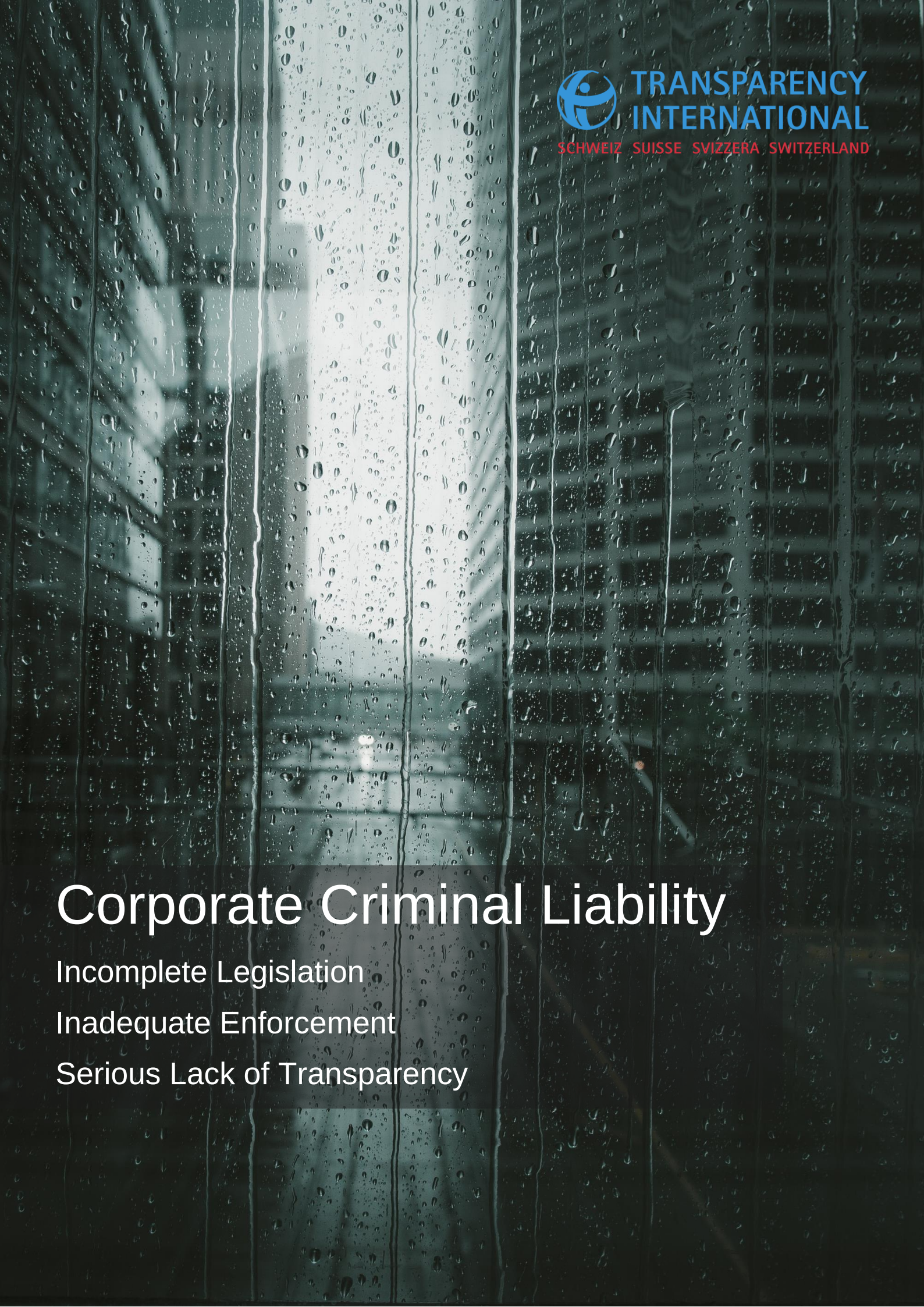

TRANSPARENCY INTERNATIONAL
SCHWEIZ SUISSE SVIZZERA SWITZERLAND

Corporate Criminal Liability

Incomplete Legislation

Inadequate Enforcement

Serious Lack of Transparency

Transparency International Switzerland (Transparency Switzerland) is the Swiss chapter of Transparency International, the world's leading nongovernmental organization dedicated to fighting corruption. Transparency Switzerland is committed to preventing and combating corruption and money laundering in Switzerland and in the business relations of Swiss actors with other countries. Transparency Switzerland is engaged in awareness-raising and advocacy work, prepares reports and develops working tools, promotes exchange among specific interest groups, collaborates with other institutions and comments on current events.

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Summary of the contents

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1. Summary

Companies are liable to criminal prosecution under Art. 102 para. 2 of the Swiss Criminal Code (*Strafgesetzbuch* [StGB]) if they are found to have failed to take all necessary and reasonable measures to prevent serious offenses that have been committed in the course of their business activities, such as corruption and money laundering. They are also liable to prosecution if a criminal offense committed within the scope of the company's purpose cannot be attributed to any particular natural person owing to inadequate organizational arrangements within the company (Art. 102 para. 1 StGB).

Although the penal provision of Art. 102 StGB has been in force since 2003, only a few companies have actually been convicted to date. This is unsatisfactory, not only with respect to the efforts Swiss companies worldwide and in Switzerland ought to make to prevent and combat corruption, but also from a societal and rule-of-law perspective in general, particularly because Swiss companies are often involved in major international corruption and money laundering cases and the true extent of delinquency is likely to be significantly greater.

This report provides a detailed analysis of the current legislation and practice in the field of corporate criminal law, including the applicable criminal proceedings. In addition, it examines the respective corporate criminal law of the neighboring countries, the United Kingdom and the OECD, as well as experiences from antitrust law, which provides mechanisms that are also relevant in the field of corporate criminal law. The results of this report show the following:

- There are gaps in corporate criminal law; in particular, corporate criminal liability (Art. 102 para. 2 StGB) is limited to an unduly narrow range of offenses. Substantial gaps also exist in criminal procedure law. It does not contain sufficient incentives to encourage companies to self-report and cooperate. In addition, the simplified proceedings commonly used in cases involving companies (summary penalty order proceedings and accelerated proceedings) suffer from constitutional flaws.

- Enforcement of corporate criminal law is inadequate. Difficulties in providing evidence often result in the public prosecutor's offices being virtually dependent on the support of the offending companies if these companies are to be held criminally accountable. However, in the past the public prosecutor's offices have made too little use of their options to motivate companies to self-report and fully cooperate. In addition, the public prosecutor's offices themselves have various shortcomings that have prevented them from prosecuting violations of Art. 102 StGB with the necessary rigor and determination.

- The application of corporate criminal law is afflicted with a serious lack of transparency. All convictions of companies under Art. 102 StGB to date have been made by way of summary penalty order proceedings, which are not open to the public while they are still in progress. Publicly accessing the judgments issued is difficult, if not impossible; the hurdles to be surmounted in accessing records on discontinuation and dismissal orders are even higher. In addition, the available statistical data are incomplete.

This report shows that there is a need for improvement in all areas. Transparency Switzerland presents ten demands, along with specific suggestions. Essentially, both in the areas of legislation and enforcement,

- The transparency of the criminal justice system should be improved significantly;

- Measures should be taken to encourage companies to self-report and fully cooperate with prosecuting authorities;

- Efforts should be made to ensure that agreements between the public prosecutor's offices and the offending companies as well as serious corporate criminal offenses are invariably judged by the courts (rather than just by the public prosecutor's offices);

- The existing gaps in the corporate criminal liability law should be closed.

2. Background, Scope and Methodology

Corporate criminal liability was introduced in Switzerland on October 1, 2003. Under this principle, a company is (subsidiarily) liable to criminal prosecution if a felony or misdemeanor is committed in the context of its business activities that cannot be attributed to any particular natural person owing to the company's inadequate organizational arrangements. In the case of certain offenses, such as corruption and money laundering, the company can be (directly) penalized if it has failed to take all necessary and reasonable organizational measures to prevent such offenses.

So far, however, only a few companies have been convicted, despite the fact that Swiss companies are often involved in major corruption and money laundering scandals and the extent of actual delinquency is likely to be significantly greater. This is unsatisfactory, not only with respect to the efforts companies should make to combat and prevent corruption, but also from a societal and rule-of-law perspective in general, simply because this state of affairs severely undermines the behavior-directing function of the principle of corporate criminal liability. In addition, in all these cases the Office of the Attorney General or the cantonal prosecutor's offices issued summary penalty orders, and in some cases accelerated proceedings were conducted. The purpose of summary penalty orders and accelerated proceedings is to simplify proceedings, and they provide ample scope for agreements between the public prosecutor's office and the defendant company. They are less transparent than the regular proceedings, and in the case of summary penalty orders, a conviction is made by the public prosecutor's office itself rather than by a court. In addition to the few convictions on record so far, a small number of proceedings were discontinued under Art. 53 StGB (Reparation) after the offending companies had made reparation payments and thus avoided being convicted. Art. 53 StGB also provides for a special procedure for the settlement of proceedings.

What are the reasons so few cases have been adjudicated in the past? What role do the special procedures for settlement play in this context, that is, the summary penalty order proceedings, the accelerated proceedings and reparation? It is undisputed that holding a company criminally accountable is quite demanding. Offenses such as corruption are difficult to detect and prove, as are inadequate organizational arrangements. Moreover, corruption and money laundering are often complex, cross-border offenses, and prosecuting them requires proceedings in an international context. Finally, the public prosecutor's offices have limited resources, whereas some companies can draw on dozens of lawyers and other experts. For this reason, Swiss antitrust law and the legal systems of other countries, such as France and the United Kingdom, provide mechanisms to encourage offending companies to self-report and cooperate with the investigating authorities. Are the relevant incentives in Swiss criminal law and criminal procedure law sufficient? The Office of the Attorney General of Switzerland believes not, which is why it has proposed a new mechanism in the context of the current revision of the Swiss Criminal Procedure Code, namely the deferment of the bringing charges in criminal proceedings against companies.[1] Similar reform efforts are also underway at the international level. In the context of the current revision of the recommendations of the OECD Working Group on Bribery in International Business Transactions, there are discussions on the inclusion of mechanisms for what are known as "non-trial resolutions."[2]

In this report, Transparency Switzerland addresses these issues and other crucial questions relating to corporate criminal liability. In so doing, Transparency Switzerland aims to provide some constructive input for the current political debates on modernizing corporate criminal liability.

The first part of this report (Section 3) will begin with a review of the current legislation and practices regarding corporate criminal liability and the available special procedures for settlement. Civil law is-

[1] For more details, see Section 3.4.2.
[2] For more details, see Section 4.7.

sues have been excluded from this review so as not to exceed the scope of the study. However, Section 3 will also include a discussion of antitrust law, given that, as already mentioned, practice in this area has been very limited. Illegal agreements between competitors bear a resemblance to corrupt practices and are sometimes even directly linked to corruption. Moreover, they are as difficult to detect as corruption is. Nevertheless, there is extensive case law on agreements, and it seems that the competition authority has been much more successful in detecting and preventing cartels than prosecuting authorities have been in detecting and proving that companies lack the organizational arrangements necessary to prevent illegal activities.

The second part (Section 4) will focus on the applicable legislation in other countries, some of which, as already indicated, have more effective special procedures for settlement than Switzerland does. Based on this overview, the current problems can then be analyzed and conclusions drawn. The report will conclude by identifying the need for action in this area and by presenting specific demands with regard to the measures needed for improvement.

The research methods used for this study included an analysis of the legal texts, their origins and the relevant legislation in selected other countries; a comprehensive analysis of literature and documents related to the issues at hand (technical literature, studies and reports, political initiatives, media reports); and a review of international best-practice standards. These analyses were supplemented by a number of expert interviews. In addition, an analysis was carried out of previous cases in which corporate criminal liability was applied, the practice regarding special procedures for settlement and the practice of the competition authority.

3. Current Legislation and Practice

3.1 Corporate Criminal Liability

3.1.1 Corporate Criminal Accountability

3.1.1.1 Legislation

Toward the end of the last century, various incidents showed that in complex and intricately structured companies, it can be difficult, if not impossible, to identify a particular natural person as the perpetrator of an offense, or that penalizing one particular natural person alone may be unfair and insufficient, since only part of the culpable activity would be penalized.[3] This situation led to reform efforts aimed at introducing corporate criminal liability. At the same time, various international conventions were drawn up, including anti-corruption conventions such as the OECD Anti-Bribery Convention, the Criminal Law Convention on Corruption of the Council of Europe and the United Nations Convention against Corruption, which provide for a tangible corporate criminal liability in the areas of regulation they address. The penal provision that entered into force on October 1, 2003 (initially as Art. 100^{quater}, and since January 1, 2007, as Art. 102 StGB), is a compromise between international pressure for harmonization and skeptical currents in Switzerland.[4]

Art. 102 StGB provides for corporate criminal liability in cases in which a criminal offense is committed in the exercise of commercial activities in accordance with the objects of the company and the offense cannot be attributed to any particular natural person because of that company's inadequate organizational arrangements. Hence, this subsidiary corporate criminal liability can be considered only if no natural person can be held accountable. In such a case, the company is not accused of having committed the offense in question, but of having made certain inadequate organizational arrangements that eventually gave rise to the offense (para. 1).

In addition, a company is directly liable to criminal prosecution regardless of the criminal liability of any particular natural person involved if certain offenses are committed at that company within the scope of its business object and the company has not made all necessary and reasonable organizational arrangements to prevent them (direct corporate criminal liability). This applies to only a small range of offenses limited to the areas of regulation of the international conventions ratified by Switzerland, namely bribery of Swiss or foreign public officials, influence peddling, active privatesector bribery, money laundering, organized crime and terrorism financing (para. 2). This corporate criminal liability is independent of the criminal liability of any particular natural person. It is thus cumulative with that of natural persons.[5]

In both cases (paras. 1 and 2) the penalty is a fine of up to CHF 5 million. Any assets that were unlawfully acquired through the commission of the offense are forfeited (Art. 70 StGB). If these assets are no longer available, compensation in the same amount must be made (Art. 71 StGB).

[3] *Botschaft zur Änderung des Schweizerischen Strafgesetzbuches und des Militärstrafgesetzes sowie zu einem Bundesgesetz über das Jugendstrafrecht vom 21. September 1998,* BBl 1999 2137.
[4] For a detailed account of its origins, see, instead of many, Mark Pieth, *"Anwendungsprobleme des Verbandsstrafrechts in Theorie und Praxis," Kölner Schrift zum Wirtschaftsrecht 2015,* pp. 223 ff.
[5] Marcel Niggli/Diego R. Gfeller, *Basler Kommentar Strafrecht, Art. 102,* Basel 2018, Rz 230, 242.

3.1.1.2 Practice

Although Art. 102 StGB has been in force since 2003, there have—as far as can be ascertained—been only four convictions of companies for offenses covered by para. 1:[6]

- ***Company A. SA* (company not known to the public):** The Freiburg investigating authorities ordered A. SA to pay a fine of CHF 3,000 because it was impossible to identify the employee who had committed a speeding violation with one of its company cars.[7]

- ***Bank D* (company not known to the public):** On July 15, 2011, the Office of the Attorney General ordered a Geneva bank to pay a fine of CHF 300,000 in accordance with Art. 102 para. 1 StGB, because it was impossible to determine which of the bank's employees had failed to exercise due diligence with regard to financial transactions and reporting suspicious activities (Art. 305ter StGB).[8]

- ***Telecommunications Company B* (company not known to the public):** On July 28, 2014, the public prosecutor's office of the Canton of Zug ordered a telecommunications company to pay a penalty for unfair competition (Art. 23 para. 1 in conjunction with Art. 3 lit. u UWG [Federal Act Against Unfair Competition]). The incriminated acts of unfair competition included numerous calls to telephone numbers marked in the directory with an asterisk, along with the note "Does not wish to receive advertising." The calls were made by a foreign company; its client was the Swiss-based Company B. The operational organizational arrangements within the accused company did not allow the calls to be attributed to any particular natural person.[9]

- ***Software Company C* (company not known to the public):** On October 24, 2019, the public prosecutor's office of the Canton of Zug ordered a software company to pay a fine for unfair competition (Art. 23 para. 1 in conjunction with Art. 3 lit. a UWG). As in the case above, illegal telephone calls had been made that could not be attributed to any particular natural person.[10]

The principle of corporate criminal liability is also rarely applied to its main manifestation, namely offenses covered by Art. 102 para. 2 StGB. As far as can be ascertained, only eight companies have been convicted in application of this provision, in each case by the Office of the Attorney General, by way of summary penalty order proceedings:[11]

- ***Alstom Network Schweiz AG:*** On November 22, 2011, the Office of the Attorney General ordered Alstom Network Schweiz AG to pay a fine of almost CHF 2.5 million, along with compensation of over CHF 36 million, for failing to make all necessary and reasonable organizational arrangements to prevent bribery of foreign public officials in Latvia, Tunisia and Malaysia.[12]

- ***Stanford Group (Suisse):*** In February 2014, the Office of the Attorney General ordered Stanford Group (Suisse) AG to pay a fine of CHF 1 million for qualified money laundering and to make an additional payment in the upper single-digit million range as compensation for the assets it had acquired through the offense.[13]

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[6] The author of this study examined the judicial practice at the federal level and in the cantons of Zurich, Zug, Bern, Geneva and Ticino. In addition, the Office of the Attorney General and the public prosecutor's offices of the cantons of Zurich, Zug, Bern, Geneva and Ticino were asked to provide information on their legal decisions.
[7] Journal des Tribunaux (JdT) 2005 I 558.
[8] OECD, Implementing the OECD Anti-Bribery Convention, Phase 3 Report: Switzerland, 2011, annex 4, Rz. 2.
[9] According to written information from the public prosecutor's office in Zug on September 14, 2020.
[10] According to written information from the public prosecutor's office in Zug on September 14, 2020.
[11] The author of this study examined the judicial practice at the federal level and in the cantons of Zurich, Zug, Bern, Geneva and Ticino. In addition, the Office of the Attorney General and the public prosecutor's offices of the cantons of Zurich, Zug, Bern, Geneva and Ticino were asked to provide information on their legal decisions. In addition to the eight cases, a further case (against Swiss Post) ultimately resulted in an acquittal by the Federal Supreme Court (BGE 142 IV 333).
[12] Press release from the Office of the Attorney General, November 22, 2011.
[13] *Bericht der Bundesanwaltschaft über ihre Tätigkeit im Jahr 2014 an die Aufsichtsbehörde,* p. 15; press release from the Office of the Attorney General, March 10, 2014.

