CENTRE DE DROIT
BANCAIRE ET FINANCIER

Revision of administrative criminal law

Publication of the preliminary draft

Par Katia Villard le 19 February 2024

On January 31, 2024, the Federal Council published the long-awaited preliminary draft of the revision of administrative criminal law. The consultation procedure will run until May 10, 2024.

For the record, administrative criminal law is criminal law, with the distinctive feature that the prosecution and adjudication of offences fall within the remit of a federal administrative authority, which varies according to the field concerned (e.g. the Federal Department of Finance for administrative criminal law offences against financial market laws) (cf. art. 1 DPA and art. 50 FINMA).

Despite its title, the current Administrative Criminal Law Act contains a few substantive provisions, but mainly procedural ones. It dates back to 1974 and appears largely obsolete. The main criticism that can generally be levelled against this law is that the legislator of fifty years ago did not take sufficient account of the fact that, notwithstanding its application by an administrative authority, administrative criminal procedure must satisfy all the guarantees of criminal procedure. Jurisprudence has only partially corrected the situation.

At the time of drafting the Federal Code of Criminal Procedure, consideration was given to incorporating administrative criminal procedure, but the idea was quickly abandoned so as not to delay the unification process.

Of considerable practical importance, however, administrative criminal law absolutely had to be modernized, and the current revision has its origins in a parliamentary motion dating back to December 2014. The time that has elapsed since then speaks volumes about the importance of the project.

The new law has been more correctly named the Federal Act on Administrative Criminal Law and Procedure. Its structure has not changed fundamentally. First and foremost, it contains rules of general criminal law which derogate from the Swiss Penal Code, otherwise applicable by analogy (art. 2 AP-DPA). As at present, administrative criminal law offences are to be found in special laws, and the AP-DPA contains only a few of them. The main changes concern the rules of administrative procedure, which have been increased from 85 to 284. Numerous provisions of the CPP – notably on procedural principles, time limits, participants in proceedings, the defense, the conduct of proceedings, coercive measures, etc. – have been taken over at face value. – have been reproduced, word for word, in the AP-DPA, with the adjustments inherent in the specific features of administrative criminal procedure. The sealing

procedure, which has been the subject of a number of controversial DPA rulings, has now been brought into line with the CPC (including the jurisdiction of the cantonal courts of constraint in place of the Complaints Court of the Federal Criminal Court) (art. 180 f. AP-DPA). The possibility of ordering secret surveillance measures, currently provided for in a few special laws (e.g. art. 90a LPTh, art. 128a LD), is now enshrined in the AP-DPA (art. 218 ff AP-DPA). However, certain particularly incisive covert surveillance measures – e.g. the monitoring of postal and telecommunications correspondence (art. 218 AP-DPA) – are only possible for certain specific offences that do not a priori concern financial institutions. On the other hand, other measures, such as the monitoring of banking relationships, can be implemented for any crime or offence under administrative criminal law, with the exception of minor offences (art. 236 AP-DPA).

In a nutshell, the new law establishes a “real” administrative criminal procedure.

At this stage, the disappointment stems from two substantive rules, which in our view are currently unsatisfactory, and which the preliminary draft does not amend.

Firstly, art. 11 para. 4 AP-DPA confirms the case law of the Swiss Federal Supreme Court, which has been widely criticized in academic circles (cf. in particular Macaluso/Garbarski ; Burgener/Villard), according to which a criminal ruling by the administration interrupts the statute of limitations for criminal proceedings. Apart from the dogmatic criticisms it deserves, this rule does not encourage the authorities to act swiftly.

Secondly, the preliminary draft does not address the issue of corporate criminal liability for administrative criminal law offences. Instead, it largely adheres to the current construction, i.e. subsidiary liability of the company where the investigation would necessitate investigative measures against punishable natural persons that are out of proportion to the seriousness of the offence, in other words where such persons are not identified (in the current DPA, the disproportion is between the investigative measures and the penalty incurred). In addition, under the current DPA, corporate liability still requires that the fine does not exceed CHF 5,000. Some special laws, however, based on art. 7 of the DPA, provide for higher fines. This is the case of art. 49 LFINMA (CHF 50,000) and art. 125 LD (CHF 100,000). Art. 7 AP-DPA repeals these provisions and sets a uniform maximum fine of CHF 50,000.

The standard is unsatisfactory for the company, which, according to the explanatory report, incurs no-fault liability. As the criminal liability of legal entities is now widely accepted by national legal systems, and its justifications – in particular the idea of reconciling the principle of culpability with the punishability of an abstract entity – have been extensively discussed in legal doctrine, the chosen construction does not appear to be in line with contemporary models of corporate liability.

Nor is art. 7 AP-DPA appropriate from the point of view of repressive imperatives. At the very least, in constellations where there is evidence of a flawed corporate culture conducive to the commission of offences, parallel liability of the company, alongside that of the individuals involved, is justified.