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"Adoption of a DPA regime should be accompanied by the necessary procedural reinforcement of the rights of individuals, and the rights of the defense, to resist vigorously and appropriately the increased powers of prosecutors through new instruments and procedures."

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Contours of a Future Swiss DPA Regime

The time may at last be right for rapid, negotiated settlement of economic criminal proceedings.

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Introduction

Although not yet turned into a draft, or even a preliminary draft, a plan announced in February 2024 by the Swiss Office of the Attorney General (OAG) did not leave anyone indifferent. At an academic seminar on Negotiated Justice in Transnational Corruption, the Attorney General of the Swiss Confederation expressed the OAG's intention to promote the introduction of a Swiss Deferred Prosecution Agreement (DPA) regime and described the anticipated contours.

Notably, an earlier proposed DPA regime was rejected by the Federal Council (the Swiss government) 5 years ago. The reasons for the rejection given at the time included concerns over the added power a Swiss DPA authority would give to the already very strong position of Swiss prosecutors, and the proposal's failure to address the nature and scope of judicial review. The Federal Council also criticized the fact that a company and the OAG could agree via a DPA on how to treat civil claims without the plaintiff participating in the process. In general, the Federal Council was also reluctant to approve a regime in which a waiver of criminal prosecution could be "bought," or at least appear to be bought. (Message of 15 October 2019 regarding the amendment of the Swiss Code of Criminal Procedure, FF 2019 6351-6436 (6367))

But much has changed since 2019, and the conditions appear to be more receptive now to acceptance of a DPA regime in Switzerland.

REASONS FOR A SWISS DPA REGIME

The OAG has given several reasons for revival of the idea of a Swiss DPA. The most important seems to be the length of criminal proceedings. Proceedings are lengthy for a variety of reasons, including the procedural obligation to prosecute and to seek the material truth, as well as sealing procedures. In complex international cases, over which several prosecuting authorities have jurisdiction, Switzerland loses out on opportunities for coordinated resolution (global deal) with other, faster jurisdictions. More broadly, the OAG now regards the introduction of a Swiss DPA authority as "an indispensable step towards guaranteeing the effectiveness of complex international prosecutions." (Blättler/Schnebli, La poursuite pénale efficace

en Suisse en matière de corruption internationale, in Capus/Hohl Zürcher, *Negotiated Justice in Transnational Corruption – Between Transparency and Confidentiality*, Neuchâtel, 2024, n. 45)

Swiss law now has a Summary Penalty Order Procedure, which enables the public prosecutor to terminate proceedings without going to court. Practice has shown that this procedure allows the parties, to a certain extent, to negotiate the stated facts, the amounts confiscated, as well as the sentence pronounced by the prosecutor, even if the law does not expressly provide for such negotiation. This was the procedure used to put an end to the Swiss part of the Alstom S.A. case in 2011.

But this summary procedure is not regarded as a substitute for a genuine DPA authority. This procedure has one major drawback: once in force, the summary penalty order has the effect of a judgment and a conviction. Compared with a DPA-type instrument, conviction can have disadvantages for the company's commercial activity — such as loss of existing public contracts, exclusion from future tenders — irrespective of the type of criminal order. The OAG has observed, correctly, that companies are more willing to cooperate with countries offering them the possibility of concluding an agreement that avoids conviction. (Blättler/Schnebli, n. 44)

Furthermore, since 2017, the OAG has refused to apply Article 53 of the Swiss Criminal Code (SCC) (abandonment of prosecution in case of reparation) in economic criminal proceedings concerning global companies actively engaged in business, for at least two reasons: respect for the will of the legislature, which designed Article 53 SCC for minor cases; and respect for the condition laid down in the same Article that the interest in prosecution on the part of the general public and of the persons harmed should be negligible. According to the OAG, in large-scale international cases, not only the public interest, but also the interest of the harmed party (e.g. the interest of the State harmed by corrupt conduct) cannot properly be considered "negligible." In any event, the Article 53 SCC is no longer being used by public prosecutors to resolve foreign bribery proceedings subsequent to the 2018 OECD report on phase 4. (This Phase 4 report by the OECD Working Group on Bribery in International Business Transactions evaluates and makes recommendations on Switzerland's implementation of the Convention on Combating Bribery of Foreign Public Officials in International Business

Transactions, see n. 84, p. 41; see also OECD (2020 written follow-up), pp. 33-34 regarding recommendation 7 (e))

In short, the Summary Penalty Order Procedure is not an adequate substitute for a DPA procedure because it presumes a criminal conviction. As for abandonment of prosecution or reparation under Article 53 SCC, these procedures have not been applied since 2018. Switzerland therefore lacks an ideal instrument for the rapid, negotiated settlement of criminal proceedings involving economic crime.