- ***Nitrochem:*** In May 2016, the Office of the Attorney General ordered Nitrochem to pay a fine of CHF 750,000 and over CHF 70,000 in compensation for bribery of foreign public officials. The Office of the Attorney General had concluded that Nitrochem had not made all the necessary and reasonable organizational arrangements to detect and prevent bribery of foreign public officials.[14]

- ***Odebrecht SA:*** On December 21, 2016, the Office of the Attorney General ordered Odebrecht SA and one of its subsidiaries to pay a fine of CHF 4.5 million and compensation of more than CHF 200 million in connection with the Petrobras complex litigation for failing to prevent bribery of foreign public officials and money laundering.[15]

- ***KBA-NotaSys:*** The company KBA-NotaSys reported itself to the Office of the Attorney General on suspicion of having made inadequate organizational arrangements in connection with bribery of foreign public officials. The Office of the Attorney General opened an investigation and on March 23, 2017, ordered KBA-NotaSys to pay a symbolic fine of CHF 1 for failing to implement all the necessary and reasonable organizational precautions to prevent bribery payments to foreign public officials. In addition, the company set up a CHF 5 million integrity fund and paid CHF 30 million in compensation to the state for unlawfully acquired assets. The purely symbolic fine of CHF 1 was imposed because the company had reported itself to the authorities (the first ever to do so in Switzerland), fully cooperated with the prosecution authorities, strengthened its compliance, set up the integrity fund and agreed to pay the compensation demanded by the Office of the Attorney General.[16]

- ***Dredging International Services:*** On May 1, 2017, the Office of the Attorney General ordered Dredging International Services to pay a fine of CHF 1 million and an additional CHF 36 million in compensation for bribing officials of the Nigerian Port Authority in connection with public tenders for the dredging of navigable waters in Nigeria. According to the Office of the Attorney General the company had failed to make all the necessary internal arrangements to prevent bribes being paid.[17]

- ***Gunvor:*** On October 14, 2019, the Office of the Attorney General ordered the Geneva-based commodity trading company Gunvor to pay some CHF 94 million, including CHF 4 million in fines, for failing to make the necessary arrangements to prevent an employee and intermediaries engaged by the company from bribing officials to gain access to the oil markets of the Republic of Congo and Côte d'Ivoire.[18]

- ***Company X*** **(company not known to the public):** On November 15, 2019, the Office of the Attorney General ordered a company to pay a fine of CHF 2 million, along with almost CHF 17 million in compensation, for failing to make all the necessary and reasonable organizational arrangements to prevent the bribery of foreign public officials.[19]

There are major differences in terms of the duration of the proceedings and the sanctions imposed in these few cases in which Art. 102 para. 2 StGB has been applied. Whereas in most cases the proceedings took several years to conclude (Gunvor: eight years; Stanford Group: five years; Company X: four years; Odebrecht and Nitrochem: three years), only two were concluded quickly—within two years in the case of Alstom Network Schweiz and within 16 months in the case of KBA-NotaSys. The

[14] Nicolas Bueno, "Swiss Multinational Enterprises and Transnational Corruption: Management Matters," Schweizerische Zeitschrift für Wirtschafts- und Finanzmarktrecht 2017/2, p. 10 f.
[15] Press release from the Office of the Attorney General, December 21, 2016.
[16] *Neue Zürcher Zeitung,* February 24, 2017; Office of the Attorney General, Activity Report 2017, p. 21; ruling of the Federal Criminal Court of August 29, 2017, BB.2017.83.
[17] Swissinfo, February 28, 2019, *"Schweizer Strafnorm gegen Korruption soll mehr Biss erhalten".*
[18] Press release from the Office of the Attorney General, October 17, 2019.
[19] Summary penalty order SV.15.0787-BECY (anonymized); the Office of the Attorney General did not mention this case in its annual report, nor did it make it public through a press release; likewise, it was not discussed in the media. Owing to the extensive anonymization, the summary penalty order does not even indicate in which country or countries the bribes were paid.

fines imposed ranged from CHF 1 (for the self-reporting company KBA-Nota-Sys SA) to CHF 4.5 million (for the initially entirely uncooperative Odebrecht SA). The value of the unlawfully acquired assets that were eventually confiscated and the amounts paid in compensation vary between roughly CHF 70,000 and over CHF 200 million.

3.1.2 Corporate Administrative Criminal Accountability

The Federal Act on Administrative Criminal Law (*Bundesgesetz über das Verwaltungsstrafrecht* [VStrR]), which entered into force as early as 1974, makes it possible to prosecute legal entities if an offense has been committed in the course of their business operations, if a fine of up to CHF 5,000 is deemed appropriate and if investigating the individual perpetrator would require disproportionate effort (Art. 7 VStrR).[20] Consequently, this provision is not applicable if an individual perpetrator can be identified. Its primary purpose is to reduce the authorities' efforts when investigating minor offenses.[21] A number of special decrees have declared Art. 7 VStrR applicable, such as the Federal Act on the Protection of the Environment, the Federal Act on the Protection of Nature and Cultural Heritage, and the Federal Act Against Unfair Competition. In certain circumstances, there may be overlaps between Art. 7 VStrR and Art. 102 StGB; in such cases, both provisions are applicable.[22]

In practice, Art. 7 VStrR is rarely applied.[23]

3.2 Special Procedures for Settlement in Criminal Cases

3.2.1 Accelerated Proceedings

3.2.1.1 Legislation

Accelerated proceedings, as defined in the Swiss Criminal Procedure Code (StPO), provide the legal basis for agreements between the defendant and the prosecution. Even before the Criminal Procedure Code was introduced, official and informal agreements were concluded between defendants and prosecutors and, possibly, between defendants and courts. However, only three cantons had legislation in this area.[24] The introduction of accelerated proceedings was the subject of considerable dispute throughout the history of the Criminal Procedure Code. The expert commission opposed such proceedings, citing constitutional concerns and arguing that agreements would interfere too much with the inquisitorial principle and the principle of compulsory prosecution. However, the Federal Council proposed introducing accelerated proceedings despite these concerns, arguing that it would be more honest to have legislation on such agreements than it would be to have no such legislation while still tolerating the agreements as a matter of legal reality.[25] Following an extensive debate, Parliament eventually agreed with the Federal Council's suggestion.[26]

Essentially, accelerated proceedings allow the parties to simplify and expedite proceedings in order to bring a case to court more quickly, with a shorter main hearing. A defendant may request that the prosecution conduct accelerated proceedings at any time before charges have been brought, provided that the defendant admits to the matters essential to the legal review of the case and accepts, at least in principle, any civil claims that may be associated with the case (Art. 358 StPO). The prosecution

[20] Some provisions in administrative criminal law stipulate significantly higher fines, including Art. 100 of the Federal Act on Value Added Tax and Art. 49 of the Federal Act on the Swiss Financial Market Supervisory Authority.
[21] *Botschaft des Bundesrates zum Entwurf eines Bundesgesetzes über das Verwaltungsstrafrecht vom 21. April 1971,* BBl 1971 I 993 1005.
[22] Ursula Cassani, *Droit pénal économique, Basel 2020,* p. 129.
[23] Matthias Forster, *Die strafrechtliche Verantwortlichkeit des Unternehmens nach Art. 102 StGB, Diss. St. Gallen, 2006,* p. 57.
[24] Georges Greiner/Irma Jaggi, *Vorbemerkungen zu Art. 358–362, Rz 10 ff., in: Basler Kommentar, Schweizerische Strafprozessordnung,* 2nd ed., Basel 2014.
[25] *Botschaft des Bundesrates zur Vereinheitlichung des Strafprozessrechts vom 21.12.2005,* BBl 2005 1085 1294 f.
[26] For a summary, see Georges Greiner/Irma Jaggi, *Vorbemerkungen zu Art. 358–362, Rz 21, in: Basler Kommentar, Schweizerische Strafprozessordnung,* 2nd ed., Basel 2014.

has the discretion to decide whether or not to conduct accelerated proceedings (Art. 359 StPO). If the prosecution has agreed to accelerated proceedings, it draws up a bill of indictment in such a way that it can be submitted for judgment by the court (Art. 360, Art. 362 para. 2 StPO). The court then examines whether the accelerated proceedings are admissible and appropriate, and whether the sanctions requested by the prosecution are proportionate. Evidence will not be taken in such cases (Art. 361, 362 StPO). If the requirements for a ruling after the accelerated proceedings are not met, the court will return the case files to the prosecution in order for regular pre-trial proceedings to be conducted. Any statements the parties have made regarding the accelerated proceedings will not be admissible in any subsequent regular proceedings if a ruling following accelerated proceedings has been rejected (Art. 362 para. 3–4 StPO).

Paradoxically, the actual agreements as such are not governed by the Criminal Procedure Code; only the formal course of the proceedings is, as just described. Agreements can be concluded in two areas:

- Agreements concerning the charge (charge bargaining): To the extent permitted by the principle of compulsory prosecution (Art. 7 StPO), a partial waiver of prosecution may be agreed upon, which will result in a waiver of the charge on individual aspects.[27]

- Agreements concerning sanctions and penalties (sentence bargaining): The parties may negotiate the consequences of sanctions, particularly the level of penalty to be imposed.[28]

In contrast, agreements on the factual matter of a case are not permissible.[29]

3.2.1.2 Practice

Accelerated proceedings are a key feature of day-to-day judicial practice; at the federal level, half the indictments are handled using the accelerated proceedings.[30] In the area of corporate criminal law, the Office of the Attorney General used the accelerated proceedings in at least three of the nine cases in which it has convicted a company.[31]

3.2.2 Summary Penalty Order Procedure

3.2.2.1 Legislation

The summary penalty order procedure is a mechanism for reaching the economic conclusion of a criminal proceeding. There is no indictment in court and thus no public trial, and the public prosecutor's office acts as the issuing authority. In addition, most cases do not involve an evidence procedure.[32] For such a procedure to be justified, the accused must have admitted the facts of the case or the case must have been sufficiently established in some other way, and the case must concern only a minor or moderate offense (Art. 352 StPO). According to the majority opinion among legal scholars, under certain conditions, the prosecuting authorities are obliged to conclude proceedings by issuing a sum-

[27] Georges Greiner/Irma Jaggi, *Vorbemerkungen zu Art. 358–362, Rz 27, Art. 358, Rz 30 ff., in: Basler Kommentar, Schweizerische Strafprozessordnung,* 2nd ed., Basel 2014.
[28] Georges Greiner/Irma Jaggi, *Vorbemerkungen zu Art. 358–362, Rz 28, Art. 358, Rz 46 ff., in: Basler Kommentar, Schweizerische Strafprozessordnung,* 2nd ed., Basel 2014.
[29] For a detailed and convincing review that also includes differing opinions, see Schwarzenegger, Art. 358, Rz 5 ff., in: *Kommentar zur Schweizerischen Strafprozessordnung,* 2nd ed., Zürich 2014.
[30] Mark Pieth, *Schweizerisches Strafprozessrecht,* 3nd ed., Basel 2016, p. 260.
[31] This is specifically stated in three of the nine summary penalty orders issued by the Office of the Attorney General (SV.18.0958-SAG; SV.15.0584-MAD; SV.16.1280-LEN). In the most recent summary penalty order case (SV.15.0787-BECY), the Office of the Attorney General initially permitted the abbreviated proceedings but then revoked its permission, stating that it would conclude the proceedings by issuing a summary penalty order. The Office of the Attorney General may or may not have used the abbreviated proceedings in the other cases as well. However, in one of the cases (SV.09.0028.-LAM), such use was unlikely, since the summary penalty order in question contains details about the course of the proceedings. In contrast, three of the summary penalty orders contain no details about the procedural history at all (EAII.04.0325-LEN; SV.14.0177-DCA; SV.12.0120-DCA).
[32] Franz Riklin, *Vorbemerkungen zu Art. 352–356, Rz 1, in: Basler Kommentar, Schweizerische Strafprozessordnung,* 2nd ed., Basel 2014.

mary penalty order.[33] However, there is some disagreement as to the extent to which proceedings against companies can be settled by means of a summary penalty order. In the past, the Office of the Attorney General had always concluded criminal proceedings against companies by way of summary penalty order proceedings,[34] regardless of the severity of the predicate offense and the fine imposed on the company, which some scholars consider to be the correct approach.[35] Others hold that this is the wrong approach, arguing that, although the sanction stipulated by Art. 102 StGB constitutes a fine, the felonies and misdemeanors attributed to the company must not be downgraded to mere contraventions and thus criminal proceedings against companies should not invariably be concluded by issuing a summary penalty order. Given that summary penalty orders are only permissible for minor or moderate offenses, criminal proceedings against companies may be settled only by means of a summary penalty order if, compared with the maximum fine of CHF 5 million, no more than a moderate fine is justified.[36] In addition, there is some dispute as to whether accelerated proceedings can be concluded by means of a summary penalty order in the first place. Whereas scholarly opinion is critical of combining these two procedures,[37] it is a regular part of the Office of the Attorney General's decision-making practice (see immediately below).

Since there is no legislation governing the actual agreements in accelerated proceedings, there is similar scope for agreements between the accused company and the public prosecutor's office in the legal reality of criminal proceedings as there is in accelerated proceedings, that is, for agreements both on the charges and on the sanctions.[38] However, there is no legal framework for this at all, nor is there one with regard to the respective proceedings. Accordingly, there is also no legislation governing the failure of a possible agreement. This means that if the public prosecutor's office does not adhere to the agreement and, say, imposes a heavier sanction, the company can appeal against the summary penalty order, but the statements made by the company are then still admissible as evidence, which they would not be in accelerated proceedings.[39] Hence, in practice, agreements in criminal proceedings probably represent too much of a risk for companies in most cases.

3.2.2.2 Practice

The summary penalty order proceedings play a major role in Switzerland, since more than 90% of all criminal cases that are not dropped are settled by means of a summary penalty order.[40] As a result, summary penalty order proceedings have become the rule and the regular standard proceedings the exception. In the area of corporate criminal law, this is even more pronounced: As noted earlier, all previous convictions of companies have been convictions by summary penalty orders.[41]

[33] Gwladys Gilliéron/Martin Killias, Art. 352, Rz 20 ff., in: *Code de procédure pénale suisse, Commentaire Romand,* 2nd ed., Basel2019.
[34] See Section 3.1.1.2 above.
[35] Niklaus Schmid/Daniel Jositsch, Art. 352, Rz 7, in: *Schweizerische Strafprozessordnung, Praxiskommentar,* 3rd ed., Zurich/St. Gallen 2018; Ursula Cassani, *Droit pénal économique, Basel 2020,* p. 11.
[36] Christian Schwarzenegger, Art. 352, Rz 7 f., in: *Kommentar zur Schweizerischen Strafprozessordnung,* 2nd ed., Zurich 2014; Alain Macaluso, *L'ordonnance pénale comme mode de clôture des procédures dirigées contre l'entreprise selon le CPPS,* Jusletter 2011, Rz 29 ff.; Gwladys Gilliéron/Martin Killias, Art. 352, Rz 14a, in: *Code de procédure pénale suisse, Commentaire Romand,* 2nd ed., Basel 2019.
[37] Georges Greiner/Irma Jaggi, Art. 358, Rz 109, in: Basler Kommentar, Schweizerische Strafprozessordnung, 2nd ed., Basel 2014; David Mühlemann, *Der (unzulässige) Strafbefehl im abgekürzten Verfahren, recht 2018(2),* pp. 83 ff.
[38] Marc Thommen, *Kurzer Prozess – fairer Prozess? Strafbefehls- und abgekürzte Verfahren zwischen Effizienz und Gerechtigkeit, Bern 2013,* pp. 159 f., 174; Mark Pieth, *Wirtschaftsstrafrecht, Basel 2016,* pp. 271 f.
[39] This is the prevailing opinion; see Marc Thommen, *Kurzer Prozess – fairer Prozess? Strafbefehls- und abgekürzte Verfahren zwischen Effizienz und Gerechtigkeit, Bern 2013,* p. 174 (with a critical note).
[40] Franz Riklin, *Vorbemerkungen zu Art. 352–356, Rz 2, in: Basler Kommentar, Schweizerische Strafprozessordnung,* 2nd ed., Basel 2018.
[41] See Section 3.1.1.2 above.

3.2.3 Reparation

3.2.3.1 Legislation

Reparation according to Art. 53 StGB has a history of more than 20 years and is linked to a universal trend to give greater consideration to the interests of aggrieved parties, or victims, and thus to victim–offender mediation. The provision was based on the understanding that the legal peace infringed by an offense can be restored by means of voluntary reparation made by the perpetrator to compensate for his or her offense, so that punishment is rendered unnecessary.[42] The principle of exemption from punishment entered into force on January 1, 2007, as part of the total revision of the General Provisions of the Criminal Code. Only a few years later, however, there were calls for the provision to be repealed because the provision was believed not to be applied as originally intended. Although Parliament rejected a parliamentary initiative to this effect at that time,[43] it has recently limited the scope of the provision.[44]

In accordance with the current version of Art. 53 StGB, which has been in force since July 1, 2019, the prosecutor's office refrains from prosecuting, presenting the case to the court or imposing a penalty if the following conditions are met:

- The offender has provided full compensation for the damage or has made all reasonable efforts to make good the injustice he/she has caused;
- 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 offense.

The principle of reparation is applicable not only in proceedings against natural persons, but also in proceedings against companies (Art. 102 StGB),[45] and at any stage of the proceedings.[46]

3.2.3.2 Practice

In practice, Art. 53 StGB has been applied in proceedings against companies only occasionally and inconsistently across Switzerland. A survey conducted by Transparency Switzerland among the Office of the Attorney General and a number of selected cantonal prosecutors' offices revealed the following situation: In the cantons of Bern, Ticino, Zug and Zurich, Art. 53 in conjunction with Art. 102 StGB has never been applied by the public prosecution authorities. In contrast, the Office of the Attorney General and the Canton of Geneva have occasionally refrained from prosecuting companies after the companies had made reparation payments:

- ***Alstom SA:*** After having convicted Alstom Network Schweiz AG for violating Art. 102 StGB, the Office of the Attorney General refrained from prosecuting its parent company, Alstom SA (France), in November 2011 in accordance with Art. 53 StGB, after it had made a compensation payment of CHF 1 million to the International Committee of the Red Cross (ICRC).[47]

[42] Céline Schenk, *Die Wiedergutmachung nach Art. 53 StGB, Jusletter,* Jan, 24, 2011, pp. 2 f.; Jürg-Beat Ackermann/Reto Weilenmann, *Wiedergutmachung (Art. 53 StGB) – "Freikauf" oder Anreiz zum Fehlermanagement? In: Jürg-Beat Ackermann/Marianne Johanna Hilf (eds.), Kurzer Prozess, zu kurzer Prozess – im Wirtschaftsstrafverfahren, Zurich 2019,* pp. 31 f.; *Botschaft des Bundesrates zur Änderung des Schweizerischen Strafgesetzbuches und des Militärstrafgesetzes sowie zu einem Bundesgesetz über das Jugendstrafrecht vom 21.9.1998,* BBl 1999 1979 2065.
[43] 10.522 Parliamentary Initiative Joder: *Abschaffung der Wiedergutmachung nach Artikel 53 StGB* [Abolition of reparation under Art. 53 StGB].
[44] 10.519 Parliamentary Initiative Vischer: *Modifizierung von Artikel 53 StGB* [Modification of Art. 53 StGB].
[45] Parliamentary Initiative: *Modifizierung von Artikel 53 StGB, Bericht der Kommission für Rechtsfragen des Nationalrats vom 3.5.2018,* BBl 2018 3757 3764 f.
[46] Stefan Trechsel/Stefan Keller, Art. 53, *Schweizerisches Strafgesetzbuch Praxiskommentar,* 3rd. ed. 2018, Rz 9.
[47] Press release from the Office of the Attorney General, November 22, 2011.

- ***Grisons Cantonal Bank:*** As part of the criminal proceedings following the bankruptcy of the Italian dairy and food corporation Parmalat, the Office of the Attorney General refrained from prosecuting the Grisons Cantonal Bank in December 2012 in accordance with Art. 53 StGB, because in the course of the proceedings the bank had reached a settlement with Parmalat, which had acted as a civil plaintiff in Switzerland and to which it had to pay € 21 million in compensation.[48]

- ***SIT:*** In November 2013, the Office of the Attorney General refrained from prosecuting SIT in accordance with Art. 53 StGB, after the company had acknowledged that it had not made all the necessary and reasonable arrangements to prevent bribery payments to foreign public officials and paid CHF 125,000 in compensation to the ICRC.[49]

- ***HSBC:*** After the Swiss subsidiary of HSBC had paid CHF 40 million to the Canton of Geneva by way of "compensation," the Public Prosecutor's Office of Geneva refrained from prosecuting HSBC in early June 2015 in accordance with Art. 53 StGB, after it had opened proceedings because the bank had made inadequate organizational arrangements to prevent money laundering.[50]

- ***Addax:*** In June 2017, the Public Prosecutor's Office of Geneva refrained from prosecuting the oil company Addax in accordance with Art. 53 StGB. In return, Addax had acknowledged possible organizational inadequacies and paid CHF 31 million to the Canton of Geneva in compensation for suspected multi-million Swiss franc bribery payments in Nigeria.[51]

The decisions of the Public Prosecutor's Office of Geneva, in particular, attracted a great deal of public attention because the reparation payments, which in each case amounted to tens of millions of Swiss francs, were paid into the Geneva state treasury, even though the canton of Geneva was not the aggrieved party in the corruption cases in question. In fact, proceedings had been opened against the companies concerned because of their activities in African countries. By its own account, the Office of the Attorney General has not applied Art. 53 to (transnationally active) companies as a general rule since 2017.[52]

3.2.4 Amicable Settlement and Leniency Programs in Antitrust Law

Illegal anti-competitive agreements resemble corrupt practices and are sometimes closely linked to corruption. In addition, as with corruption, detecting and prosecuting illegal anti-competitive agreements can be challenging because every party involved benefits from the offense and thus has a vested interest in keeping the illegal activity secret. For this reason, antitrust law provides a number of special mechanisms for detecting and sanctioning such activities. These mechanisms will be discussed in this section.

