Revamping Anticorruption Criminal Law – The Making of (In-)Transparency

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I. Introduction

1. In recent years, numerous nations have embarked on concerted endeavours to reconfigure their anti-corruption criminal laws.[1] These efforts are aimed at enhancing the prosecutorial efficacy against corruption, targeting both natural persons and legal entities. The overhaul encompasses both substantive and procedural dimensions of law, impacting the criminal justice system as a whole. The modifications unfold in European jurisdictions through formal legislative enactments (*de jure* models), exemplified by France and the United Kingdom, as well as through pragmatic, bottom-up approaches without statutory amendments (*de facto* models), as observed in Switzerland. In Switzerland, transnational corporate corruption cases are settled by mean of Summary Penalty Orders.[2]

2. The result of this is quickly summarized: just as a compass needle invariably points north, all restructured criminal justice systems rely on the cooperation of suspects and the enhancement of consensus-based settlement of proceedings with as little court publicity as possible. In this article, we use the term 'settlement' for such procedures.

3. However, despite the importance of such consensus-based elements in settlements giving the appearance of a partner-like (horizontal) approach, the authoritative (vertical) relationship between the criminal prosecution authorities with its monopoly of coercion, that is the exclusive prosecution and punishment power and the suspects subjected to coercion, when becoming the object of a criminal investigation, remains intact. Hence, because the monopoly of coercion does not dissolve, the voluntariness of defendants entering settlement resolutions is at least questionable

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2 Cf. for an overview of many more countries MAKINWA, 16 ff. and for more explanations about this kind of procedures BLÄTTLER/SCHNEBLI, N 12 ff.; GOETZ STAEHELIN/LEMBO, N 36 ff.; WERNLI, N 4 ff.

to some extent. Rather, in this area, criminal law is increasingly assimilating to administrative law, with its 'administrativisation' taking place.[3]

4. This assimilation of criminal law with administrative law weakens or potentially eliminates traditional features of criminal trials: the right against self-incrimination, evidence-gathering until reaching the jurisdiction-specific standard of proof, the intervention of courts, the publicity of court trials, and the public pronouncement that communicates the judgement.[4]

5. Furthermore, the 'administrativisation' is also evident in that law enforcement agencies, rather than the judicial branch, are predominantly taking action, and this takes place essentially under the secrecy that has long characterised administrative activity.[5] Jurisdictions that nevertheless attempt to preserve a place for courts and, in particular, for public trials in the area of settlements struggle and do so by creating a special role for the courts that is tailored to settlement proceedings.[6]

6. Hence, within the framework of settlement procedures, the substantive actions deliberately take place 'backstage', that is, away from the courtroom. 'Front stage', that is, in front of the general public, there is practically no performance.[7] The public is subsequently only presented with carefully crafted narratives, to varying degrees transparent depending on the legal framework of the state and the negotiation between the defendant company and the prosecutorial authority.[8] What they have in common is that the originally underlying facts and the negotiations remain opaque.

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3 The blurring between administrative and criminal law actors and the applied mechanisms is a general trend that reaches beyond the domain of anticorruption settlements, see CAPUS 2019; SELLIER/WEYEMBERGH, 22.

4 LANGER 2021, 378, 385; LANGER 2022, 84.

5 HÄNER, 281 ff.

6 For United Kingdom, see MACMANUS/CONROY, N 9 ff.; KING/LORD, 308-315; BISGROVE/WEEKES, 428 f. For the US, see DAVIS, 764-770. For France, see BOHNERT, N 11 f.; LAPÉROU-SCHENEIDER, N 52 ff.; MENSOUS/FOEGLE, N 6 ff.; GALLI, 365-367.

7 CAPUS/BOZINOVA, 3.

8 MAKINWA, 21.

Settlements are diligently negotiated text modules that contain exclusively sanitised statements.[9]

7. This movement towards reduced transparency is notably remarkable in an era distinguished by a substantial increase in openness across various sectors, marked by enhanced public visibility. The principle of publicity has gained considerable prominence in all branches of the law, akin to the principle of trust.[10] The extent of control that can be effectively exerted in this manner may be debatable; however, it undeniably enhances societal knowledge and the foreseeability of governmental actions and notably the predictability of law enforcement.

8. Increased demands for more transparency have arisen, not least thanks to the rapid development in the field of communication technology and information procurement over the past 20 years. Courts are awakening, at least in part, and judgements can increasingly be consulted online in databases. Even visual transmissions from the courtroom are no longer taboo.[11] In the Swiss context, discussions are increasingly even pointing towards a paradigm shift regarding administrative actions from the principle of secrecy with a reservation of publicity to the principle of publicity with a reservation of secrecy in justified cases only.[12]

9. As of the economic sector, regulatory supervisory authorities — probably not coincidentally, especially in the financial and capital market sector, which relies heavily on trust — use transparency and the publication of names of institutions in breach of their duties as a repressive measure with a punitive character, as a reputational sanction ('naming and shaming').[13] Moreover, demands for transparency have increasingly become vocal directly towards

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9 DAVIS, 826 f.

