have an academic or other legitimate interest and if the access is not contrary to any overriding public or private interests (Art. 101(3) SCCP).

Parties or uninvolved third parties, whether individuals or companies, if obligated by criminal investigation authorities to submit documents, may claim their confidentiality interests through the right to seal (Art. 248 SCCP; see question 7.2 above). Sealing can prevent documents that are subject to secrecy interests from being included in the investigation files.

16 Elements of a Corporate Sentence

16.1 After the court determines that a defendant is guilty of a crime, are there any rules or guidelines governing the court's imposition of a sentence on the defendant? Please describe the sentencing process.

The sentence is to be determined within the usually wide range determined by statutory law for the offence. The court determines the sentence based on the offender's degree of guilt. It takes account of the previous conduct and the personal circumstances of the offender as well as the effect that the sentence will have on his life (Art. 47(1f) SCC). The degree of guilt is to be assessed upon the seriousness or danger to the legal interest concerned, the reprehensibility of the offender's conduct, their motives and aims in committing the crime, and the extent to which, given their personal and external circumstances, the offender could have avoided the unlawful behaviour (Art. 47(2) SCC).

These principles apply *mutatis mutandis* in case of corporate criminal liability where the maximum penalty is a fine not exceeding CHF 5 million (Art. 102(1) SCC). When assessing the amount of the fine, the judge will additionally and in particular consider the damage caused, the graveness of the organisational deficit and the economic strength of the company.

In addition to the penalty, the court will order the forfeiture of assets acquired by the perpetrator or a third party through the commission of the offence. A third party, whether a natural person or company, and even if not criminally liable, will be protected only if it acquired the assets in good faith and provided adequate compensation. Where the original assets are no longer available, the court will issue an equivalent compensatory claim (Art. 70 *et seqq.* SCC).

16.2 Before imposing a sentence on a corporation, must the court determine whether the sentence satisfies any elements? If so, please describe those elements.

Enterprises are fined based upon the gravity of the offence, the gravity of the organisational deficit that enabled it, the extent of damages caused, and the economic strength of the enterprise. The courts have ample discretion in determining the sanction imposed as there are no binding sentencing rules.

The maximum fine for corporate liability is CHF 5 million (Art. 102(1) SCC). In addition to the fine, the corporate entity faces the confiscation of the proceeds acquired through the commission of the offence (Art. 70 *et seqq.* SCC). In case of corporate liability, the forfeiture of assets is often the larger financial risk as compared to the maximum fine of CHF 5 million.

16.3 Do victims have an opportunity to be heard before or during sentencing? Are victims ever required to be heard? Can victims obtain financial restitution or damages from the convicted party?

Swiss law distinguishes between victims and persons suffering harm. A person suffering harm is a person whose rights have been directly violated by the offence (Art. 115 (1) SCCP). A victim is a person suffering harm whose physical, sexual or mental integrity has been directly and adversely affected by the offence (Art. 116 (1) SCCP). Both can expressly declare the wish to participate as a party in the criminal proceedings as a criminal and/or civil claimant. This, however, is voluntary; the person harmed is not obliged to participate in the proceedings as a party.

As a party of the criminal proceedings, the criminal and/or civil claimant has a right to be heard. This includes the right to inspect the files, to participate in procedural acts, to comment on the case and the proceedings and to request that further evidence be taken (Art. 107 (1) SCCP). In practice, criminal and/or civil claimants usually take part in the questioning of the accused person and, in the main hearing, have access to the investigation files and file motions to the court regarding the sentencing and compensation for damages.

The person suffering harm can bring civil claims based on the offence in the criminal proceedings (Art. 122 SCCP). The civil claims must be quantified and provided with a brief statement on the grounds and the relevant evidence (Art. 123 SCCP). The court decides on a pending civil claim when it convicts the accused or if it acquits the accused but is in a position to decide on the civil claim. Otherwise, the civil claim may be referred for civil proceedings (Art. 126 SCCP). Since 1 January 2024, prosecutors can also decide on the civil claim in a summary penalty order, provided the defendant has acknowledged the civil claim or the assessment is possible without taking further evidence and the amount does not exceed CHF 30,000 (Art. 353(2) SCCP).

During criminal proceedings, assets belonging to the accused or to a third party can be seized, amongst other things, if it is expected that the assets will be used as security for procedural costs, penalties, fines or damages or will have to be returned to the persons suffering harm (Art. 263(1) SCCP). The court can order the forfeiture of seized assets that have been acquired through the commission of an offence or that are intended to be used in the commission of an offence or as payment therefor, unless the assets are to be passed on to the person harmed for the purpose of restoring the lawful position (Art. 70(1) SCC). If these assets are no longer available, the court may uphold a claim for compensation by the state in equivalent value and use it for the benefit of the person harmed, if it is anticipated that the perpetrator will not pay damages or satisfaction (Arts 71 and 73 SCC).

The criminal and/or civil claimant is furthermore entitled to appropriate damages from the accused for costs incurred in the proceedings provided that the claim is successful, or the accused is liable to pay the procedural costs (Art. 433(1) SCCP). The latter is typically the case when the accused is convicted (Art. 426(1) SCCP).

17 Appeals

17.1 Is a guilty or a non-guilty verdict appealable by either the defendant or the government?

Swiss criminal procedural law does not distinguish between a trial and sentencing phase. A bifurcation may exceptionally be granted upon request. However, an appeal is only possible against the final verdict deciding on guilt and sanctions (Art. 342 SCCP).