3.2.4.1 Legislation

The purpose of the Cartel Act (*Kartellgesetz* [KG]) is to prevent economically or socially damaging effects of cartels and other restraints of competition and thus to promote competition in the interest of a free market economy (Art. 1 KG). To achieve this purpose, illegal anti-competitive agreements and unlawful activities of market-dominating companies are sanctioned (Art. 49a para. 1 KG). Cartel law provides two special procedures for settlement and/or penalty mitigation, namely amicable settlement, created by the 1995 revision of the Cartel Act, and leniency programs, created by the 2003 revision of the Cartel Act.

[48] Office of the Attorney General, Activity Report 2012, p. 12.
[49] Press release from the Office of the Attorney General, November 12, 2013.
[50] Press release from the Public Prosecutor's Office of Geneva, June 4, 2015.
[51] Press release from the Public Prosecutor's Office of Geneva, July 5, 2017.
[52] Office of the Attorney General, Activity Report 2017, p. 8.

If the Secretariat of the Competition Commission (WEKO) considers a restraint of competition to be inadmissible, it may propose to the companies involved an amicable settlement on how to eliminate the restraint (Art. 29 para. 1 KG). The purpose of concluding an amicable settlement is to restore the lawful state of affairs and to conclude an antitrust investigation as swiftly and straightforwardly as possible,[53] the latter being not only in the interest of the authorities and the public, but often also in the interest of the companies concerned, because antitrust law proceedings are damaging to a company's reputation and expensive and tie up resources.[54] On the part of the WEKO Secretariat, an amicable settlement requires that it has opened an investigation and reached the conclusion that an unlawful restraint of competition exists.[55] The evidence proceedings and legal assessment need not be completed; the WEKO Secretariat may propose an amicable settlement at any stage of the investigation proceedings.[56] On the part of the companies, an amicable settlement requires in particular their willingness to take voluntary measures to eliminate the restraint of competition and to cooperate with the Secretariat. Companies may express their interest in reaching an amicable settlement, but they have no claim on the WEKO Secretariat either to enter into negotiations with them or to conclude an amicable settlement.[57]

An amicable settlement provides measures to eliminate a restraint of competition that the WEKO Secretariat has deemed inadmissible. Such measures may include adjustments to the conduct and structure of a company. In addition, they always concern future activities—amicable arrangements cannot be reached on the company's past activities. Accordingly, the relevant facts of a case and their legal assessment are not open to negotiation.[58] As a rule, companies are not required to acknowledge the facts of the case and their legal assessment. An explicit waiver of legal remedies is also not required, although the purpose of an amicable settlement is to conclude proceedings as efficiently as possible and thus to avoid an appeal.[59] Finally, a possible sanction and its severity are not open to negotiation either. Hence, an amicable settlement has no bearing on the results of the investigation and, in particular, does not entail a waiver of any possible sanctions for a violation of the Cartel Act.[60] An amicable arrangement is put in writing and requires the approval of WEKO (Art. 29 para. 2 KG).

A possible sanctioning of a company may not be open to negotiation within the context of an amicable settlement, but a mutually agreed amicable settlement that has been approved by WEKO does have consequences for the severity of the sanctions. The conclusion of an amicable settlement is recognized as good cooperation and rewarded by WEKO with a reduction of sanctions. In practice, such a reduction ranges between 5 and 20 percent, depending on how early in the proceedings the amicable settlement was reached.[61] The conclusion of an amicable settlement also has implications for the investigation proceedings. After all, one of the main purposes of an amicable settlement is to allow for the proceedings to be conducted and concluded as efficiently as possible. In this way, in particular, it becomes possible to reduce the time required to investigate the facts of the case, as well as the scope of the description of the nature and extent of the violation of the law, thereby shortening proceedings.[62] This in turn will also reduce the procedural costs.[63]

Willful violation of an amicable settlement is sanctioned by a fine of up to CHF 100,000 (Art. 54 KG).

Under the so-called leniency program (also known as self-reporting scheme, or *Bonusregelung* in German), sanctions may be waived in whole or in part if the company cooperates in uncovering and eliminating the restraint of competition (Art. 49a para. 2 KG). The purpose of this program is to prevent

[53] Carla Beuret, *Art. 29, Kartellgesetz, Kommentar, Zurich/St. Gallen 2018,* Rz 4 f.
[54] Manuela Rapold, *Kartellrechts-Compliance, Bern 2016,* p. 172.
[55] *Merkblatt des Sekretariats der WEKO vom 28. Februar 2018: Einvernehmliche Regelungen,* p. 1.
[56] *Botschaft des Bundesrates zu einem Bundesgesetz über Kartelle und andere Wettbewerbsbeschränkungen vom 23. November 1994,* BBl 1995 468 604.
[57] *Merkblatt des Sekretariats der WEKO vom 28. Februar 2018: Einvernehmliche Regelungen,* pp. 1, 3.
[58] Carla Beuret, *Art. 29, Kartellgesetz, Kommentar, Zurich/St. Gallen 2018,* Rz 34 ff.
[59] Carla Beuret, *Art. 29, Kartellgesetz, Kommentar, Zurich/St. Gallen 2018,* Rz 9 ff.
[60] *Merkblatt des Sekretariats der WEKO vom 28. Februar 2018: Einvernehmliche Regelungen,* p. 2.
[61] *Merkblatt des Sekretariats der WEKO vom 28. Februar 2018: Einvernehmliche Regelungen,* p. 2.
[62] *Merkblatt des Sekretariats der WEKO vom 28. Februar 2018: Einvernehmliche Regelungen,* p. 2.
[63] Carla Beuret, *Art. 29, Kartellgesetz, Kommentar, Zurich/St. Gallen 2018,* Rz 50 f.

the emergence of cartels and to make it easier for the competition authority to uncover and prosecute existing cartels. The program is also intended to create an incentive for companies that are members of a cartel to contribute to its uncovering on their own initiative.[64]

There are two possible scenarios in which sanctions can be waived in full[65]:

- In the first, a company reports its involvement in an unlawful restraint of competition to the authorities and is the first to provide information that will enable antitrust proceedings to be initiated (Art. 8 para. 1 lit. a KG Sanctions Ordinance [SVKG]). In such a situation, the competition authority has no or insufficient information to initiate proceedings prior to the self-reporting.[66]

- In the second scenario, a company presents evidence that facilitates the detection of an unlawful restraint of competition (Art. 8 para. 1 lit. b SVKG). In such a situation, the competition authority does not have sufficient evidence to prove the violation of competition law.[67]

In addition, the following additional requirements must be met in either of these scenarios: The company must not have taken an instigating or leading role in the violation of the competition law in question and must not have forced another company to participate in it. Moreover, the company must provide the competition authority, without being requested to do so, with all information and evidence relating to the violation of competition law within its sphere of influence; cooperate with the competition authority without interruption, unreservedly and without delay throughout the entire duration of the proceedings; and cease its involvement in the violation of competition law by the time it reports itself or after being ordered to do so by the competition authority (Art. 8 para. 2 SVKG).

In all other cases in which a company cooperates with the competition authority, the sanctions may be reduced. Depending on the extent to which the company contributes to the success of the proceedings, sanctions can be reduced by up to 50 percent. If a company provides information or submits evidence about other unlawful violations of competition law without being requested to do so, the reduction is up to 80 percent (Art. 12 SVKG). An amicable settlement that has been reached in addition to any of the forms of cooperation provided for in Art. 12 SVKG has an additional mitigating effect in practice.[68]

3.2.4.2 Practice

The mechanisms of amicable settlement and leniency programs are used extensively and are an integral part of day-to-day practice. According to WEKO, in 80 to 90 percent of all uncovered cases the authorities received crucial support through self-reporting. The self-reporting system has thus proved to be very effective and has met all expectations.[69] Between 2005 and 2019, WEKO opened 71 new investigations, while during the same period, amicable settlements were reached in 40 cases and sanctions (direct sanctions acc. to Art. 49a KG) were imposed in 64 cases. Of the 40 investigations resulting in amicable settlements, 29 were concluded through sanctioning proceedings in accordance with Art. 49a KG.[70] In all cases, the amicable settlements had a mitigating effect on the sanctions. Between 2005 and 2019, sanctions were waived in full under the leniency program in 20 cases, 12 of which also involved an amicable settlement. Sanctions were reduced by up to 50 percent in 18 cases, of which 15 also involved an amicable settlement; sanctions were reduced by up to 80% in 3 cases, 2 of which also involved an amicable settlement (see Table).[71] WEKO, or its Secretariat,

[64] Patrick Krauskopf, *Art. 49a, Kartellgesetz, Kommentar, Zurich/St. Gallen 2018,* Rz 68.
[65] It should be noted that, in addition, Art. 49a para. 3 KG provides for three special cases in which charges can be waived.
[66] Patrick Krauskopf, *Art. 49a, Kartellgesetz, Kommentar, Zurich/St. Gallen 2018,* Rz 74.
[67] Patrick Krauskopf, *Art. 49a, Kartellgesetz, Kommentar, Zurich/St. Gallen 2018,* Rz 74.
[68] Samuel Howald, *Einvernehmliche Regelungen bei sanktionsbedrohten Verhaltensweisen im Schweizerischen Kartellrecht,* sic! 11/2012, p. 708 f.
[69] *Neue Zürcher Zeitung,* April 17, 2018, *Kronzeugen gegen Schweizer Kartelle.*
[70] Art. 49a KG governs the sanctions that can be imposed for unlawful restraint of competition.
[71] These figures on the practical application of Art. 49a KG have been taken from all previously published editions of Law and Policy of Competition for the years 2006–2019, in which WEKO publishes data relating to investigations it has opened or conducted. Depending on the facts of the case, an investigation is targeted at a varying number of companies.

has issued information sheets on the most relevant legal provisions, along with supplementary forms that explain and clarify the practice of their application (materially and as regards the proceedings).

Amicable arrangements and leniency programs in sanction proceedings according to Art. 49a KG

Year	Direct sanctions	Amicable agreements[72]	Full sanction waivers	Reduction of sanctions by up to 80%	Reduction of sanctions by up to 50%
2005	1	-	-	-	-
2006	1	1	-	-	-
2007	2	1	-	-	-
2008	1	1	-	-	-
2009	5	2	1	-	2
2010	3	1	1	1	1
2011	2	-	-	-	-
2012	5	3	2	1	2
2013	3	1	2	-	1
2014	2	1	1	-	-
2015	6	3	3	-	2
2016	8	6[73]	5[74]	1	6
2017	11	-	-	-	-
2018	4	-	1	-	-
2019	10	9	4	-	4
Total	64	29	20	3	18

Source: Recht und Politik des Wettbewerbs (RPW), the official publication of WEKO, 2006–19.

3.3 Transparency of Criminal Justice

Art. 30 para. 3 of the Federal Constitution enshrines the principle of judicial publicity. Under this principle, court hearings and the pronouncement of judgments are to be public, subject to statutory exceptions. The judgments of the Federal Supreme Court and the Federal Criminal Court are available online (in most cases in anonymized form) in separate judgment databases. A central, publicly accessible database of judgments at the cantonal level does not exist. The situation is different in the individual cantons and there is less transparency in general than in the federal courts. In particular, criminal convictions handed down by the courts of first instance are not (or at least not universally) available online.[75]

Summary penalty order proceedings (over 90% of all criminal cases that are not dropped are now settled by means of summary penalty order proceedings)[76] are non-public while proceedings are in

[72] Which led to reduced sanctions.
[73] Press release from WEKO, December 21, 2016.
[74] Press release from WEKO, December 21, 2016; press release from WEKO, June 7, 2016; press release from WEKO, October 4, 2016.
[75] Taking the Canton of Bern as an example: Rulings of the civil and criminal courts of the Canton of Bern have been published on an online platform since January 1, 2017. The Criminal Division, which consists of the 1st and 2nd Criminal Division and the Board of Appeal, publishes all rulings except those that do not involve material decisions. The regional courts of first instance, on the other hand, are free to decide whether and to what extent they publish their rulings on the online platform.
[76] See Section 3.2.2.2.

progress (Art. 69 para. 3 lit. d StPO). Summary penalty orders are also not made public. However, interested persons must be granted access to these orders (Art. 69 para. 2 StPO). According to the will of the legislator, an actual proof of interest is not required—merely having expressed the wish to view such documents is deemed sufficient proof of interest.[77] This is undisputedly the case during appeal and objection periods. According to academic opinion, after these periods have expired, access can be granted (only) under consideration of private and public interests and any possible conflicting interests can be accommodated by anonymization.[78]

Likewise not published are discontinuation and dismissal orders, including decisions to refrain from prosecution in application of Art. 53 StGB (Reparation). In the practice of the Federal Supreme Court, the right to access these orders exists only if there is a legitimate interest in information and no overriding public or private interests preclude such access.[79]

The public prosecutor's offices and courts can notify the public about pending proceedings if this is called for because of the particular importance of a criminal case (Art. 74 para. 1 lit. d StPO). The public's interest in information must not be restricted by unreasonable constraints. It suffices if a case attracts above-average attention.[80]

In addition to these individual case-related public disclosures, certain information is also recorded for statistical purposes. The Federal Statistical Office keeps criminal conviction statistics. These statistics are based on the data from the Criminal Records, but are limited to the individual offenses of the Specific Provisions of the Criminal Code and thus do not cover corporate criminal liability (Art. 102 StGB).[81] Reparation cases (Art. 53 StGB) are also not recorded statistically, since they do not involve a conviction. In addition, the Federal Statistical Office keeps statistics on criminal offenses that are recorded by the police (the Federal Office of Police and the cantonal police) by canton, degree of execution and stage of investigation, but these statistics are also limited to the offenses listed in the Specific Provisions part of the Criminal Code.[82] Every year, the Office of the Attorney General publishes some general statistics, such as the "money laundering" and "international corruption" cases pending and the number of criminal investigations opened and completed each year (though with no differentiation by offense category).[83] The cantonal public prosecutor's offices provide similar information.[84] Neither the Office of the Attorney General nor the cantonal prosecutor's offices keep statistics on dismissal and *nolle prosequi* orders according to individual offenses.

3.4 Reform Efforts

3.4.1 Reform Efforts by Parliament and the Federal Council

Corporate criminal liability has been a recurring subject of debate in Parliament since its introduction. All parliamentary initiatives in this area have been aimed at broadening the scope of the norm and thus of criminal liability. Various motions have been put forward to provide for direct criminal liability for all types of offenses under Art. 102 para. 2 StGB (rather than merely for subsidiary liability under

[77] *Botschaft des Bundesrates zur Vereinheitlichung des Strafprozessrechts vom 21.12.2005,* BBl 2006 1085 1152; Council debate (only conducted in the Council of States), Amtliches Bulletin 2006 S 1001–1004.
[78] Urs Saxer/Simon Thurnheer, Art. 69, Rz 39, including further information, in: *Basler Kommentar, Schweizerische Strafprozessordnung,* 2nd ed., Basel 2014.
[79] BGer 1C_13/2016; BGer 1B-68/2012; BGE 137 I 16; BGE 134 I 286. According to the case law of the Federal Supreme Court, journalists always have a legitimate interest in information because of the controlling function of the media (BGE 137 I 16 E. 2.4). (BGE 137 I 16 E. 2.4).
[80] Urs Saxer/Simon Thurnheer, Art. 74, Rz 17, including further information, in: *Basler Kommentar, Schweizerische Strafprozessordnung,* 2nd ed., Basel 2014.
[81] Federal Statistical Office, Criminal Conviction Statistics.
[82] Federal Statistical Office, Offences Recorded by the Police.
[83] This information is included in the activity reports of the Office of the Attorney General.
[84] To return to the example of the Canton of Bern: The annual activity reports of the judicial authorities and the Public Prosecutor's Office of the Canton of Bern provide, among other things, the numbers of indictments, dismissals and nolle prosequi cases per year.

Art. 102 para. 1 StGB) for companies for all offenses; to broaden the scope of criminal liability of clubs and stadium operators in connection with violence at sporting events, to tighten corporate criminal liability in the nuclear energy industry and for offenses involving corruption abroad and to recoup unlawfully acquired assets in third countries and return them to the countries concerned.[85] All these motions were either rejected or closed because they were not addressed within the prescribed time limit. One postulate submitted to the Federal Council and two interpellations concerned the criminal prosecution of financial intermediaries,[86] and four other interpellations concerned liability issues in the areas of new technologies, advertising and human rights violations.[87]

In the area of reparation under Art. 53 StGB, one parliamentary initiative called for the abolition of the provision and one motion called for the limitation of its scope, both of them unsuccessfully.[88] However, another parliamentary initiative was successful and recently led to the modification of Art. 53 StGB.[89] One parliamentary initiative unsuccessfully called for the abolition, or at least restriction, of accelerated proceedings, and one postulate unsuccessfully called for the elaboration of a set of legal and organizational measures for dealing with complex cases of white-collar crime.[90]

Reform efforts are also frequently made in the area of antitrust law. The following such efforts are relevant to the issues addressed in this report: Based on the results of an evaluation of the Cartel Act, the Federal Council revised this law. After even the preparatory work had proved difficult—the Federal Council conducted three consultations—Parliament buried the bill in 2014. Among other things, the Federal Council would have wanted to strengthen the independence of the competition authority and, in response to a motion[91] to consider compliance programs set up by companies to ensure compliance with antitrust laws as a mitigating factor in sanctioning.[92] All other reform attempts related to the issues at hand were also unsuccessful, namely two motions to strengthen the independence of WEKO and introduce sanctions against natural persons; a parliamentary initiative to introduce an exemption from sanctions for companies if they have implemented compliance programs to comply with antitrust law[93]; and two parliamentary initiatives that again addressed undisputed aspects of the failed 2014 revision

[85] 09.3365 Motion Jositsch: *Umsetzung der Strafbarkeit von Unternehmen* [Implementation of corporate criminal liability]; 11.3333 Motion Glanzmann-Hunkeler: *Gewalt an Sportveranstaltungen* [Violence at sporting events]; 11.3179 Motion Zanetti: *Verschärfung der Strafbestimmungen im Kernenergiegesetz* [Tightening of the penal provisions of the Nuclear Energy Act]; 17.4009 Motion Hadorn: *Paradise Papers. Rechtsgrundlagen zur Verhütung der Korruption im Ausland* [Paradise Papers: Legal foundations for the prevention of corruption abroad]; 17.3547 Motion Sommaruga: *Rückführung von eingezogenen Korruptionsgeldern an die bestohlenen Bevölkerungen* [Restitution of confiscated bribes to the populations that have been robbed].