10 JUTZI 54.

11 In Germany, the ban on broadcasting from courtrooms, which had been in force since the 1960s, was abolished in 2016/2017. The justification can be found in BT-Drs. 18/10144, 13-17; JAHN, 246 ff. regarding Germany, United Kingdom, France.

12 HÄNER, 292 f.; TIEFENTHAL, 448.

13 WATTER/KÄGI, 39.

economic players. Ten years ago, 'The Economist' even proclaimed 'the openness revolution'.[14] Since then, supranational regulations and national legal acts have been forcing companies to transparency.[15]

10. The rise in corporate transparency is a counter-reaction to the neoliberalisation of the 1980s, when state regulation and control were scaled back under the promise that the market itself would regulate even harmful behaviours of companies. However, the market can only react when things become publicly known and when there is a media to spread the information. This has apparently not happened sufficiently as whistle-blowers and leakers, as well as the 'public watchdogs' (NGOs and independent investigative journalists) have gained in importance.[16]

11. Turning again towards criminal justice and related transparency issues, it is inevitable to note that the concept of transparency in criminal justice is very closely linked to court trials.[17] Hence, the suppression of court trials by trial-avoiding settlement proceedings leads to fears that the absence of competing stories presented and debated in court will eliminate the kind of storytelling that creates transparency.[18]

12. However, the practice of law enforcement authorities in various jurisdictions shows that other platforms have been created and used

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14 The Economist, The openness revolution, December 12, 2014.

15 Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU regarding disclosure of non-financial and diversity information by certain large undertakings and groups; see also WERNLI, N 19.

16 Since secrecy encourages indiscretions, it is hardly surprising that the leaks have been coming one after the other for ten years: April 2013 – The Offshore Leaks; November/December 2014 – The Luxembourg Leaks; February 2015 – The Swiss Leaks; April 2016 – The Panama Papers; September 2016 – The Bahamas Leaks; May 2017 – The Malta Files; November 2017 – The Paradise Papers; October 2018 – The CumEx files; February 2021 – OpenLux; June 2021 – The IRS tax data leak; October 2021 – The Pandora Papers.

17 This becomes particularly clear in the ECHR, which explicitly refers the right to publicity (and thus transparency) to the court hearing – if one takes place, cf. ECHR, art. 6.

18 STERN 2021; CAPUS/BOZINOVA, 2 f.

to make criminal justice also in the area of settlements transparent. Prosecution authorities publish settlements and the related relevant documents on their official websites, thereby rendering the content of settlements directly accessible. Besides, they hold press conferences, issue press releases, and produce annual reports. Although primarily aimed at supervisory authorities, these annual reports also serve as valuable sources of information for journalists.[19]

13. 'Publicity is the very soul of justice [...]',[20] to state it with BENTHAM. The objectives pursued through publicity in criminal justice are quite diverse: for example, the purpose of controlling power emerges as a goal from the classical literature such as Bentham. According to this point of view, the way in which criminal power is exercised should be transparent to society in order to prevent abuse of power. The authorities entrusted with the competence to exercise this penal power must do so openly, justify their deployment and the use of their resources.

14. From the perspective of punishment theory or criminal law theory in general, publicity of criminal justice is important for preventive and repressive reasons. This involves both the utilitarian assumption of the general deterrent effect, i.e. the deterrence of potential offenders, and the deterrence of convicted offenders preventing recidivism and, finally, the educational assumption in the positive sense (strengthening those willing to comply with the law).[21] This is also the case in relation to corporate prosecution: settlements are considered to be a deterrent tool[22], but they shall equally encourage corporates to adhere to compliance standards in order to comply with law.[23] Focusing instead more on the needs of

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19 See for a description of sources for journalists MAURISSE, N 9.

20 BENTHAM, 355.

21 FISSE, 107 ff.; HAZEL, 45 ff.; BUELL, 473 ff.

22 HAWLEY et al., 318. Some authors even fear an over-deterrence effect by excessive enforcement in case of multiple prosecutions in different jurisdictions, cf. ODED, 237; FEELEY, 182.

23 HAWLEY et al., 311 ff.; KING/LORD, 94.

victims, one is lead to restorative justice and their integration into criminal procedures to enhance reconciliation and remediation.[24]

15. In addition to these traditional goals, yet another goal of the criminal justice publicity has emerged with regard to public court trials. They serve as a place for the construction of social reality.[25] From this perspective, the outcome (condemnation or acquittal) is less important than the fact that criminal proceedings and trials help to establish a commonly accepted understanding of the facts.