Any partial or final judgment of a cantonal court of first instance may be appealed to the corresponding cantonal court of appeal (Art. 398 *et seqq.* SCCP). At the federal level, since 1 January 2019, judgments of Federal Criminal Tribunal may be appealed to the Higher Appeals Chamber of the Federal Criminal Tribunal. In either case, the appellate courts can fully review the appealed judgment, including errors of law, incorrect or inappropriate determination of facts, and inappropriate exercise of discretion (Arts 393 and 398 SCCP).

Furthermore, any participant of the appeal proceedings mentioned before may lodge a further appeal to the Federal Supreme Court, provided he can show a legally relevant

interest for the submission of an appeal, such interest being assumed in the case of the accused, prosecution and under certain circumstance, the injured party (Art. 78 *et seqq*. FSCA). The Federal Supreme Court's review is limited to legal errors and manifestly incorrect findings of fact (Art. 95 *et seqq*. FSCA).

17.2 Is a criminal sentence following a guilty verdict appealable? If so, which party may appeal?

See question 17.1 above.

17.3 What is the appellate court's standard of review?

See question 17.1 above.

17.4 If the appellate court upholds the appeal, what powers does it have to remedy any injustice by the trial court?

Appellate courts have the power to either remedy the ruling by deciding on the merits *in lieu* of the lower court or they may remit the case back with instructions to the lower court for a new ruling (Arts 397, 408 and 409 SCCP; 107 FSCA).

In practice, the Federal Supreme Court regularly remits the case back to the lower court for a new decision on the merits, in particular where additional facts need to be established. The lower appellate courts very often decide themselves on the merits.

Dr. Florian Baumann, head of the Kellerhals Carrard White-Collar Crime practice group, graduated from the University of Zurich (*Juris Doctor* and Master of Laws) and is admitted to all Swiss courts. He wrote his doctoral thesis on the confiscation of illicit proceeds and completed postgraduate studies at the Collège d'Europe in Bruges with the H.E.E. His practice focuses on cases involving both criminal and civil law. He represents clients in multinational asset recovery cases, criminal and administrative legal assistance proceedings and internal investigations. He advises banks and other financial intermediaries on compliance issues, including representation in administrative investigations or compliance-related litigation. He lectures on forfeiture and money laundering at the MAS Economic Crime Investigation at the University of Luzern and has published in both the Basel Commentary on the Swiss Criminal Code and the Basel Commentary on the Swiss Criminal Procedure Code. He also contributed to the new Basel Commentary on International Criminal Law, which was published in 2015.

Kellerhals Carrard Zürich KlG
Rämistrasse 5
P.O. Box, 8024 Zurich
Switzerland

Tel: +41 58 200 39 00
Email: florian.baumann@kellerhals-carrard.ch
URL: www.kellerhals-carrard.ch/en/team/florian-baumann

Dr. Roman Huber is counsel at Kellerhals Carrard Zürich. He is an experienced disputes and regulatory investigations lawyer who has over 15 years' experience in dispute resolution issues and advises and represents private and corporate clients at all stages of the dispute resolution process in civil and criminal law matters. Roman is further experienced in conducting large-scale internal investigations relating to white-collar crime and regulatory issues. Before joining Kellerhals Carrard, Roman was Head of Compliance Investigations Switzerland at a major Swiss bank in Zurich (2021–2022) and worked for the Swiss Financial Market Supervisory Authority (FINMA) at the Enforcement Division as the Deputy Head of International Cooperation (2019–2021). Prior to joining FINMA, Roman was a core member of the Litigation & Arbitration and Internal Investigation & White-Collar Crime department for many years at two major Swiss law firms. From September 2015 until February 2016, he was seconded to Novartis International AG, Group Legal, Basel. Roman holds a Ph.D. in Law from the University of Zurich (2013) and received a LL.M. from the University of New South Wales, Sydney (2012) and a Master of Laws degree from the University of Lucerne (2006). Roman is a lecturer at the University of St. Gallen.

Kellerhals Carrard Zürich KlG
Rämistrasse 5
P.O. Box, 8024 Zurich
Switzerland

Tel: +41 58 200 39 00
Email: roman.huber@kellerhals-carrard.ch
LinkedIn: www.linkedin.com/in/romanhuber2022

Cristina Ess is a member of the Kellerhals Carrard White-Collar Crime practice group. After graduating from the University of Zurich, she gained experience in a law firm in Zurich specialised in criminal defence, in particular in white-collar crime. After passing the Bar exam, Cristina joined Kellerhals Carrard Zürich's White-Collar Crime team and now primarily represents and advises clients in all areas of white-collar crime, particularly in relation to fraud, misappropriation and money laundering, as well as in international legal assistance and administrative assistance proceedings. In addition, she co-leads Kellerhals Carrard Zürich's team combating fraud and forgery related to Swiss federal COVID-19 loans and conducts numerous criminal proceedings throughout the eastern part of Switzerland.

Kellerhals Carrard Zürich KlG
Rämistrasse 5
P.O. Box, 8024 Zurich
Switzerland

Tel: +41 58 200 39 00
Email: cristina.ess@kellerhals-carrard.ch
LinkedIn: www.linkedin.com/in/cristina-ess-4988a5256

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