A FUTURE SWISS DPA REGIME

Although the OAG's proposal has not yet been reduced to specific legislation, the proposal is based on the elements that the OAG says it has retained following an analysis of the systems in place in the United States, the United Kingdom, Ireland, France, the Netherlands, the Czech Republic and Portugal. The OAG is seeking a proposal that addresses two main issues: reparation and compliance. To this end, the OAG considers the following features of a future Swiss DPA regime to be essential (Blättler/Schnebli, n. 42):

- Acknowledgement of the facts and full cooperation from the company;
- Self-disclosure would be favored, but is not a prerequisite;
- The company should repay its unjust enrichment and compensate the injured parties; in some cases, compensation could be made by means of payment to a charitable institution or a NGO;
- To prevent recurrence, conditions could be imposed on the company--for example, organizational compliance, which may include the development of awareness-raising and training programs for employees, the implementation of risk detection mechanisms or the establishment of a whistle-blowing platform, as well as control and compliance mechanisms, and adoption of a code of conduct (Blättler/Schnebli, n. 48; *see also* OECD Principles of Corporate Governance (2023));
- Monitoring of the implementation of conditions established by the DPA, whether by a state agency, specialized companies or law firms (the OAG contemplates selection of monitors who would be "experts" with "special

knowledge," within the meaning of article 182 of the Swiss Code of Criminal Procedure (Blättler/Schnebli, n. 50), and who would also be considered public officials within the meaning of article 110 para. 3 SCC);

- Approval of the DPA by a judge, in open court, according to the principle of public hearings, would be required; and
- Adoption of published guidelines would be necessary to provide sufficient clarity to considering going the route of a DPA; the guidelines would cover such topics as the conditions for benefiting from such a program, the advantages to be gained from self-disclosure, or from full cooperation. (Blättler/Schnebli, n. 44)

SOME IMPORTANT QUESTIONS ARE OPEN

The elements put forward by the OAG obviously raise numerous questions. Among them are three particularly sensitive ones, to which the drafters of the future bill will have to pay particular attention.

1. The fate of individuals. The OAG makes no secret of the fact that one of the aims of a Swiss DPA regime is "to convict the individuals responsible within the company" (Blättler/Schnebli, n. 34); in other words, prosecutors want to be able to make deals with companies in order to help secure convictions of individuals. The OAG will therefore want to obtain unlimited use of the evidence obtained in the DPA proceedings against the company, including possibly the DPA itself, and use it in parallel or subsequent proceedings against individuals. It would be up to the judge to evaluate the evidence in question under the principle of free evaluation of evidence. However, treating a contractual instrument such as a DPA as evidence would be highly questionable in a continental system without the procedural safeguards that normally accompany it, like restrictions related to their subsequent use in other proceedings.

In contrast, in the UK and the United States, a statement of facts contained in a DPA would not ordinarily be admissible in a subsequent proceeding against an individual because it would be considered hearsay not subject to an exception under Federal Rule of Evidence 803. Moreover, a statement of facts, to the same extent as a foreign judgment, should not be treated as

evidence of the facts investigated, evidence being a trace left by a fact in the material world or in a person's memory. (Kinzer, Les enjeux de la transparence du point de vue de la défense, in : Capus/Hohl Zürcher, Negotiated Justice in Transnational Corruption – Between Transparency and Confidentiality, Neuchâtel, 2024, n. 38)

2. Judicial Review. Switzerland will need to determine the role it intends to assign to judges with respect to a future DPA regime. The fundamental role of the judge in a continental legal system means that the American model, which lacks meaningful judicial oversight of DPAs, is unlikely to be adopted. It is simply inconceivable that the content of a DPA or, even more, the issue of whether a DPA has been violated, would be left solely to the discretion of prosecutors. So, the Swiss judge will have a role. It could be a role similar to that in the UK DPA system, where the court is involved at two stages and reviews the content to confirm it is in the interest of justice, and it is fair, reasonable and proportionate. The role could also be more significant, with the judge being required to conduct a limited review, e.g. a prima facie examination, to ensure that the content of the DPA broadly aligns with the file.

3. Corporate Cooperation. The issue of cooperation gives rise to a series of important questions: What corporate behavior amounts to sufficient or full cooperation to weigh against prosecution and in favor of entering into a DPA? Does cooperation require waiver of privilege? If a company waives privilege, can the waiver be limited, for example, to a narrowly defined subject matter, or must the waiver be broader to protect the rights of individual defendants? What is meant by full corporate cooperation is an important question for the drafters of DPA legislation and the guidelines that will follow.

CONCLUSION

The thorny issues briefly outlined here are only some of the issues to be addressed in future legislation. The Swiss political system enacts new legislation only after extensive consultation and reflection. Yet a DPA-type instrument may be getting closer to adoption largely for the reasons set out by the OAG and summarized above. Adoption of a DPA regime should be accompanied by the necessary procedural reinforcement of the rights of individuals, and the rights of the defense, to resist vigorously and appropriately the increased powers of prosecutors through new instruments and procedures.

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