[86] 13.3658 Postulate Zanetti: *Verletzungen des Wirtschafts- und Steuerrechts* [Violations of commercial and tax law] (…); 12.3349 Interpellation Nordmann: *Verletzung der Sorgfaltspflichten durch gewisse Banken* [Violations of due diligence obligations by certain banks]; 19.3399 Interpellation Badran: *Inwieweit ist die Schweiz von Cum-Ex- und Cum-Cum-Geschäften betroffen?* [To what extent is Switzerland affected by cum-ex and cum-cum trades?]

[87] 15.3446 Interpellation Markwalder: *Neue Technologien und autonome Apparate* [New technologies and autonomous apparatuses] (…); 17.3276 Interpellation Schwaab: *Wie steht es um die Verantwortlichkeit für Werbung im Internet* [What is the situation regarding responsibility for advertising on the Internet?] (…); 12.3499 Interpellation Seydoux-Christe: *Durch ausländische Tochterfirmen von Schweizer Unternehmen begangene Menschenrechtsverletzungen* [Human rights violations committed by foreign subsidiaries of Swiss companies] (…); 12.3904 Interpellation Wyss: *Massnahmen gegen Straflosigkeit von Unternehmen bei Menschenrechtsverletzungen und Umweltschäden* [Measures against impunity of companies for human rights violations and environmental damage].

[88] 10.522 Parliamentary Initiative Joder: *Abschaffung der Wiedergutmachung nach Art. 53 StGB* [Abolition of reparation under Art. 53 StGB]; 11.4041 Motion National Council Commission for Legal Affairs: *Für eine vernünftige Revision von Art. 53 StGB* [For a reasonable revision of Art. 53 StGB].

[89] 10.519 Parliamentary Initiative Fischer: *Modifizierung von Art. 53 StGB* [Modification of Art. 53 StGB]; on this, see Section 3.2.3.1.

[90] 12.496 Parliamentary Initiative Jositsch: *Abschaffung respektive Einschränkung des abgekürzten Verfahrens in der Schweizerischen Strafprozessordnung* [Abolition or restriction of the abbreviated procedure in the Swiss Code of Criminal Procedure]; 06.3362 Postulate Recordon: *Gerichtliche Verfahren und Wirtschaftskriminalität* [Judicial proceedings and white-collar crime].

[91] 07.3856 Motion Schweiger: *Ausgewogeneres und wirksameres Sanktionssystem für das Schweizer Kartellrecht* [A more balanced and effective sanctioning system for Swiss antitrust law].

[92] *Botschaft des Bundesrates zur Änderung des Kartellgesetzes und zum Bundesgesetz über die Organisation der Wettbewerbsbehörde vom 22. Februar 2012*, BBl 2011 3905 ff.

[93] 08.3509 Motion de Bumann: *Echter Wettbewerb in der Schweizer Wirtschaft* [Real competition in the Swiss economy]; 10.3302 Motion de Bumann: *Für echten Wettbewerb und tiefere Preise* [For real competition and lower prices]; 08.443 Parliamentary Initiative Kaufmann: *Existenzgefährdung infolge von Kartellbussen verhindern* [Preventing threats to companies' survival as a result of antitrust fines].

of the Cartel Act.[94] Two motions are currently pending—one to improve the situation of SMEs in competition proceedings and another one to consider both qualitative and quantitative criteria in assessing the inadmissibility of anti-competitive agreements.[95]

3.4.2 Revision of the Criminal Procedure Code: Proposal for Deferred Prosecution

During the consultations regarding the revision of the Criminal Procedure Code currently underway, the Office of the Attorney General suggested introducing a new mechanism in early 2018 referred to as "deferred prosecution." Deferred prosecution is intended to be used in criminal proceedings against companies. It is a special type of out-of-court settlement under which the public prosecutor's office waives charges for a clearly defined period of time. If the company fulfills the obligations agreed upon with the public prosecutor's office during this period (the "probationary period"), the public prosecutor's office will terminate the proceedings permanently. If, on the other hand, the company violates the agreement and does not remedy this violation within a period of time set by the public prosecutor, the public prosecutor will bring charges against the company. In the deferred prosecution agreement, the company must acknowledge the facts of the case brought against it. In addition, the agreement with the public prosecutor's office must include a stipulation as to the fines to be paid by the company, the property and assets to be confiscated, and the amount of compensation from civil law claims to be paid to the private plaintiff. Moreover, the agreement must specify the measures to be taken by the company to remedy the organizational inadequacies and prevent further offenses, as well as a mechanism for reviewing these measures.[96]

The Office of the Attorney General considers that this new mechanism will benefit companies' interests because it would allow them to avoid a conviction that could lead to far-reaching collateral damage for them, including the revocation of official permits.[97] Efforts to introduce this mechanism are also supported by the Swiss Bar Association.[98] The corporate union Economiesuisse, however, is critical of it because it would further strengthen the already strong position of the prosecuting authorities.[99]

The Federal Council did not include the proposal of "deferred prosecution" in its Dispatch on the revision of the Criminal Procedure Code, for the following reasons in particular: The Federal Council believed that the public prosecutor's office would assume too strong a position, and that the courts would not approve of the agreement with the companies in question nor would the companies have any legal remedies. It also argued that companies would be able to buy their way out of a guilty verdict by simply paying a fine, which would be particularly problematic if the offense in question was committed with intent. What would also be problematic is that public prosecutors and companies could agree on civil claims without involving the civil parties.[100] The bill is currently being deliberated in Parliament.

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[94] 14.3946 Motion Amherd: *Für eine kleine Revision des Kartellgesetzes* [Toward a minor revision of the Cartel Act]; 16.473 Parliamentary Initiative de Bumann: *Kleine Revision des Kartellgesetzes* [A minor revision of the Cartel Act].
[95] 16.4094 Motion Fournier: *Verbesserung der Situation der KMU in Wettbewerbsverfahren* [Improving the situation of SMEs in competition proceedings]; 18.4282 Motion Français: *Die Kartellgesetzrevision muss sowohl qualitative als auch quantitative Kriterien berücksichtigen (…)* [The revision of the Cartel Act must consider both qualitative and quantitative criteria (…)].
[96] Appendix to the Consultation of the Office of the Attorney General on the revision of the Criminal Procedure Code of March 20, 2018.
[97] Appendix to the Consultation of the Office of the Attorney General on the revision of the Criminal Procedure Code of March 20, 2018.
[98] Appendix to the Consultation of the Office of the Attorney General on the revision of the Criminal Procedure Code of March 20, 2018; Consultation with the Swiss Bar Association on March 13, 2018.
[99] Economiesuisse, *Keine Vergleiche im Strafrecht: Die aufgeschobene Anklageerhebung für Unternehmen, Dossierpolitik 1/2020,* March 10, 2020.
[100] *Botschaft des Bundesrates zur Änderung der Strafprozessordnung vom 28. August 2019,* BBl 2019 6697 6723.

4. Legislation in Other Countries and at the OECD

4.1 Legislation Models: An Overview

Corporate criminal and/or administrative criminal liability has become widely established on an international scale. Likewise, special procedures for settlement or penalty mitigation have been adopted, with greater or lesser degrees of codification in each country. In the 44 signatory states to the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, these special procedures for settlement even represent the principal means of enforcing their respective national anti-corruption legislation. The OECD signatory states have concluded almost 80 percent of their foreign bribery cases using these special procedures.[101] Three of these special procedures are of primary importance: deferred prosecution agreements, plea bargaining, and immunity and leniency programs.

A *deferred prosecution agreement* is an agreement between a public prosecutor's office and a defendant company to defer—and ultimately terminate—prosecution for a specified period of time, provided that the company fulfills certain obligations during that period. In *plea bargaining*, a company admits its guilt in exchange for a reduction in sentence or for other concessions. The focus of *immunity and leniency programs* is to uncover and prevent as yet undetected criminal activities.[102] As a rule, for these mechanisms to be considered in criminal proceedings, companies are expected to have reported themselves to the authorities, to cooperate fully and to remedy the compliance issues in question.

The following is a summary of the applicable legislation in Switzerland's neighboring EU countries, in the United Kingdom and at the OECD.[103]

4.2 France

4.2.1 Corporate Criminal Liability

Under the French Criminal Code (*Code pénal*, CP), companies are criminally liable for offenses committed by their organs or representatives on behalf of the company (*"pour leur compte"*) (Art. 121-2 CP). In addition to fines,[104] companies face sanctions such as exclusion from public tenders, the dissolution of the company or the company being placed under a compliance program of the anti-corruption authority (Art. 131-38 et seq. CP). Yet corporate criminal liability does not exempt natural persons who have been involved in a criminal offense from criminal liability (Art. 121-2 para. 3 CP).

[101] OECD, Resolving Foreign Bribery Cases with Non-Trial Resolutions, 2019, p. 13.
[102] Transparency International Helpdesk, Deferred Prosecution Agreements, Plea Bargaining, Immunity Programmes and Corruption, Berlin 2017, which includes further information; OECD, Resolving Foreign Bribery Cases with Non-Trial Resolutions, 2019, p. 11.
[103] In order not to go beyond the scope of this report, the discussion in this section is limited to a selection of regulatory mechanisms, which itself is limited to mechanisms from criminal and administrative criminal law. Antitrust law mechanisms are not discussed.
[104] The amounts of fines are provided for in the respective special laws and are five times those for natural persons (Art. 131-38 para. 1 CP) and EUR 1 million if the relevant special law does not provide for fines for natural persons (Art. 131-38 para. 2 CP).

Convictions of companies are quite common in France.[105] However, before the introduction of the "Loi Sapin II" (see below) companies were rarely convicted in connection with corruption offenses, and even when a conviction was handed down, the sanctions imposed were fairly lenient.[106]

4.2.2 Special Procedures for Settlement

The "Loi Sapin II," which entered into force on December 9, 2016, provides a way for the French prosecuting authorities to refrain from prosecuting companies by concluding an agreement with them (Art. 41-1-2 of the Penal Procedure Code [*Code de procédure pénale*, CPP]).[107] In cases of corruption and other white-collar crime in which the question of corporate criminal liability is raised, the public prosecutor's office can propose an agreement (*Convention judiciaire d'intérêt public*, CJIP) to the company. For this to be possible, the public prosecutor's investigations must be sufficiently advanced in order to ensure that the accusations are satisfactorily substantiated (*"niveau suffisant de preuve de la commission de faits de corruption"*), so that if the CJIP fails, the accused company can be charged.[108]

A CJIP stipulates one or more of the following obligations and requirements for a company (Art. 41-1-2 para. 1 CPP)[109]:

- The company makes a payment to the Treasury that is based on the value of the unlawfully gained advantages (but not exceeding 30% of the average annual turnover of the last three years).

- The company agrees to being placed under a compliance program supervised by the French anti-corruption agency. Such a program involves measures to prevent and combat corruption, such as the adoption of a code of conduct and a procedure for reporting irregularities (Art. 131-39-2 CP). Any costs incurred by the anti-corruption authority in supervising this program will be charged to the company up to a maximum amount specified in the CJIP.[110]

- The company makes reparation payments to the victims within a set period of time.

Once the company has agreed to the written CJIP, the CJIP has to be confirmed by a court of law, which must be done in a public procedure. The court's decision is final, but the company may revoke its consent within ten days. The court's decision and the CJIP are published both on the website of the anti-corruption authority and through a press release from the public prosecutor's office. The court's decision constitutes neither an acknowledgment of guilt nor a criminal conviction. Accordingly, there is no record in the Criminal Register (Art. 41-1-2 para. 2 CPP). If the company does not comply with the obligations and requirements of a concluded CJIP, the public prosecutor's office suspends implementation of the CJIP (Art. 41-1-2 para. 3 CPP). Whether or not a CJIP will be proposed is at the sole discretion of the public prosecutor's office and will depend on the history of the company, whether it has disclosed the facts on its own initiative and whether it cooperates throughout the proceedings.[111] In addition, for a CJIP to be considered, the company must acknowledge the facts of the case and the results of its legal assessment.[112] However, the company is not required to make an admission of guilt (Art. 41-1-2 para. 2 CPP). The public prosecutor's office notifies the victims of its

[105] Between 2002 and 2005 alone, companies were convicted in 2,340 cases (OECD Report France Phase 3, 2012, Rz 55).
[106] OECD, Resolving Foreign Bribery Cases with Non-Trial Resolutions, 2019, p. 34; OECD Report France Phase 3, 2012, Rz 10 f., 55 f.; OECD Report France Phase 3 Follow-Up, 2014, Rz 1.
[107] Art. 41-1-2 Code de procédure pénale; Procureur de la République financier and Agence française anticorruption, Lignes Directrices de la Mise en Œuvre de la Convention Judiciaire d'Intérêt Public (hereafter: Lignes Directrices).
[108] Lignes Directrices, p. 7.
[109] Ministry of Justice, Circulaire relative à la présentation et la mise en œuvre des dispositions pénales prévues par la loi n°2016-1691 du 9 décembre 2016 relative à la transparence, à la lutte contre la corruption et à la modernisation de la vie économique (hereafter: Circulaire), pp. 11 ff.
[110] Lignes Directrices, pp. 14 ff.
[111] Circulaire, p. 16.
[112] Circulaire, pp. 11 f.

decision to propose a CJIP and invites them to indicate the nature and extent of the damage they have sustained. The conclusion of a CJIP does not affect the victims' right to claim damages through the civil courts.[113]

By the end of 2019, seven CJIPs had been concluded since the introduction of the Loi Sapin II in December 2016.[114]

Aside from the CJIP, the consideration of cooperation or compensation for damages by companies is not specifically legislated in France. Nevertheless, the courts may consider either or both in determining penalties.[115] Regardless of whether a CJIP has been concluded, the criminal liability of the natural persons involved remains unaffected (Art. 41-1-2 para. 1 CPP).

4.3 United Kingdom

4.3.1 Corporate Criminal Liability

In the United Kingdom, corporate criminal liability is standardized according to various special decrees. The Bribery Act 2010 (UKBA) is applicable to corruption offenses; at the same time, it establishes the strictest rules on corporate criminal liability. Under this Act, a company is liable to criminal prosecution for corruption offenses committed by persons associated with it if it is unable to prove that it has taken appropriate measures to prevent such offenses (Art. 7 UKBA). Companies face unlimited fines (Art. 11 UKBA).[116] However, although enforcement has become stricter in recent years, very few companies have been subject to criminal prosecution.[117]

4.3.2 Special Procedures for Settlement

Since 2014, prosecuting authorities can conclude deferred prosecution agreements (DPAs) with companies for certain types of alleged offenses, including corruption.[118] By signing a DPA, a company commits itself to fulfilling certain obligations over a specified period of time, such as paying a fine, paying reparations to victims, making donations to charitable organizations and implementing a compliance program. In return, prosecution will be suspended and will be resumed only if the company violates the DPA.[119] If the company does not violate the DPA by the end of the specified period, the proceedings are discontinued.[120] The prosecuting authority may propose a DPA to the company if the available evidence allows it (collection of evidence is sufficient for reasonable suspicion) and if the discontinuation of prosecution would not be against the public interest. Whether or not to propose a DPA is at the sole discretion of the prosecuting authority; companies are not legally entitled to a DPA.[121] Various factors increase the chances of such a proposal being made, such as whether the company has reported itself to the authorities, whether it has "a clean slate" and whether it has already implemented an internal compliance program.[122] A mandatory requirement for any DPA is that companies fully cooperate with the prosecuting authorities. The conclusion of a DPA does not require an

[113] Art. 41-1-2 para. 1 CPP; Lignes Directrices, p. 11.
[114] Website of the anti-corruption agency Agence française anticorruption, which publishes all CJIPs: https://www.agence-francaise-anticorruption.gouv.fr/fr/convention-judiciaire-dinteret-public (last accessed: September 7, 2020).
[115] J. Fournier/M. Langhorst/J. van den Bosch/C. Viennet, *Strafbarkeit von Unternehmen, Stand 30.04.2019,* E-Avis ISDC 2019-09, p. 52.
[116] OECD Report UK Phase 3, 2012, Rz 49.
[117] OECD Report UK Phase 4 Follow-Up, 2019, p. 4; Transparency International UK's Submission of Written Evidence to the Select Committee on the Bribery Act 2010, 11 July 2018, Section 2.2.
[118] Crime and Courts Act 2013, Schedule 17, Deferred Prosecution Agreements (on their applicability, including their applicability to corruption offenses, see Art. 26).
[119] Crime and Courts Act 2013, Schedule 17, Deferred Prosecution Agreements, Artt. 1–5 and 9; Serious Fraud Office (SFO), Deferred Prosecution Agreements Code of Practice – Crimes and Courts Act, 2013, Section 6.
[120] Crime and Courts Act 2013, Schedule 17, Deferred Prosecution Agreements, Art. 11.
[121] SFO, Deferred Prosecution Agreements Code of Practice – Crimes and Courts Act 2013, Sections 1 and 2.
[122] SFO, Deferred Prosecution Agreements Code of Practice – Crimes and Courts Act 2013, Sections 2.8 and 2.9.

acknowledgment of the company's guilt, but it does require an acknowledgment of the facts of the case, which are to be recorded in a "Statement of Facts" (Art. 5 Schedule 17).[123]

Every DPA must be approved by a court of law both once negotiations have begun and once the agreement has been concluded. In each case, the court verifies whether the proposed DPA is "in the interest of justice" and whether the terms and conditions are "fair, reasonable and proportionate" (Artt. 7 and 8 Schedule 17). This verification by the court is for the most part conducted in a closed session. However, the prosecuting authority is legally required to publish the DPA and the court's decision on its website.[124] The conclusion of a DPA does not exempt individual natural persons from criminal liability.[125]

By the end of 2019, five DPAs had been signed, namely with Standard Bank (2015), Sarclad Ltd (2016), Rolls-Royce (2017), Tesco (2017) and Serco Geografix Ltd (2019).[126] In none of these cases were there any convictions of individual natural persons.[127]

Another way of simplifying the settlement of proceedings besides DPAs is by a plea agreement. To reach such an agreement, the accused company first agrees with the prosecution authorities on certain points before eventually acknowledging its guilt and being convicted.[128] However, agreements regarding any specific penalty are not permitted, and the final decision on the case will remain with the court regardless of the terms of the agreement.[129] In the past, the plea agreement option was used in a number of major corruption cases.[130]

Consent orders (Art. 276 Proceeds of Crime Act) are yet another means of settling disputes and were used in particular before the introduction of DPAs.[131] In civil law such orders are a mechanism for recovering unlawfully acquired assets in which an accused company and the prosecuting authorities can reach an out-of-court settlement.[132]

4.4 Austria

4.4.1 Corporate Criminal Liability

Corporate criminal liability in Austria is governed by a special criminal law, the Act on the Accountability of Associations (*Verbandsverantwortlichkeitsgesetz*, VbVG) (effective January 1, 2006).[133] According to this law, a company is liable for any criminal offenses—Austria does not have a limited list of offenses—that have been committed by its decision-makers and their employees, either for the benefit of the company or in violation of the company's obligations (e.g., regarding its hazard monitoring and product governance duties). However, a company is liable for criminal offenses committed by employees only if the commission of the offense was made possible or essentially facilitated by the fact that decision-makers had failed to make the necessary technical, organizational or staffing ar-

[123] SFO, Deferred Prosecution Agreements Code of Practice – Crimes and Courts Act 2013, Section 6.
[124] Crime and Courts Act 2013, Schedule 17 Artt. 7 and 8; Corruption Watch Report, 2016, pp. 21 f.
[125] SFO, Deferred Prosecution Agreements Code of Practice – Crimes and Courts Act, Section 2.9.1.
[126] Current DPAs, https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/deferred-prosecution-agreements/ (last accessed: September 7, 2020).
[127] Financial Times, "Serco Will Be a Test of Whether SFO Can Get Convictions," and Corruption Watch Report 2016, p. 23.
[128] OECD Report UK Phase 4, 2017, Rz 150; OECD Report UK Phase 3, 2012, Rz 53 ff.
[129] OECD Report UK Phase 3, Rz. 56 f. and Attorney General's Guidance for Plea Discussions in Cases of Serious or Complex Fraud, 2012, A1 f., A9 and D9 ff.
[130] Transparency International Helpdesk, Deferred Prosecution Agreements, Plea Bargaining, Immunity Programmes and Corruption, 2017, p. 3.
[131] Art. 276 Proceeds of Crimes Act 2002.
[132] OECD Report Phase 3, 2012, Rz 65 ff.; C. Letzien, *Internationale Korruption und Jurisdiktionskonflikte, Wiesbaden, 2018,* pp. 258 f.
[133] Corporate Criminal Liability Act *(Bundesgesetz über die Verantwortlichkeit von Verbänden für Straftaten, or Verbandsverantwortlichkeitsgesetz, VbVG).*

rangements to prevent such offenses (Art. 3 VbVG).[134] The law provides for fines of EUR 50 to 1.8 million as sanctions for companies (Art. 4 VbVG). In practice, however, companies are rarely convicted.[135]

4.4.2 Special Procedures for Settlement

The public prosecutor's office may refrain from or withdraw from prosecuting a company if it considers prosecution and sanctioning to be unnecessary. This is particularly the case if investigations or prosecution requests would involve considerable effort that would be manifestly disproportionate to the gravity of the matter or to the sanctions to be expected if a conviction were handed down (Art. 18 VbVG). In addition, proceedings are to be discontinued if the "nuisance value of the offense" is low and a penalty does not appear necessary to deter the company from committing criminal offenses or to prevent others from committing criminal offenses (Art. 191 Criminal Procedure Code [*Strafprozessordnung*, StPO]). If, on the basis of sufficiently established facts, proceedings cannot be discontinued in accordance with Art. 18 VbVG or Art. 190 et seqq. StPO, prosecution must be discontinued under the "diversion" principle if the company pays compensation for the damage caused by the offense, eliminates other consequences of the offense and provides evidence of these measures without delay, and if the imposition of a fine is not considered necessary to deter the company from committing criminal offenses or to prevent others from committing criminal offenses (Art. 19 VbVG). A diversion involves the imposition of one of the following three measures on the company:

- A payment in money;
- A probationary period that may not exceed three years and may be combined with technical, organizational or staff-related measures with the consent of the company;
- The provision of charitable services that must be provided free of charge within a reasonable period not exceeding six months (Art. 19 VbVG).

In addition, the legitimate interests of the victims must be furthered to the maximum extent possible.[136] A diversion does not involve a guilty verdict but requires a thorough investigation of the facts. Once the imposed measures have been implemented, the public prosecutor's office will withdraw from criminal prosecution.[137] The discontinuation of the proceedings against the company, under both Art. 18 and Art. 19 VbVG, has no bearing on any proceedings against individual natural persons.[138]

In practice, there has been an increasing tendency in recent years for proceedings against companies to be discontinued; 2016 was the first year in which over 100 such proceedings were discontinued. Diversion in proceedings against companies, on the other hand, is rarely used.[139]

In addition to the above-mentioned mechanisms, cooperation and compensation for damages by companies are also taken into consideration in determining penalties. For example, penalties are mitigated if the company has contributed extensively to the establishment of the truth after the offense, has remedied the consequences of the offense and has taken considerable steps to prevent similar offenses in the future (Art. 5 VbVG). In addition, Austrian law offers the possibility of not enforcing a fine during a probationary period and, if necessary, imposing orders and prohibitions, and later waiving it entirely (Artt. 6 to 8 VbVG). In addition, Austrian law provides the option of not enforcing a fine during a probationary period and, if necessary, imposing obligations and prohibitions, and later waiving the

[134] Hilf/Zeder in: Höpfel/Ratz, *Wiener Kommentar zum Strafgesetzbuch,* 2nd ed., Art. 3 VbVG.
[135] BMJ, *Sicherheitsbericht 2017 – Bericht über die Tätigkeit der Strafjustiz,* pp. 30 ff.; N. Wess et al., *(Neben-)Folgen einer Verurteilung nach dem VbVG, Zeitschrift für Wirtschafts- und Finanzstrafrecht 2/2017,* p. 54.
[136] Oskar Maleczky, *Strafrecht, Allgemeiner Teil II, 2014,* p. 21.
[137] E. Steininger, *Verbandsverantwortlichkeitsgesetz,* 2nd ed., 2018, pp. 115 ff.
[138] Hilf/Zeder in: Höpfel/Ratz, *Wiener Kommentar zum Strafgesetzbuch,* 2nd ed., Art. 18 Rz 10 and Art. 19 Rz 13.
[139] BMJ, *Sicherheitsbericht 2017 – Bericht über die Tätigkeit der Strafjustiz,* pp. 31 f.; N. Wess, *(Neben-)Folgen einer Verurteilung nach dem VbVG, Zeitschrift für Wirtschafts- und Finanzstrafrecht 2/2017,* p. 54.

fine altogether (Artt. 6 to 8 VbVG). In all cases, a company is ordered to compensate for the damage "to the best of its ability" (Art. 8 para. 2 VbVG).

4.5 Italy

4.5.1 Corporate Criminal Liability

In 2001 a special decree was issued in Italy concerning corporate administrative criminal liability.[140] According to this decree, companies are liable to criminal prosecution for certain offenses, including corruption offenses, committed by their executives and their employees for the interest or benefit of the company if the companies cannot prove that they have made appropriate arrangements to prevent such offenses (Artt. 5 to 7 Decree No. 231/2001). In addition to fines, the law provides for other sanctions such as the prohibition of certain activities and the withdrawal of licenses (Art. 9 Decree No. 231/2001). However, in practice, companies are rarely convicted.[141]

4.5.2 Special Procedures for Settlement

The law enforcement authorities and the accused company can request a settlement (*patteggiamento*) before the court, which then decides whether to accept or reject the settlement.[142] A *patteggiamento* generally does not require acknowledgment of guilt.[143] If successful, a *patteggiamento* can relieve a company of up to one third of the penalty. Additional advantages in favor of the company can be agreed upon, such as a suspended sentence and the waiver of the penalty after five years, provided that the company commits no other similar offenses.[144] On the whole, the proceedings and specifics of the *pattegiamenti* are intransparent and rarely accessible to the public.

According to the OECD, *patteggiamenti* are the most important mechanism for prosecuting corruption in Italy and, given Italy's short statute of limitations, are the main "safety net" for holding companies accountable.[145] Accordingly, the few proceedings against companies that are conducted are almost all settled by *patteggiamenti*.[146]

In addition to *patteggiamenti*, cooperation and compensation for damages by the company are taken into consideration in determining penalties. For example, penalties are mitigated if the company has provided full compensation for damages before legal proceedings are initiated or has implemented a compliance program to prevent corruption offenses (Art. 12 Decree No. 231/2001).

4.6 Germany

4.6.1 Corporate Criminal Liability

German law does not yet[147] provide for corporate criminal liability.[148] Companies can be held accountable only under regulatory law (i.e., administrative criminal law) in accordance with the Act on Regulatory Offenses (*Ordnungswidrigkeitengesetz* [OwiG]), with fines of up to EUR 10 million. For this law

[140] Decree No. 231/2001 of June 8, 2001.
[141] OECD Report Italy Phase 3, 2011, Rz 50 f. and 61 ff.; OECD Report Italy Phase 3 Follow-Up, 2014, Rz 1.
[142] Artt. 444 to 448 of the Italian Criminal Procedure Code; Corruption Watch Report, Out of Court, Out of Sight, 2016, p. 27; OECD Report Italy Phase 3, 2011, Rz 93. Patteggiamenti are not only available to companies, but also to individual natural persons (OECD Report Italy Phase 3, 2011, Rz 93).
[143] Corruption Watch Report, Out of Court, Out of Sight, p. 27.
[144] OECD Report Italy Phase 3, 2011, Rz. 93 f.; Corruption Watch Report, Out of Court, Out of Sight, 2016, p. 27.
[145] OECD Report Italy Phase 3, 2011, Rz. 95 ff.; OECD, The Liability of Legal Persons for Foreign Bribery: A Stocktaking Report, 2016, p. 156.
[146] OECD Report Italy Phase 3, 2011, Rz. 50 and 95; Corruption Watch Report, Out of Court, Out of Sight, 2016, p. 27.
[147] On reform efforts in this area, see the next section.
[148] OECD Report Germany Phase 4, 2018, Rz 212 and 213.

to apply, a manager or executive must have committed company-related criminal offenses or administrative offenses (Art. 30 OwiG). The latter type of offenses also includes violations of a company's supervisory and control obligations (Art. 130 OwiG). Prosecution of regulatory offenses is at the discretion of the authorities (Art. 47 OwiG). Authorities exercise their discretion very differently, which is why there are considerable differences in application across the country.[149] On the whole, legal persons are rarely convicted and, if they are, receive only moderate sentences.[150] However, several Swiss banks have been ordered to pay heavy fines in Germany in recent years for aiding and abetting tax evasion and tax fraud.[151]

4.6.2 Special Procedures for Settlement

German law provides prosecuting and judicial authorities with considerable scope to settle cases without conviction at any stage of the proceedings, and almost entirely without setting any application criteria.[152] The only express provision is that the discontinuation of proceedings may not be made dependent on or relate to a payment to a charitable institution or other agency (Art. 47.3 OwiG). Consequently, the practice is inconsistent and uncertain.[153] Increasingly, the option of confiscating gains from criminal offenses is being used. This legal consequence can be imposed instead of a fine (Art. 29a OwiG).[154] It is imposed by a public prosecutor's office and is subject to review by a court. On the whole, the procedures are not transparent, and since they lack the necessary legal framework, they afford the authorities considerable discretion.[155]

Currently, reform efforts are underway in Germany. On April 21, 2020, the Federal Ministry of Justice and Consumer Protection published the draft of a new "Act to Strengthen Integrity in Business," the key element of which is the "Act on the Sanctioning of Association-Related Offenses."[156] Essentially, its adoption would mean the introduction of corporate criminal law.

According to this law, the prosecuting authorities are obliged to conduct criminal proceedings against a company if a predicate offense (*Anlassstraftat*) has been committed. However, the authorities have various options to refrain from prosecution. For example, they may, with the approval of the court, refrain from prosecution if they deem the offense to be of minor gravity and there is no public interest in prosecution (Art. 35 of the draft). The prosecuting authorities may also, with the approval of the court, temporarily refrain from initiating legal proceedings if they can impose obligations and requirements on the company that are likely to eliminate public interest in prosecution. In such cases, they set a time limit for the company to comply with the obligations and requirements. If the company does comply, prosecution is discontinued (Art. 36 of the draft). The consultation proceedings concerning the draft were completed in the summer of 2020.[157]

4.7 OECD

In 1997, the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (Anti-Bribery Convention, hereafter: "Convention") was signed. The signatory states, including Switzerland for the past 20 years, have committed themselves to taking the measures necessary to establish the liability of legal persons for bribing foreign public officials (Art. 2 Convention). In

[149] *Kölner Entwurf eines Verbandssanktionengesetzes,* University of Cologne 2017, pp. 14 f.; OECD Report Germany Phase 4, 2018, Rz 297.
[150] OECD Report Germany Phase 4, 2018, Rz 232 ff. and 245 ff.
[151] For example, Julius Baer paid a fine of EUR 50 million (Tagesanzeiger, November 14, 2011), Credit Suisse paid a fine of EUR 150 million (Frankfurter Rundschau, January 22, 2019) and UBS paid a fine of EUR 300 million (Süddeutsche Zeitung, July 29, 2014).
[152] OECD Report Germany Phase 4, 2018, Rz 222 ff., 233 ff. and 251 ff.
[153] OECD Report Germany Phase 4, 2018, Rz 236 ff., 249 ff. and 251 ff.
[154] OECD Report Germany Phase 4, 2018, Rz 224 ff. and 256.
[155] OECD Report Germany Phase 4, 2018, Rz 224 ff.
[156] Draft proposal by the Federal Ministry of Justice and Consumer Protection of April 20, 2020.
[157] https://www.noerr.com/de/newsroom/news/referentenentwurf-zum-verbandssanktionengesetz (last accessed: April 30, 2020).

addition, the Convention requires that bribery of foreign public officials be punishable by effective, proportionate and dissuasive penalties (Art. 3 para. 1 Convention). If a signatory state fails to hold companies criminally liable, it must ensure that companies are subject to effective, proportionate and dissuasive non-criminal sanctions, including monetary sanctions (Art. 3 para. 2 Convention). The bribe and the proceeds of the bribery should be seized and confiscated or monetary sanctions of comparable effect should be imposed (Art. 3 para. 3 Convention). In addition, each signatory state should consider providing for further civil or administrative sanctions (Art. 3 para. 4 Convention).

With regard to law enforcement, the Convention requires that investigative procedures must not be influenced by considerations of national economic interest, the possible effect on relations with another state or the identity of the natural or legal persons involved (Art. 5 Convention). No further requirements are set out in the Convention. Hence, it does not contain any specific requirements regarding special procedures for settlement. However, in the context of its country evaluations, the OECD regularly stresses the importance of efficient criminal prosecution and, related to this, the importance of suitable prosecution mechanisms.[158] In 2019, the OECD compiled a comprehensive report on the special procedures for out-of-court settlement used by the signatory states of the Anti-Bribery Convention to facilitate its enforcement. In it, the OECD once again stressed the great importance of these mechanisms for combating corruption[159] and defined "good practices," integrating its previous positions from its country evaluations. One such "good practice" is that companies are required to comply with certain conditions in return for sanction relief, including the elaboration and implementation of compliance programs to reliably prevent corrupt activities in the future.[160]

The OECD's recommendations on combating corruption, which are currently under revision, are likely to be extended to include instruments regarding special procedures for out-of-court settlement, given the importance that the signatory states and the OECD Secretariat attach to them.

[158] On the situation in Switzerland, see OECD, Implementing the OECD Anti-Bribery Convention, Phase 4 Report: Switzerland, 2018, Rz 78 ff.
[159] See Section 4.1.
[160] OECD, Resolving Foreign Bribery Cases with Non-Trial Resolutions, 2019.

5. Discussion of Legislation and Practice

5.1 Essential Guiding Principles

What are the essential guiding principles that govern the legislation and practice of corporate criminal liability and that legislation and practice must follow? Based on the current legislation in Switzerland, international guidelines,[161] international best-practice standards[162] and fundamental rule-of-law considerations, Transparency Switzerland adheres to the following:

- Legislation: Companies become liable to criminal prosecution if they are found to have failed to make all necessary and reasonable organizational arrangements to effectively prevent corruption, money laundering and other felonies and misdemeanors.

- Enforcement: Corporate criminal law is systematically and consistently enforced. To facilitate this, legislation and practice create incentives for offending companies to report themselves to the authorities and cooperate fully with the prosecuting authorities.

- Transparency: The procedures applied and the rulings and orders issued are transparent and accessible to the public.

5.2 Corporate Criminal Liability

5.2.1 Important Legislation, But Scope Too Narrow

The introduction of corporate criminal liability in Switzerland through Art. 102 para. 2 StGB was a milestone in preventing and combating corruption and other improper conduct. Not only did it close a loophole in criminal liability legislation, but it also created a mechanism for encouraging companies to take corruption and other improper conduct seriously and make appropriate arrangements to prevent it altogether. Its effects extend far beyond Switzerland's borders. Swiss companies are obliged under Swiss criminal law to prevent corruption and money laundering in their worldwide operations. If they fail to do so, they become liable to prosecution in Switzerland.

In principle, the provision of Art. 102 para. 2 StGB is a suitable means of holding companies criminally liable.[163] Unfortunately, however, its scope is limited to a small range of offenses, namely active corruption (bribery of Swiss or foreign public officials, granting advantages, bribery of private individuals), money laundering, organized crime and terrorism financing. It is regrettable[164] that it does not cover all other felonies and misdemeanors, including passive forms of corruption (e.g., when a private individual accepts a bribe), fraud and criminal mismanagement. Hence, in the vast majority of cases, the worst that can happen to a company is to risk becoming criminally liable for an offense under Art. 102 para. 1 StGB. However, the requirements for this subsidiary criminal liability—which applies only if the

[161] The most notable of these are the relevant OECD, Council of Europe and UN conventions.
[162] See OECD, Resolving Foreign Bribery Cases with Non-Trial Resolutions, 2019; Transparency International, Anti-Corruption Helpdesk, Deferred Prosecution Agreements, Plea Bargaining, Immunity Programmes and Corruption, Berlin 2017, which includes further information; in addition, the legislation of other countries (especially France and the United Kingdom), see Section 4.
[163] This is also the prevailing doctrine; see, e.g., Mark Pieth, *Ein Plaidoyer für eine Reform der strafrechtlichen Unternehmenshaftung,* Jusletter February 19, 2018; critically, Gunther Arzt, *Strafbarkeit juristischer Personen: Anderson, vom Märchen zum Alptraum, SZW 2002,* pp. 226 ff.
[164] To a large part, this is also the prevailing view in the literature; see, e.g., Franziska Plüss, *Der Patron verschwindet – die Verantwortung auch? ZStrR 2/2009,* pp. 221 f.

offense cannot be traced to any particular natural person owing to the company's inadequate organizational arrangements—are so high that companies rarely have to worry about criminal liability.

In the context of this report, corporate administrative criminal liability under Art. 7 VStrR is *de facto* irrelevant, if for no other reason than that it applies only to fines not exceeding CHF 5,000.

5.2.2 Sanctioning Issues and Insufficient Consideration of the Populations Who Have Been Stolen From

Another shortcoming of the provision of Art. 102 StGB is its punitive consequences. The maximum penalty is CHF 5 million, which is too low to be an effective deterrent. Moreover, in practice, the maximum penalty has never been imposed.[165] For this reason, the OECD is right to criticize Switzerland on both counts (legislation and practice).[166] The brief summary penalty orders, on the other hand, unfortunately do not provide any reliable information on conduct that might have a mitigating effect on sanctions. It is true that these orders do show that self-reporting and full cooperation with the authorities have a mitigating effect on sanctions. However, offending companies have no way of knowing whether this will also be the case in the future, which considerably diminishes the incentive to self-report.

What may act as a deterrent for companies is the confiscation of unlawfully acquired profits or demands for compensation. In practice, substantial compensation payments have been imposed in the past.[167] However, if the value of the unlawfully acquired assets is not particularly high, then confiscation or compensation claims alone will not have a sufficiently deterrent effect.

The criminal activities for which companies have been convicted under Art. 102 para. 2 StGB in the past—bribery of foreign public officials and money laundering—were all committed outside Switzerland. The main victims of these offenses were the populations of the countries in which the companies operated. Hence, it is unfair and objectionable that the fines and the unlawfully acquired assets, or the compensation payments, should benefit the federal or cantonal treasuries rather than the cheated populations of the affected countries. Neither the Swiss Penal Code[168] nor the Federal Act on the Freezing and the Restitution of Illicit Assets Held by Foreign Politically Exposed Persons provides for mechanisms to give due consideration to the populations that have actually been stolen from.[169] Unfortunately, Parliament recently rejected a motion that sought to rectify this unsatisfactory situation.[170]

5.2.3 Not Enough Convictions

Although corporate criminal liability has now existed for more than 17 years and concerns offenses that public prosecutor's offices are legally obliged to prosecute, there have been only a few convictions so far.[171] This is unsatisfactory in two respects: First, the contours of such offenses is still lacking in important areas. For example, the courts have not yet been able to establish exactly what constitutes inadequate organizational arrangements in order for a company to be held criminally liable under Art. 102 para. 2 StGB.[172] Second, the provision's behavior-directing function is severely undermined. Be-

[165] See Section 3.1.1.2.
[166] OECD, Implementing the OECD Anti-Bribery Convention, Phase 4 Report: Switzerland, 2018, Rz 94 ff.
[167] See Section 3.1.1.2.
[168] Unless the foreign state acts as plaintiff in Swiss proceedings under Art. 70 StGB, which is highly unlikely and actually has never happened.
[169] There is a federal law on the sharing of confiscated assets. However, this law has never been applied in an interstate context under Art. 102 StGB (according to written information from the Federal Office of Justice dated September 16, 2020) and is thus not suitable for actually considering cheated populations.
[170] 17.3547 Motion Sommaruga: *Rückführung von eingezogenen Korruptionsgeldern an die bestohlenen Bevölkerungen* [Restitution of confiscated corruption funds to the populations that have been stolen from].
[171] On the extremely limited case law, see Section 3.1.1.2.
[172] Stefan Trechsel/Marc Jean-Richard-dit-Bressel, *Art. 102, Schweizerisches Strafgesetzbuch Praxiskommentar,* 3rd ed. 2018, Rz 15; OECD, Implementing the OECD Anti-Bribery Convention, Phase 4 Report: Switzerland, 2018, pp. 29, 65. The summary penalty order against Gunvor at least shows some promise in this regard; on the Gunvor case, see Section 3.1.1.2.

cause there is very little reason for companies to be concerned about being held criminally accountable for illegal activities, they may be strongly tempted not to comply with the provision.

However, there is no dearth of corruption, money laundering and other serious crimes (see text box below). It should be remembered that the number of undetected cases of corruption and money laundering is very high.[173] Hence, the known cases represent only the tip of the iceberg.

Crime statistics on corruption and money laundering

In 2019, the cantonal police services recorded 1,772 cases of money laundering. Compared with the previous year, the number had risen by 547 offenses, an increase of almost 45 percent. Also in 2019, 145 criminal proceedings for money laundering were pending with the Office of the Attorney General, compared with 203 in the previous year. The Money Laundering Reporting Office Switzerland (MROS) received 7,705 suspicious activity reports in 2019. Compared with the previous year (6,126 in 2018), their number had thus increased by about 25 percent.

In 2019 and 2018, the cantonal police services recorded 12 and 18 corruption offenses, respectively. In 2019, 45 criminal investigations into international corruption were pending with the Office of the Attorney General, compared with 56 pending investigations in the previous year.

Source: Federal Statistical Office, Police Crime Statistics, 2019 Annual Report on Criminal Offenses Recorded by the Police; 2019 Annual Report of the Office of the Attorney General; 2019 Annual MROS Report.

5.2.4 Why There Are So Few Convictions

There are four major reasons that probably explain why Art. 102 StGB is rarely applied:

5.2.4.1 Corruption and Money Laundering Occur in the Shadows

The first reason is that corruption and money laundering offenses occur in the shadows. As a result, in the vast majority of cases, the prosecuting authorities never become aware of such offenses. Without sufficient initial suspicion, they have no power to investigate. As a consequence, indictments and verdicts are very rare. This makes self-reports by companies all the more important. With one single exception, however,[174] self-reporting has so far been virtually non-existent in Switzerland. The incentives for companies to report themselves are simply too weak for them to do so.[175] In addition, companies now face major legal uncertainties if they report themselves. Given the lack of provisions in criminal law and criminal procedural law, as well as the lack of proper guidance from the public prosecutor's offices, companies have no reliable information on the duration of proceedings, on sanctions or on the procedural and material advantages of self-reporting, full cooperation and effective improvements regarding compliance. Nor have previous rulings created any legal certainty on these points as yet.[176] In addition to self-reporting by companies, whistleblowers could also help significantly in disclosing wrongful practices and bringing them to the attention of prosecuting authorities. Most of the known cases of corruption have come to light thanks to whistleblowers.[177] However, the major problem in Switzerland is that whistleblowers are not sufficiently protected by law. They risk losing their jobs if they report to the prosecuting authorities and may even become liable to prosecution themselves as a result of their report.[178]

[173] Nicolas Queloz et al., *Processus de corruption en Suisse: Résultats de recherche, analyse critique du cadre légal et de sa mise en œuvre, stratégie de prévention et de riposte, Basel/Geneva/Munich 2000,* p. 450.
[174] Self-report of KBA-NotaSys, see Section 3.1.1.2.
[175] See Section 5.3.3.
[176] See Section 3.1.1.2 on the major differences in terms of duration of proceedings and sanction mitigation.
[177] See HTW Chur and Integrity Line, *Meldestellen in Schweizer Unternehmen: Whistleblowing Report 2018,* which includes further information. In cases of money laundering, suspicious activity reports (in accordance with the Money Laundering Act) to the Money Laundering Reporting Office Switzerland (and their referral to the prosecuting authorities) are used to uncover offenses. It is not unusual for corruption offenses to be detected following a report of suspected money laundering.
[178] Transparency Switzerland, *Korruption in der Schweiz, Bern 2015,* pp. 31 f.

5.2.4.2 Gaps in Criminal Liability Legislation

The second reason is that there are gaps in the legislation governing criminal liability.[179] As was shown in Section 5.2.1, in the case of direct corporate criminal liability as defined in Art. 102 para. 2 StGB the range of predicate offenses (*Anlassstraftaten*) is too limited. Consequently, in important critical circumstances, it is simply impossible to hold a company criminally liable.

5.2.4.3 Difficulties in Obtaining Evidence

The third reason is that evidence is difficult to obtain. There are considerable challenges involved in providing evidence owing to the elements of the offense defined by Art. 102 StGB. The prosecuting authorities must first present evidence that the predicate offense *(Anlassstraftat)* has been committed in the course of the company's business activities within the scope of its corporate purpose, which is challenging.[180] In addition, previous experience of the prosecuting authorities in dealing with cases of direct corporate criminal liability has shown that it is particularly challenging to prove that a company lacks the necessary organizational arrangements to prevent the offense of which it is accused.[181] Depending on the size, structure and activities of a company, individual cases can quickly prove to be complex. And if an offense is committed in a cross-border context, which tends to be the rule in cases of corruption and money laundering, additional issues are involved in providing mutual legal assistance. Such difficulties pose the risk that any proceedings may expire under the statute of limitations.[182]

5.2.4.4 Shortcomings by the Prosecuting Authorities

Finally, the sporadic application of Art. 102 StGB is also due to shortcomings on the part of the prosecuting enforcement authorities, in particular the Office of the Attorney General, which has jurisdiction over most cases of corporate criminal liability. Experts agree that the Office of the Attorney General should conduct more proceedings against companies.[183] Even in cases in which other countries pursued criminal proceedings against Swiss companies in the past, such proceedings were not always conducted in Switzerland as well, as far as can be ascertained.[184] In addition, it appears that the Office of the Attorney General—as far as can be ascertained—does not, or does not always, initiate proceedings against companies even if proceedings have already begun against members of their staff on suspicion of corruption.[185] And many of the (all too few) proceedings that have been initiated come to a standstill or are at risk of expiring under the statute of limitations.[186] What, then, are the problems?

- Experts estimate that, contrary to its own official statements,[187] the Office of the Attorney General clearly does not have sufficient human resources to conduct the highly demanding proceedings.[188] The currently pending large trial complexes Petrobras, 1MDB and FIFA alone are likely to absorb a large part of the existing resources. Insufficient resources are also a problem for the police and create practical constraints for criminal prosecution.[189]

[179] See also Ursula Cassani, *Droit pénal économique, Basel 2020,* p. 109.
[180] Alain Macaluso/Andrew M. Garbarski, *La résponsabilité pénale de l'entreprise après l'arrêt 'La Poste Suisse,' AJP 1/2017,* pp. 103 ff.
[181] OECD, Implementing the OECD Anti-Bribery Convention, Phase 4 Report: Switzerland, 2018, Rz 145.
[182] See also Georges Greiner/Irma Jaggi, *Vorbemerkungen zu Art. 358-362, Rz 28, Art. 358, Rz 46 ff., in: Basler Kommentar, Schweizerische Strafprozessordnung,* 2n ed., Basel 2014.
[183] Along these lines, also: OECD, Implementing the OECD Anti-Bribery Convention, Phase 4 Report: Switzerland, 2018, Rz 55.
[184] For example, in connection with the accusations of corruption against Novartis in the United States and Greece. Novartis has since paid USD 729 million to the American authorities in this case; see *Neue Zürcher Zeitung,* July 2, 2020.
[185] For example, in connection with corrupt arms deals in Russia, the Office of the Attorney General is conducting proceedings against individuals, but as far as is known, not against the company (Ruag); see, e.g., *Neue Zürcher Zeitung,* March 22, 2018.
[186] On proceedings that have come to a standstill, see, e.g., Mark Pieth and Markus Mohler in a joint guest commentary in *Neue Zürcher Zeitung,* June 6, 2020.
[187] OECD, Implementing the OECD Anti-Bribery Convention, Phase 4 Report: Switzerland, 2018, Rz 52.
[188] Critically, also: OECD, Implementing the OECD Anti-Bribery Convention, Phase 4 Report: Switzerland, 2018, 54, 55.
[189] OECD, Implementing the OECD Anti-Bribery Convention, Phase 4 Report: Switzerland, 2018, 54.

- In addition, there are organizational problems. Since its foundation, the Office of the Attorney General has been restructured several times. This ties up resources that are likely to be unavailable for its regular responsibilities, namely criminal prosecution. The last major restructuring was carried out in 2016. As part of this restructuring, the existing departments were scaled back and the unit specializing in international corruption was dissolved and replaced by what are now called ("ad hoc") task forces, which are created depending on the size of the individual case. It is doubtful whether the desired efficiency gains have actually been achieved in this way. Unfortunately—as far as can be ascertained—the Supervisory Authority for the Office of the Attorney General (*Aufsichtsbehörde über die Bundesanwaltschaft* [AB-BA]) no longer seems concerned with this problem, after it had previously expressed reservations shortly after the reorganization was implemented.[190] Most recently, there have been calls for the (re)introduction of a unit specializing in corruption abroad.[191] However, the criticism currently being voiced is much more fundamental. For example, a postulate (not yet submitted) has raised the question of whether the Office of the Attorney General might not experience general structural problems because of its unresolved problems and has called on the Federal Council to review the structure, organization, competence and supervision of the Office of the Attorney General.[192] In addition, a parliamentary initiative to reform the federal prosecuting authorities was recently submitted.[193] The audit commissions of the Federal Assembly shared these concerns in a recently published report on the supervisory relationship between the Office of the Attorney General and its Supervisory Authority. These commissions see a need for legislative intervention with regard to the organization of the Office of the Attorney General and to the organization, competence, mechanisms and resources of the Supervisory Authority for the Office of the Attorney General.[194]

- Another question is whether the Office of the Attorney General even has the necessary expertise to conduct the demanding proceedings. For one thing, numerous voluntary and involuntary departures of experienced prosecutors over the past few years[195] have resulted in a major loss of expertise. Also, critics have noted that there is a general lack of expertise, with young prosecutors lacking experience and older prosecutors failing to monitor the activities of their younger colleagues.[196]

- Over the past year and a half, all these issues have been overshadowed by the lingering concerns about the Attorney General himself.[197] These concerns have only recently led to his resignation after the Federal Administrative Court confirmed that he had repeatedly violated his official duties.[198] This affair not only has contributed that individual criminal proceedings in connection with the controversial payments in the run-up to the 2006 World Cup in Germany fell under the

[190] AB-BA Activity Report 2016, p. 10. In subsequent annual reports, the AB-BA no longer addresses this issue. The problems resulting from the reorganization have not gone unnoticed by the OECD: Implementing the OECD Anti-Bribery Convention, Phase 4 Report: Switzerland, 2018, Rz 60.
[191] Sonntagszeitung, June 13, 2020, interview with Paolo Bernasconi: *Es wird jahrelang ohne konkretes Ziel ermittelt.*
[192] 19.3570 Postulate Jositsch: *Überprüfung von Struktur, Organisation, Zuständigkeit und Überwachung der Bundesanwaltschaft: Eine parlamentarische Initiative der SVP-Fraktion* [Review of the structure, organization, competence and supervision of the Office of the Attorney General: A parliamentary initiative of the SVP parliamentary group]. Parliamentary Initiative 19.479 calls for reforms regarding the supervision of the Office of the Attorney General. The way the Office of the Attorney General is currently supervised is also criticized by Mark Pieth and Markus Mohler in a joint guest commentary in *Neue Zürcher Zeitung,* June 6, 2020.
[193] 20.474 Parliamentary Initiative Sommaruga: *Réforme pour des autorités de poursuite pénale fédérales renforcées et plus efficientes* [Reform for stronger and more efficient federal prosecution authorities].
[194] *Aufsichtsverhältnis zwischen der Bundesanwaltschaft und ihrer Aufsichtsbehörde,* Report of the audit commissions of the National Council and the Council of States of June 24, 2020, p. 60. Since then, the audit commissions have commissioned external reports on the restructuring of the Office of the Attorney General (*Schweizer Radio und Fernsehen, Tagesschau,* July 29, 2020).
[195] Moreover, the dismissed prosecutors were wrongly dismissed; see Der Bund, May 14, 2020, *Wie der erfolgreichste Bundesanwalt zum Buhmann wurde.*
[196] Sonntagszeitung, June 13, 2020, *Es wird jahrelang ohne konkretes Ziel ermittelt,* interview with Paolo Bernasconi.
[197] For an overview, see, e.g., *Neue Zürcher Zeitung,* May 20, 2020, *Eine Freistellung von Bundesanwalt Michael Lauber ist längst überfällig.*
[198] See *Neue Zürcher Zeitung,* July 29, 2020, *Bundesanwalt Michael Lauber tritt zurück.*

statute of limitations, but also has resulted in the authority itself suffering enormous damage both nationally and internationally owing to a loss of credibility.[199]

5.2.5 No Record in the Criminal Register

Criminal convictions against companies are not recorded in the Criminal Register.[200] This is unsatisfactory, and Switzerland is rightly criticized by the OECD.[201] A corporate criminal register would allow for a correct assessment of penalties for repeat offenses and would provide well-managed companies with a (good) reputational record.[202] A few years ago, the Federal Council intended to rectify this shortcoming,[203] but Parliament did not adopt the proposal.

5.3 Accelerated Proceedings and Summary Penalty Order Procedure

5.3.1 Benefits of the Two Procedures and the Role of Self-Reporting and Cooperation

In terms of procedural economy, these two procedures certainly offer great benefits. Particularly in complex white-collar criminal proceedings against companies, it is in the public interest as well as in the interest of the public prosecutor's office and the courts to reduce the workload of the judiciary. However, given the considerable challenges involved in providing proof,[204] the benefits are likely to be of an even more fundamental nature. Especially when it comes to complex white-collar criminal proceedings, and in particular proceedings against companies, the question is whether the issue is "merely" the excessive workload of the judiciary or whether the prosecuting authorities are generally overstrained with the demands of such cases.[205] If companies are to be held criminally accountable, it is likely that the judiciary will often have to rely on their support downright. This is true even for an initial suspicion. As indicated earlier, one of the main reasons for the very small number of convictions under Art. 102 StGB is probably that only one company has so far reported itself to the prosecuting authorities.[206] But even after having reported itself, a company's cooperation will often be a key factor in determining whether and to what extent evidence of its criminal accountability can be amassed. Given this, both the public and the public prosecutor's office have considerable interest in the two proceedings, which allow scope for negotiation and thus create incentives for cooperation. A factor that should not be underestimated is that such proceedings, if conducted efficiently and swiftly, also help to reduce the risk of expiry under the statute of limitations.[207] Not surprisingly, then, the very small number of convictions of companies to date have in all cases been made in the form of summary penalty order proceedings, and in some cases even in combination with accelerated proceedings.

These two simplified procedures also provide potentially major benefits from the perspective of the companies concerned. The companies are at lower risk of incurring damage to their reputation, because the two procedures attract less publicity than does the regular procedure—in particular, less publicity than does the main public hearing during the regular procedure. In addition, both procedures

[199] See, e.g., Aargauer Zeitung, March 4, 2020, *Affäre um Bundesanwalt Lauber: 'Ein Reputationsschaden für die Schweiz';* Finews.ch, July 31, 2020, *Fall Lauber: Kann die Schweiz 'Bundesanwalt'?*
[200] See Ursula Cassani, *Droit pénal économique, Basel 2020,* p. 134.
[201] OECD, Implementing the OECD Anti-Bribery Convention, Phase 4 Report: Switzerland, 2018, Rz 104 ff.
[202] See *Botschaft zum Strafregistergesetz vom 20. Juni 2014,* BBl 2014 5713 5720.
[203] In the context of the *Botschaft zum Strafregistergesetz vom 20. Juni 2014,* BBl 2014 5713 ff.
[204] See Section 5.2.4.3.
[205] See also Mark Pieth, *Schweizerisches Strafprozessrecht,* 3rd ed., Basel 2016, p. 260, which includes further information. On the reasons for the excessive demands placed on the judiciary, see Section 5.1.4.
[206] See Sections 3.1.1.2 and 5.2.4.1.
[207] See also Georges Greiner/Irma Jaggi, *Vorbemerkungen zu Art. 358-362, Rz 28, Art. 358, Rz 46 ff., in: Basler Kommentar, Schweizerische Strafprozessordnung,* 2nd ed., Basel 2014; 207 Franz Riklin, *Vorbemerkungen zu Art. 352-356, Rz 35, in: Basler Kommentar, Schweizerische Strafprozessordnung,* 2n ed., Basel 2014.

are designed to shorten proceedings, which not only reduces negative publicity for the companies but also helps to keep procedural and legal costs low, which is likewise in the companies' interest. It should be noted, however, that to date the Office of the Attorney General has concluded only two proceedings against companies swiftly, that is, within two years. In other cases against companies, it took the Office of the Attorney General much longer to reach a verdict, in some cases even up to eight years.[208] Finally, companies may hope for a lower penalty if they report themselves and cooperate fully.[209] Experience from antitrust law and criminal proceedings in other countries also shows that self-reporting and cooperation with the authorities are the most appropriate ways for offending companies to break free of illegal activities. Companies engaged in illegal operations often find themselves in a vicious circle: They can be blackmailed by their criminal business partners and must be prepared for a scandalous revelation at any time, such as by the investigative media, if they fail to "come clean." However, the key condition for self-reporting and full cooperation is that the law offers a sufficiently favorable legal framework for both these options (see Sections 5.3.2 and 5.3.3).

5.3.2 Rule-of-Law Deficiencies of the Two Procedures

Aside from these benefits, the accelerated proceedings and summary penalty order procedure are fraught with the following deficiencies in connection with the application of the rule of law:

- Except for prohibiting the use of statements according to Art. 362 para. 4 StPO, there are no legal parameters for possible agreements between the public prosecutor's office and the companies concerned. This gap in the legislation gives the public prosecutor's offices considerable scope, both in applying agreements (i.e., when and in which proceedings they conclude agreements) and in the specific scope of these agreements. From a rule-of-law perspective, this is problematic,[210] especially considering that even the very possibility of reaching an agreement in itself can be problematic, since such an arrangement can quickly conflict with key principles of criminal procedural law, especially the inquisitorial principle and the principle of compulsory prosecution. However, the public prosecutor's offices also have considerable scope in other areas, in particular with regard to how they conduct proceedings and, thus, the duration of proceedings.

- This wide scope makes it all the more important that the public prosecutor's offices, and above all the Office of the Attorney General, exercise their extensive discretion dutifully[211] and in a way that is reliable and predictable for those potentially concerned. Unfortunately, however, public prosecutor's offices have no publicly accessible guidelines, information sheets and explanations that specify the extent of this scope when applying and interpreting the agreements and the procedure, particularly with regard to self-reporting, full cooperation and effective compliance improvements, nor do any of the previously issued summary penalty orders provide any guidance on this matter. They are kept very brief and comprise only a few pages.[212] Hence there is a lack of uniformity and predictability in the application of the law.[213] Other authorities, such as WEKO and the Swiss Financial Market Supervisory Authority (Finma), on the other hand, have created legal certainty by publishing guidelines and information sheets describing their practice.[214]

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[208] See Section 3.1.1.2.
[209] See also Georges Greiner/Irma Jaggi, *Vorbemerkungen zu Art. 358-362, Rz 36, in: Basler Kommentar, Schweizerische Strafprozessordnung,* 2nd ed., Basel 2014; Mark Pieth, *Schweizerisches Strafprozessrecht,* 3rd ed., Basel 2016, pp. 269 f.
[210] This view is shared by the OECD, which has called on Switzerland to establish a transparent legal framework. See OECD, Implementing the OECD Anti-Bribery Convention, Phase 4 Report: Switzerland, 2018, p. 42.
[211] Most of the cases in question fall within the jurisdiction of the Office of the Attorney General.
[212] The summary penalty orders in question comprise 8, 11, 12, 13, 17, 19, 24 and 37 pages, respectively.
[213] On the different ways the summary penalty order procedure is applied, see Georges Greiner/Irma Jaggi, *Vorbemerkungen zu Art. 352–356, Rz 5b, in: Basler Kommentar, Schweizerische Strafprozessordnung,* 2nd ed., Basel 2014; for criticism of its inconsistent application, see Ibid., Vorbemerkungen zu Art. 358–362, Rz 38 ff. The uncertain legal situation is also criticized by the OECD, which has called on Switzerland to create a clear legal framework and ensure predictability. See OECD, Implementing the OECD Anti-Bribery Convention, Phase 4 Report: Switzerland, 2018, p. 42.
[214] See Section 3.2.4.2.

- Most of the proceedings that have been conducted so far have lasted far too long. With full cooperation, it should be possible to conclude proceedings within one to two years.

- Corporate criminal law is not usually concerned with petty offenses. In the simplified procedures used in corporate criminal law, too much decision-making power is thus concentrated in the hands of the public prosecutor's offices, especially when the public prosecutor's offices reach agreements with companies. In order to avoid the risk of "trading with justice"[215] and the risk of giving the impression that such trading might be going on, agreements made between a public prosecutor's office and an accused company should be subject to judicial review. It is worth remembering that in at least three of the nine cases to date, the Office of the Attorney General concluded even the accelerated proceedings by issuing summary penalty orders, thus making these cases exempt from judicial review. What is also troubling is that the public prosecutor's offices sanction even grave violations by companies by issuing summary penalty orders, meaning that such cases cannot be assessed by the courts, and the general public learns about the cases only after the fact, if at all.[216]

- The simplified procedures may unduly narrow the scope of investigations into the facts and lead to a violation of the inquisitorial principle. This entails the risk that essential facts may be concealed, with the consequence that the legal assessment may not be based on the actual facts of a case.[217] However, facts that have not previously been assessed by the public prosecutor's office can always be made the subject of a new investigation later on. This means that companies are taking risks if they try to keep certain facts secret.

- The simplified procedures suffer from a serious lack of transparency, even with regard to allowing public access to the decisions handed down.[218]

5.3.3 Insufficient Incentives for Self-Reporting and Cooperation

Except for one single case, legal practice has not yet been able to encourage offending companies to report themselves to the authorities. This situation probably results primarily from most of the aforementioned shortcomings of the two procedures. As a result, the consequences for companies of self-reporting and cooperation are essentially unpredictable, especially with regard to the duration of proceedings and sanctions.

In addition, the law does not provide for conditional exemptions from sanctioning as part of an agreement between a public prosecutor's office and a company if the necessary requirements are met (the only exception being reparation under Art. 53 StGB). However, the possibility of being exempt from prosecution is likely to be a major factor in encouraging companies to report themselves and cooperate with the prosecuting authorities. This is evident from experience in cartel law: According to WEKO, self-reporting was crucial in helping the authorities in the vast majority of cases uncovered by this commission in the past.[219] Experience with the mechanisms of amicable settlement and leniency programs provided by antitrust law indicates how criminal prosecution could function more effectively as well: These mechanisms could be used to uncover and prosecute a company's illegal activities that are otherwise difficult to detect, and cooperative companies in return could receive sanctions ranging

[215] Probably the most commonly raised objection in principle to agreement procedures is that they constitute a "trade in justice"; see Marc Thommen, *Kurzer Prozess – fairer Prozess? Strafbefehls- und abgekürzte Verfahren zwischen Effizienz und Gerechtigkeit, Bern 2013,* p. 149.
[216] See Sections 3.2.2.1 and 3.2.2.2.
[217] See Franz Riklin, *Vorbemerkungen zu Art. 352–356, Rz 5, Art. 352, Rz 1 ff., in: Basler Kommentar, Schweizerische Strafprozessordnung,* 2nd ed., Basel 2014; Georges Greiner/Irma Jaggi, *Vorbemerkungen zu Art. 358–362, Rz 41, in: Basler Kommentar, Schweizerische Strafprozessordnung,* 2nd ed., Basel 2014; Bertrand Perrin/Pascal de Preux, *Art. 360, Rz 5, in: Code de procédure pénale suisse, Commentaire Romand,* 2nd ed., Basel 2019. The drawbacks and risks of reducing the scope of an investigation of the facts are also put into perspective in academic teaching by fundamentally addressing the relationship between justice and truth; see Marc Thommen, *Kurzer Prozess – fairer Prozess? Strafbefehls- und abgekürzte Verfahren zwischen Effizienz und Gerechtigkeit, Bern 2013,* pp. 264 ff.
[218] See Section 5.6.
[219] See Section 3.2.4.2.

from leniency to a complete waiver of sanctions. In other countries, especially in France and the United Kingdom, we do not even have to refer to antitrust law. In these countries, sophisticated and well-balanced mechanisms for out-of-court settlement are now also in force in criminal law for proceedings against companies.[220]

5.4 Reparation

5.4.1 Benefits and Useful Approaches

The underlying rationale behind reparation according to Art. 53 StGB is well thought out. It makes sense not just to impose sanctions to address injustices that have been committed but also to consider other options for victim–offender mediation. One such way is reparation, in which the perpetrators pay compensation for the injustice they have committed. In addition, if the mechanism of reparation is used as intended, the popular complaint about an alleged two-tier system of justice in which the wealthy can buy their way out of punishment are not convincing. This is because when it comes to compensating for damages or making all reasonable efforts to remedy an injustice, the resources available to the accused individual must be taken into consideration, specifically his or her financial situation.[221] Hence, non-wealthy as well as wealthy individuals can benefit from the provision under Art. 53 StGB.[222]

Reparation offers some advantages for the offending companies. It allows them to avoid the far-reaching negative consequences of a conviction. They also benefit from a quicker and more discreet completion of proceedings, which tends to be less damaging to their reputation and usually entails lower procedural and legal costs.[223] The reparation provision is also beneficial for the authorities, because their workload may be smaller than it would be if they conducted full criminal proceedings and because resources are not tied up for as long as they would be in lengthy proceedings that in some cases progress through several higher courts. In addition, the reparation provision makes it possible to hold companies accountable even when evidence is weak.[224]

5.4.2 Limited Applicability in the Corporate Context

Despite these benefits and useful approaches, reparation in its current form under Art. 53 StGB is limited in its applicability to companies.[225] The following aspects are particularly problematic:

- Attempts to apply the reparation provision in cases of direct corporate criminal liability (Art. 102 para. 2 StGB)[226] are likely to fail in many cases because the requirement that there must be little public interest in prosecution is rarely met. In fact, such cases quickly turn out to be instances of serious white-collar crime. In such a situation, it is highly unlikely that the public would have little interest in criminal prosecution.[227]

[220] See Sections 4.2 and 4.3. The same is particularly true for the United States; on the mechanisms available in United States law, see https://www.justice.gov/criminal-fraud/corporate-enforcement-policy (last accessed: September 7, 2020).
[221] Jürg-Beat Ackermann/Reto Weilenmann, *Wiedergutmachung (Art. 53 StGB) – "Freikauf" oder Anreiz zum Fehlermanagement? In: Jürg-Beat Ackermann/Marianne Johanna Hilf (eds.), Kurzer Prozess, zu kurzer Prozess – im Wirtschaftsstrafverfahren, Zurich 2019,* pp. 46 f.
[222] Franz Riklin, Art. 53, *Basler Kommentar Strafrecht, Basel 2018,* Rz 11, 24.
[223] Sonja Pflaum, *Die Erledigung von Strafverfahren gegen Unternehmen durch Wiedergutmachung,* GesKR 1/2019, pp. 122 f.
[224] As practiced by the Public Prosecutor's Office of the Canton of Geneva. See also Sonja Pflaum, *Die Erledigung von Strafverfahren gegen Unternehmen durch Wiedergutmachung,* GesKR 1/2019, pp. 120 f.
[225] The OECD is even more critical, demanding that the reparation provision not be applied to natural persons either (in the context of bribery of a foreign public official). See OECD, Implementing the OECD Anti-Bribery Convention, Phase 4 Report: Switzerland, 2018, pp. 42.
[226] In practice, cases of subsidiary corporate liability under Art. 102 para. 1 StGB are extremely rare.
[227] See also Marcel Niggli/Diego R. Gfeller, *Basler Kommentar Strafrecht, Art. 102, Basel 2018,* Rz 344.

- Another problem that prevents the application of the reparation provision in the context of corporate criminal liability, particularly in the case of Art. 102 para. 2 StGB, is that some essential conditions for exemption from criminal liability are not met. Given the gravity of the offenses in question, additional conditions would have to be met besides reparation and acknowledgment of the facts in order for the offending company to be deemed exempt from sanctions. For example, the company would have to provide substantial assistance in establishing the facts of the case (self-reporting and full cooperation with the prosecuting authorities). In addition, the relevant legislation would have to provide, among other things, certain obligations that would prevent further offenses and to require authorities to monitor a company's compliance with these obligations and requirements. Such conditions and requirements as a prerequisite for a possible exemption from sanctions have been well established and have been tried and tested both in Swiss antitrust law and in the legal practices of other countries.

- The public prosecutor's offices have extensive discretion in determining whether the conditions for applying Art. 53 StGB are met. They are obliged to exercise this discretion in accordance with their duties. In addition, as in the accelerated proceedings and the summary penalty order proceedings, those potentially concerned should have a clear understanding as to when proceedings are discontinued in accordance with Art. 53 StGB. However, as with the accelerated and summary penalty order proceedings, there are no publicly accessible guidelines, information sheets and comments available concerning the application practice regarding the reparation provision. Even the few cases in which the reparation provision has been applied fail to provide any clarification in this respect. Among these cases, the most prominent have been those handled by the Public Prosecutor's Office of the Canton of Geneva, where, despite accusations of corruption in Africa, the companies in question made reparation payments not to the countries concerned but to the Geneva treasury. This has little to do with the intended victim–offender mediation provided for in the provision and thus is improper.[228]

- The procedures for the application of reparation suffer from a considerable lack of transparency.[229]

5.5 Antitrust Law: Effective Detection of Cartels Thanks to Self-Reporting, Cooperation and Procedural Certainty

The situation in antitrust law stands in striking contrast to the unsatisfactory situation of corporate criminal liability and reparation. Amicable settlement (an agreement between the WEKO Secretariat and the companies involved) and leniency programs (a reduction or even a waiver of sanctions if the company in question participates in the detection and elimination of the restraint of competition) are widely used in practice.[230] The reduction or even waiver of sanctions associated with the two mechanisms motivates companies to assist in the detection and elimination of cartels.[231] According to WEKO, in the vast majority of the cases it has handled, the authority has received crucial assistance through self-reporting.[232] This is further helped by procedural certainty. Unlike the prosecuting authorities, the WEKO Secretariat has issued information leaflets and comments on amicable settlement and leniency programs[233] that specify the applicable legal provisions and offer companies clarity about the prevailing application practice.

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[228] See also Rainer Angst/Hans Maurer, *Das 'Interesse der Öffentlichkeit' gemäss Art. 53 lit. b StGB: Versuch einer Konkretisierung,* forumpoenale 2008, pp. 373 ff.; cf., however, Franz Riklin, *Art. 53, Basler Kommentar Strafrecht, Basel 2018,* Rz 17.
[229] See Section 5.6.3.
[230] See Section 3.2.4.2.
[231] Fabio Babey/Damiano Canapa, *Die Bonusregelung im Schweizer Kartellrecht,* SJZ 112 (2016), p. 513.
[232] See Section 3.2.4.2.
[233] See especially *Merkblatt des Sekretariats der WEKO, Einvernehmliche Regelungen* of February 28, 2018; *Merkblatt und Formular des Sekretariats der WEKO, Bonusregelung (Selbstanzeige)* of September 8, 2014; *Erläuterungen zur Sanktionsverordnung (SVKG).*

The companies thus effectively contribute to the detection and elimination of cartels and serve to enforce antitrust law.[234] Thanks to the cooperation of the company or companies concerned, which is closely linked to the mechanisms, the work of the authorities in investigating the facts of the case is significantly facilitated, allowing for a speedier completion of proceedings and helping to save human and financial resources. The latter also holds true for the companies concerned: Antitrust law proceedings are cost-intensive, damage the reputation of the companies and tie up resources, which is why an efficient completion of the proceedings is also in the interest of the companies.[235] By significantly increasing the likelihood that cartels will be detected, the two mechanisms also have the potential effect of preventing the formation of cartels.[236]

A problematic aspect, however, is that antitrust law permits a limited investigation of the facts of a case. This creates the risk that essential facts may remain hidden, with the consequence that the legal assessment may not be based on the actual circumstances.[237]

5.6 Judicial Transparency

5.6.1 Judicial Publicity as a Pillar of the Rule of Law and Democracy

The principle of judicial publicity and the resulting rights of the population to information are of crucial importance for the rule of law and democracy. They ensure transparency in the administration of justice, which is a prerequisite for democratic control of the judiciary by the people and implies the rejection of any form of secret cabinet justice. Without judicial publicity, it would be impossible to determine whether the judiciary unduly discriminates against or privileges individual parties to proceedings, and criticism of unilateral or questionable investigative activities or inadequate conduct of proceedings would be out of the question.[238]

In view of this paramount role of judicial publicity, the existing mechanisms for its implementation are eminently important. Unfortunately, however, the existing mechanisms have serious shortcomings. Most of them are not limited to proceedings against companies but are of a general nature. The four shortcomings described below are the most important.[239]

5.6.2 Serious Lack of Transparency in Summary Penalty Order Proceedings

As previously mentioned, almost all criminal proceedings that have not been discontinued are settled by a summary penalty order (in the context of Art. 102 StGB, all such proceedings are settled this way without exception),[240] and the summary penalty order proceedings take place in closed session and largely go unnoticed by the public. This makes it all the more troubling that a considerable lack of transparency remains even after the proceedings have been completed.[241] The public has unrestricted access to the summary penalty orders only during an ongoing appeal or objection period.[242] The condition for gaining access, however, is that the public must learn about the summary penalty order early enough, which is impossible in all but a few exceptional cases.[243] After the period for legal remedies or appeals has expired, it is unclear whether and to what extent the individual public prose-

[234] Patrick Krauskopf, *Art. 49a, Kartellgesetz Kommentar, Zurich/St. Gallen 2018,* Rz 68.
[235] Carla Beuret, *Art. 29, Kartellgesetz Kommentar, Zurich/St. Gallen 2018,* Rz 1, 5; Manuela Rapold, *Kartellrechts-Compliance, Bern 2016,* p. 172.
[236] Seraina Denoth, *Kronzeugenregelung und Schadenersatzklagen im Kartellrecht, Zurich/St. Gallen 2012,* pp. 83 f.
[237] See also Carla Beuret, *Die Einvernehmliche Regelung im Schweizerischen Kartellrecht, Zurich/St. Gallen 2016,* Rz 266.
[238] This view is supported by the Federal Court (BGE 137 I 16 E. 2.2).
[239] The problem areas mentioned in the following have essentially also been highlighted by the OECD; see OECD, Implementing the OECD Anti-Bribery Convention, Phase 4 Report: Switzerland, 2018, Rz 114.
[240] See Section 3.3.
[241] See also OECD, Implementing the OECD Anti-Bribery Convention, Phase 4 Report: Switzerland, 2018, Rz 80 f.
[242] See Section 3.3.
[243] For example, if the public prosecutor's office makes an exception and notifies the public because of the special importance of the case, which is at its discretion.

cutor's offices will allow access to the summary penalty orders. As a rule, access is likely to be granted in anonymized form, but this is not guaranteed. Another shortcoming is that the summary penalty orders are not included in publicly accessible judgment databases, not even those that exceed petty and mass crimes.[244] The result of this is that interested parties must submit requests for access to every public prosecutor's office that has issued a summary penalty order (which includes the Office of the Attorney General and the 26 cantonal public prosecutor's offices!). In general, the public prosecutor's offices can electronically filter out convictions only according to specific elements of offenses in the Specific Provisions of the Criminal Code and thus not the convictions according to Art. 102 StGB. The consequence is that these offices are usually either unable[245] to provide information on the previous applications of Art. 102 StGB or must rely on the individual memory of their employees.[246] The Public Prosecutor's Office of the Canton of Geneva even left repeated relevant requests for information from Transparency Switzerland entirely unanswered. All these restrictions make it extremely difficult, if not impossible, to obtain a reliable overview of the case law, not to mention to review it.

5.6.3 Serious Lack of Transparency Regarding Discontinuation and Dismissal Orders

The lack of transparency is even more pronounced in the case of discontinuation and dismissal order proceedings, including proceedings involving application of the reparations provision, than in the case of summary penalty order proceedings. In addition to precisely the same shortcomings as in the summary penalty order proceedings, there are three more:

- Interested parties must demonstrate a legitimate interest in obtaining information in order to be able to access discontinuation and dismissal orders.[247]
- In addition, accessing the information must not conflict with any overriding public or private interests.[248]
- The public prosecutor's offices do not usually[249] classify the discontinuation and dismissal orders they have issued according to specific offenses defined in the Criminal Code, meaning that they are unable, for example, to filter out electronically the discontinuation orders issued in application of Art. 53 StGB in conjunction with Art. 102 StGB.

These hurdles make systematic public control of the procedural discontinuation practices of the public prosecutor's offices downright impossible. Given the immense power of the public prosecutor's offices to discontinue or dismiss proceedings—when public prosecutor's offices discontinue criminal proceedings without the necessary conditions being met, no one except the parties directly involved in the proceedings can take legal action against them—this situation is extremely objectionable.

5.6.4 Serious Lack of Transparency Regarding Cantonal Court Rulings

Getting an overview of and monitoring cantonal case law is very laborious because there is no central publicly accessible judgment database. This is further complicated by the fact that the existing cantonal online databases are largely limited to the case law of the higher courts.[250]

[244] See Section 3.3.
[245] This has been the case with the Public Prosecutor's Office of the Canton of Ticino.
[246] This has been the case with the public prosecutor's offices in Bern, Zug and Zurich. It took the Office of the Attorney General several weeks to respond to a request for access submitted by Transparency Switzerland, and the response it eventually sent was incomplete. At least one relevant decision was not included in it, which Transparency Switzerland was able to discover thanks to the OECD Country Report Switzerland, Phase 3. This outcome seems to suggest that the Office of the Attorney General must also rely on the (incomplete) memory of its employees.
[247] See Section 3.3. The Federal Court recognizes that media producers have a legitimate interest in information because of the controlling function of the media (BGE 137 I 16 E. 2.4).
[248] See Section Ziff. 3.3.
[249] Requests for information were submitted to the cantons of Zurich, Zug, Bern, Ticino and Geneva.
[250] See Section 3.3.

5.6.5 Incomplete Statistics

The existing statistical data are incomplete in several respects. For example, the national judgment statistics and the statistics of offenses registered by the police unfortunately do not include offenses under the General Provisions of the Criminal Code and thus do not include information on Art. 53 StGB (reparation) and Art. 102 StGB (corporate criminal liability).[251] Equally unfortunate is the fact that no statistics exist to date on the number of discontinuation and dismissal orders according to specific offenses, and that no public statistics are kept on the value of assets seized or confiscated in connection with corruption offenses, nor on any reparation payments made in such cases.

[251] See Section 3.3.

6. Conclusion: Significant Shortcomings in All Areas

This report shows that there are significant shortcomings in all of the areas examined. These shortcomings concern the existing legislation in criminal and procedural law, the enforcement of this (incomplete) legislation, and the transparency of proceedings against and convictions of companies.

6.1 Incomplete Legislation in Criminal and Procedural Law

First, the penal provision of Art. 102 StGB itself is incomplete. In its essential form—direct corporate criminal liability according to Art. 102 para. 2 StGB—it is limited to an unduly narrow range of offenses. The maximum fine of CHF 5 million is too low to have a deterrent effect, and there are no effective mechanisms to ensure that the population of the states affected by the offenses—usually the main victims of the crimes—receive a fair share of the unlawfully acquired profits or of the compensation payments.

However, shortcomings also exist in the legislation on special procedures for settlement: The two simplified procedures—the summary penalty order procedure and the accelerated proceedings—do not allow for a waiver of a conviction under certain circumstances, although this would be an important incentive for companies to report themselves and cooperate fully with the prosecution authorities. In addition, these special procedures suffer from rule-of-law deficiencies. For example, there is no legal framework specifying the scope and details of agreements between prosecuting authorities and offending companies. Nor is there any guarantee that agreements that have been reached must be approved by the courts; the summary penalty order procedure is concluded by the public prosecutor's offices themselves, and it is a matter of dispute whether involvement of a court is mandatory in accelerated proceedings. Another unclear and disputed question is whether the summary penalty procedure is also admissible in cases of serious corporate crimes. In a corporate context, the reparation provision (Art. 53 StGB) is applicable only to a limited extent. In cases of serious predicate offences *(Anlasstaten)*, it is unlikely that the public will have no interest in prosecution. In addition, important requirements for exemption from criminal liability are not met in cases where serious offenses have been committed, such as the imposition of conditions on an offending company in order to prevent future offenses.

6.2 Inadequate Enforcement

Although the legislation on corporate criminal liability has been in force since 2003, only a few companies have since been finally convicted. This is due not only to the incompleteness of the legislation, but also to major failures in its enforcement. The public prosecutor's offices have failed to close the existing legal loopholes by means of guidelines, information sheets and commentaries, as a result of which the application of the law has been neither consistent nor predictable. However, predictability and legal certainty are likely to be particularly important prerequisites for companies to report themselves and cooperate with the prosecuting authorities. Hence, it should not come as a surprise that with one exception, there have been no cases of self-reporting. This situation is aggravated by the excessive duration of the proceedings (up to eight years), which is a considerable burden for accused companies. In addition, there are shortcomings on the part of the prosecuting authorities themselves, in particular the Office of the Attorney General, which has jurisdiction over most of the proceedings in question. Among other things, it has insufficient resources to conduct the demanding proceedings

against companies and has been faced with organizational issues and problems. Overall, the prosecution authorities have so far not prosecuted violations of Art. 102 StGB as consistently as they ought to, even though the offense defined in this provision is one that authorities are legally obliged to investigate and prosecute. In some cases, the reparation provision (Art. 53 StGB) has been applied in excess of, and thus in contravention of, its intended purpose.

6.3 Serious Lack of Transparency

In addition to the shortcomings in legislation and enforcement, there is a serious lack of transparency. All previous convictions of companies were handed down in summary penalty order proceedings, which are not open to the public while they are ongoing. Moreover, unrestricted public access to the summary penalty orders is provided only on request and only for a period of a few days. After this period—as in the case of discontinuation and dismissal orders, including the discontinuation of proceedings according to the reparation provision (Art. 53 StGB)—there will be additional hurdles to be overcome in addition to those mentioned above in order to obtain access to the judgments (demonstration of a legitimate interest and no conflict with overriding public or private interests). Whereas the case law of the Federal Supreme Court and the Federal Administrative Court is publicly accessible through an electronic judgment database (usually, however, only in anonymized form), there are still major differences between the cantons with regard to the publication of case law. The available statistical data on the judicial practice at the national and cantonal levels are incomplete as well.

7. Need for Action and Demands

7.1 Considerable Need for Action in All Areas

Given the significant shortcomings described in the previous sections, there is an urgent need for action. Based on the analysis presented in this report, and in line with the effective antitrust legislation and practice as well as the international best practice standards[252] and existing legislation on corporate criminal liability in other countries, this section outlines the specific need for action, along with the most important demands concerning the necessary improvement measures. Section 7.2 summarizes all the important demands in a clearly arranged ten-point checklist. The demands build on the existing legislation and practice in Switzerland and take into consideration the special characteristics of the Swiss context. They can be implemented effectively with reasonable effort.

As a first step and in a low threshold approach, corrective measures on the enforcement level should be introduced, which in itself can lead to significant improvements. The public prosecutor's offices should systematically prosecute violations of Art. 102 StGB. In addition, the existing (albeit limited) scope for sanctions should be exhausted (more than in the past), which would at least have a certain deterrent effect. If there is a reasonable suspicion of corruption, money laundering and violations of Art. 102 StGB, companies should contact the prosecuting authorities on their own initiative and cooperate fully with them. It is important, however, that companies that report themselves, cooperate fully with the public prosecution authorities and improve their compliance be rewarded with significant reductions in sanctions. This should serve as a major incentive for the offending companies to cooperate better with the public prosecution authorities and thus help to ensure that their wrongdoing can be uncovered and sanctioned. For this to be accomplished, however, the public prosecutor's offices should prepare publicly available guidelines, information sheets and commentaries, thereby ensuring a consistent and predictable practice regarding corporate criminal liability, and particularly regarding the applicable types of procedures, the duration of proceedings, the sanctions, the discontinuation of proceedings, as well as self-reporting and cooperation by companies. Similar information sheets have been successfully used by other authorities, such as WEKO and the Financial Market Supervisory Authority Finma. The public prosecutor's offices should also always take serious corporate offenses and agreements reached with the offending companies before the courts for judicial assessment. Policymakers should provide the public prosecutor's offices with sufficient resources so they can conduct the often complex proceedings in the first place.

However, in order to improve the situation thoroughly and with lasting effect, legal adjustments are necessary in addition to the improvements in enforcement. From a rule-of-law perspective, the lack of legislation on important parameters of criminal law is problematic. For example, there is an urgent need for clarity in the legislation on the possible scope and contents of agreements between the prosecuting authorities and the offending companies and, under certain strict conditions, on the possibility of exempting offending companies from sanctions. The Office of the Attorney General has already submitted a proposal to this effect, which is sound in many respects and is in line with international best-practice standards regarding these points: Under certain circumstances and provided that certain conditions are met, it should be possible to suspend prosecution and, if those conditions are met for a period of time to be determined, to refrain from prosecution altogether. Experience from antitrust law, as well as the international best-practice standards and provisions in other countries, show that this possibility of exemption from sanctions is a major incentive for offending companies to report themselves and cooperate fully with the authorities, which plays a crucial role both in the detection of offenses that are difficult to uncover and prove, such as corporate crimes, and for holding the compa-

[252] OECD, Resolving Foreign Bribery Cases with Non-Trial Resolutions, 2019; Transparency International Helpdesk, Deferred Prosecution Agreements, Plea Bargaining, Immunity Programmes and Corruption, Berlin 2017, with further information.

nies concerned accountable. However, there are some important points in the Office of the Attorney General's proposal that need to be improved. In particular, the aim should be to ensure that no further power is concentrated at the public prosecutor's offices and that all agreements reached between the public prosecutor's offices and the accused companies must be approved by the courts.

Moreover, only a legislative adjustment can close the existing loophole in criminal liability, namely an extension of the range of predicate offenses in Art. 102 para. 2 StGB. In order to provide greater incentives for self-reporting and full cooperation by offending companies, legislation should also stipulate that the summary penalty order procedure and the accelerated proceedings can be applied only in cases where companies report themselves and subsequently cooperate fully, or in cases where companies at least cooperate fully. In addition, legal clarity should be established on other existing shortcomings of the summary penalty order procedure and accelerated proceedings: It should not be permissible for serious violations by companies to be settled by summary penalty orders, and agreements should be possible only as part of accelerated proceedings, which in turn should always be concluded by a court that has assessed whether the agreements are in accordance with legal requirements. Further, the legal maximum fine should be increased, and there should be a way for the population of the states that have been stolen from to share in the illegally acquired assets that have been confiscated. Most of the prevailing transparency issues can be remedied only through legal adjustments as well, and this also applies to the elimination of the organizational shortcomings at the Office of the Attorney General. A legislative amendment is also needed to provide better protection for whistleblowers—in addition to self-reporting by offending companies, they play a crucial role in uncovering corporate wrongdoings.

7.2 Improving Corporate Criminal Law: Ten Demands

Public Prosecutor's Offices

1. The Office of the Attorney General and the cantonal public prosecutor's offices should systematically prosecute violations of Art. 102 StGB and issue standardized guidelines and information sheets on their practice of applying Art. 102 StGB and, in this context, on their practice of using the summary penalty order procedure, the accelerated proceedings and reparation. In doing so, they should, among other things:

    - Define the criteria for choosing the appropriate procedure and declare that they will settle only minor to moderately serious corporate crimes by summary penalty orders (with a maximum fine being set for summary penalty orders) and that they will never settle accelerated proceedings by a summary penalty order themselves, but will submit the indictment to the competent court;

    - Define the conditions and outline the permissible scope and contents of agreements between the public prosecutor's offices and the offending companies and declare that they will enter into agreements with offending companies only in accelerated proceedings;

    - Determine which industry-specific best-practice standards they recognize as appropriate for achieving compliance by companies in the context of Art. 102 para. 2 StGB;

    - Establish the criteria for conducting proceedings and declare that they will conclude proceedings against companies within one or two years if the companies fully cooperate with them;

    - Define the criteria for their sanctioning practice (fines, confiscation and compensation claims) in order to utilize the existing (albeit limited) range of sanctions available more consistently than in the past and to offer offending companies significant reductions in sanctions

as a reward for self-reporting, fully cooperating with the public prosecution authorities and improving their compliance;

- Apply the reparation provision (Art. 53 StGB) in connection with corporate criminal liability with moderation; if they still choose to apply this provision, they should only recognize reparation payments made to the actually aggrieved parties and to organizations acting on behalf of the aggrieved parties;

- Create the greatest possible degree of transparency regarding their practice to the extent permitted by law.

Politics and Administration

2. Corporate criminal liability under Art. 102 para. 2 StGB should no longer be limited to the narrow range of predicate offenses currently covered by this provision (active forms of corruption, money laundering, organized crime, terrorist financing), but should be extended to include the full range of felonies and misdemeanors.

3. Legislation should establish,

   - That the summary penalty order procedure and the accelerated proceedings may only be used when companies report themselves and subsequently cooperate fully, or at least when the companies concerned cooperate fully;

   - That the public prosecutor's offices may settle only minor or moderately serious corporate offenses by summary penalty orders;

   - That agreements between public prosecutor's offices and offending companies are permissible only in accelerated proceedings;

   - That accelerated proceedings may never be settled by a summary penalty order and that the indictment must always be submitted to the competent court;

   - The conditions and permissible scope of agreements between the public prosecutor's offices and the offending companies.

4. Under strict conditions, it should be possible to exempt offending companies from penalties. The "Deferment of Prosecution in Criminal Proceedings Against Companies" model proposed by the Office of the Attorney General provides a useful basis for discussion in this regard. However, this model still needs to be improved, particularly with respect to the following points:

   - It should only be applicable to cases in which a company has reported itself to the authorities and has not previously been convicted;

   - The rights of private plaintiffs should be protected;

   - The agreement between the public prosecutor's office and the offending company should require the approval of a court.

5. The maximum fine of CHF 5 million should be increased to an appropriate scale. In addition, an effective mechanism should be created to enable the affected country's population that has been stolen from to receive an appropriate share of the confiscated unlawfully acquired assets or of the compensation payments, if this population has suffered damages as a result of the company's criminal activities.

6. Criminal convictions of companies should be recorded in the criminal register.

7. Legal bases should be established to improve the transparency of the criminal justice system as follows:

   - Access to summary penalty orders, discontinuation and dismissal orders, including discontinuation orders issued in the application of the reparation provision, should be granted without proof of a legitimate interest;

   - Summary penalty orders, suspension orders and dismissal orders, not including orders issued in cases of petty and common offenses, should be recorded in publicly accessible judgment databases;

   - A central, publicly accessible judgment database on cantonal case law should be created;

   - Statistical records should be kept of 1) judgments based on Art. 102 StGB; 2) discontinuation and dismissal orders, classified according to the individual offenses in connection with which they were issued; and 3) the value of assets seized or confiscated in connection with corruption offenses, or the amounts of the compensation and reparation payments made.

8. Legal protection of whistleblowers should be improved.

9. An assessment should be made as to which legal and internal adjustments to the structure, jurisdiction, organization and supervision/independence of the Office of the Attorney General are necessary or expedient to improve enforcement of corporate criminal law. In addition, the Office of the Attorney General should be provided with more resources in order to better be able to conduct the demanding and complex proceedings against companies.

Companies

10. The companies should practice a culture of zero tolerance of corruption and money laundering and take the necessary measures to adopt such a culture. As soon as they have a reasonable suspicion of violations of Art. 102 StGB, they should contact and fully cooperate with the prosecuting authorities.

8. Annex

8.1 Legal provisions

8.1.1 Swiss Criminal Code (Excerpt)

Art. 53 Reparation

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. a suspended custodial sentence not exceeding one year, a suspended monetary penalty or a fine are suitable as a penalty;
b. the interest in prosecution of the general public and of the persons harmed are negligible; and
c. the offender has admitted the offence.

Title seven: Corporate Criminal Liability – Art. 102 Liability under the criminal law

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

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

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

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

a. any legal entity under private law;
b. any legal entity under public law with exception of local authorities;
c. companies;
d. sole proprietorships.

8.1.2 Bundesgesetz über das Verwaltungsstrafrecht (Excerpt), not available in English

Art. 7 Sonderordnung bei Bussen bis zu 5000 Franken

[1] Fällt eine Busse von höchstens 5000 Franken in Betracht und würde die Ermittlung der nach Artikel 6 strafbaren Personen Untersuchungsmassnahmen bedingen, die im Hinblick auf die verwirkte Strafe unverhältnismässig wären, so kann von einer Verfolgung dieser Personen Umgang genommen und an ihrer Stelle die juristische Person, die Kollektiv- oder Kommanditgesellschaft oder die Einzelfirma zur Bezahlung der Busse verurteilt werden.

[2] Für Personengesamtheiten ohne Rechtspersönlichkeit gilt Absatz 1 sinngemäss.

8.1.3 Federal Act on Cartels and other Restraints of Competition (Excerpt)

Art. 29 Amicable settlement

[1] If the Secretariat considers that a restraint of competition is unlawful, it may propose an amicable settlement to the undertakings involved concerning ways to eliminate the restraint.

[2] The amicable settlement is formulated in writing and approved by the Competition Commission.

Art. 49a Sanction for unlawful restraints of competition

[1] Any undertaking that participates in an unlawful agreement pursuant to Article 5 paragraphs 3 and 4 or that behaves unlawfully pursuant to Article 7 shall be charged up to 10 per cent of the turnover that it achieved in Switzerland in the preceding three financial years. Article 9 paragraph 3 applies by analogy. 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.

[2] If the undertaking assists in the discovery and elimination of the restraint of competition, a charge may be waived in whole or in part.

[3] The charge is waived if:

a. the undertaking submits notification of the restraint of competition before it takes effect. If the undertaking is informed of the opening of a procedure under Articles 26-30 within five months of submitting its notification but continues to implement the restraint of competition, the charge is not waived;
b. the restraint of competition has not been exercised for more than five years by the time an investigation is opened;
c. the Federal Council has authorised a restraint of competition under Article 8.

8.1.4 Ordinance on Sanctions imposed for Unlawful Restraints of Competition (Excerpt)

Section 3: Complete Immunity from a Sanction – Art. 8 Requirements

[1] The Competition Commission shall grant an undertaking complete immunity from a sanction if the undertaking reports its own participation in a restraint of competition within the meaning of Article 5 paragraphs 3 and 4 Cartel Act and if it is the first undertaking to:

a. provide information that enables the competition authority to open competition law proceedings under Article 27 Cartel Act; or
b. provide evidence that enables the competition authority to establish an infringement of competition in accordance with Article 5 paragraphs 3 or 4 Cartel Act.

[2] Immunity from a sanction shall be granted only if the undertaking:

a. has not coerced any other undertaking into participating in the infringement of competition and has not played the instigating or leading role in the relevant infringement of competition;
b. voluntarily submits to the competition authority all available information and evidence relating to the infringement of competition that lies within its sphere of influence;
c. continuously cooperates with the competition authority throughout the procedure without restrictions and without delay;
d. ceases its participation in the infringement of competition upon submitting its voluntary report or upon being ordered to do by the competition authority.

[3] Immunity from a sanction in accordance with paragraph 1 letter a shall only be granted if the competition authority does not already possess sufficient information to open proceedings under Articles 26 and 27 Cartel Act in relation to the reported restraint of competition.

[4] Immunity from a sanction in accordance with paragraph 1 letter b shall only be granted if:

a. no other undertaking already fulfils the requirements for complete immunity in accordance with paragraph 1 letter a, and
b. the competition authority does not already possess sufficient evidence to prove the infringement of competition.

Section 4: Reduction of Sanction – Art. 12 Requirements

[1] The Competition Commission shall reduce the sanction if an undertaking voluntarily cooperates in proceedings and if it terminates its participation in the infringement of competition no later than at the time at which it submits evidence.

[2] The reduction shall amount to up to 50 per cent of the sanction calculated in accordance with Articles 3–7. The importance of the undertaking's contribution to the success of the proceedings shall be decisive.

[3] The reduction shall amount to up to 80 per cent of the sanction calculated in accordance with Articles 3–7 if an undertaking voluntarily provides information or submits evidence on further infringements of competition in accordance with Article 5 paragraph 3 or 4 Cartel Act.

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8.3 Abbreviations

AB-BA	Supervisory Authority for the Office of the Attorney General
AG	Aktiengesellschaft (corporation)
AJP	*Aktuelle Juristische Praxis*
Art.	Article
BBl	*Bundesblatt*
BGE	Official Collection of the decisions of the Federal Supreme Court of Switzerland
BGer	Federal Supreme Court of Switzerland
CHF	Swiss francs
Ed.	edition/editor
e.g.	for example
et al.	and others
f./ff.	and the following
GesKR	*Zeitschrift für Gesellschafts- und Kapitalmarktrecht*
lit.	litera (letter)
KG	Federal Act on Cartels and other Restraints of Competition of October 6, 1995 (SR 251)
MROS	Money Laundering Reporting Office Switzerland
OECD	Organisation for Economic Co-operation and Development
PaIv	Parliamentary Initiative
Para	Paragraph
Rz	Marginal number
SA	Société anonyme (corporation)
SJZ	*Schweizerische Juristen-Zeitung*
StGB	Swiss Criminal Code of December 21, 1937 (SR 311.0)
StPO	Swiss Criminal Procedure Code of October 5, 2007 (SR 312.0)
SZW	*Schweizerische Zeitschrift für Wirtschafts- und Finanzmarktrecht*
UWG	Federal Act Against Unfair Competition of December 19, 1986 (SR 241)
WEKO	Competition Commission
Ziff.	Number
ZStrR	*Schweizerische Zeitschrift für Strafrecht*

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