16. To what extent do prosecutorial authorities' efforts to create transparency in settlement proceedings reflect these goals? To assess how transparency is achieved through alternative platforms and publicity techniques other than criminal court trials, we have conducted an empirical analysis. Specifically, we examined how the Office of the Attorney General of Switzerland (OAG), which is primarily responsible for prosecuting transnational corruption cases,[26] uses such platforms. The main results are presented in the following section.

II. The making of (in)transparency by the OAG

17. An examination of the practice of the aforementioned platforms (*infra* N 12) highlights significant international disparities. Notably, the *U.S. Department of Justice*, the *Serious Fraud Office* (SFO, UK) and the *Parquet National Financier* (PNF, F) openly and systematically list and disclose settlements through their respective websites, whereas the use of such a platform is lacking in Switzerland.

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24 BRAITHWAITE, 1 ff.; cf. LORD, N 26 ff.

25 This has been discussed for some time in relation to criminal proceedings before international criminal tribunals and recently become particularly evident in the criminal proceedings against climate change and environmental activists. Obviously, strategically-minded activists deliberately rely on the publicity of criminal proceedings in order to gain the desired media attention for their main interest, the protection of the climate/environment and the discussion about their status in society. See HAYES, 208 ff.; BARKAN, 944 ff.; VANHALA, 750 ff.

26 Art. 24 SCC.

18. The official website of the OAG does not feature either the individual Summary Penalty Orders or a comprehensive compilation detailing all recent rulings. Instead, the OAG is primarily disclosing newly issued Summary Penalty Orders on-site, that is at the OAG premises, accessible solely by prior appointment and within a four-week timeframe. However, the Summary Penalty Orders published during this limited period are not anonymised, i.e. interested persons have full access to information about the individuals or legal entities involved. Access to older Summary Penalty Orders or other OAG decisions, including abandonment of proceedings orders[27] and no-proceedings orders, requires a substantiated request and is limited to anonymised forms. The OAG's website openly outlines various criteria and limitations for access, emphasizing the delicate balance between individual interests, judicial confidentiality, and the efficient operation of the criminal justice system.[28] Alongside these limitations, notably recent alterations implemented on the website suggest that the public, fundamentally, is entitled to access Summary Penalty Orders. In practice, media professionals are generally granted access considering their control function, and for private individuals, the effort involved in submitting a formal request is generally regarded as a sufficient interest.[29] However, the major effort consists of finding out if and which Summary Penalty Orders have actually been issued and are available to the public. The compilation of recently issued Summary Penalty Orders undergoes weekly updates, yet it remains inaccessible on the website. To forestall the oversight of any specific Summary Penalty Order it remains imperative to submit a weekly inquiry to the OAG.

19. Hence, the availability of Summary Penalty Orders depends on two factors: the conclusion of legal proceedings and the proactive effort

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27 In general, all legal terms in this contribution are used according to the English version of the Swiss Criminal Procedure Code, here according to art. 319, https://www.fedlex.admin.ch/eli/cc/2010/267/en (last visited on 30.11.2023).

28 https://www.bundesanwaltschaft.ch/mpc/en/home/zugang-zu-amtlichen-dokumenten/strafbefehle--einstellungs--und-nichtanhandnahmeverfuegungen.html (last visited on 30.11.2023).

29 HILTI 2021, 21.

of the public to request access. This setup results in a form of publicity that is rather reactive or passive, essentially available only when specifically requested ('on demand').

20. However, proactive strategies are as well used by the OAG. They involve various media-related activities like issuing press releases, organising press conferences, or publishing annual reports online, that are generated by the OAG for the attention of its supervisory authority.[30]

21. To gauge the making of transparency with regard to transnational corporate corruption cases by way of proactive strategies, three key questions emerge:

    a. How frequently does the OAG provide reports on transnational corporate corruption proceedings, and which specific cases are covered?

    b. At what stage of the proceedings does the OAG engage in communication, and what is the reason to report?

    c. What information is conveyed? This question seeks to elucidate the degree of transparency by evaluating the depth of detail regarding the offenses committed and the concrete criminal behaviour involved.

22. The three questions are examined using a quantitative-qualitative content analysis approach. The dataset comprises all communications made available on the official website of the OAG[31] subsequent to the implementation of the Swiss criminal procedural code in January 2011. Specifically, it encompasses two data sets: Firstly, all press releases disseminated from 2011 to the present ($N = 162$; including press releases until November 22, 2023, for the ongoing year). Secondly, all annual reports spanning the

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30 Responding to media enquiries is another aspect of the media work of the OAG. According to the most recent annual report, responding to such media enquiries accounts for a substantial proportion of communication activities (annual report 2022, 46).

31 https://www.bundesanwaltschaft.ch/mpc/en/home.html (last visited on 28.11.2023).

years 2011 to 2022 (N = 12).[32] These press releases and annual reports are collectively referred to as communication contributions in this study.

23. In total, the OAG communicates 309 times on specific criminal cases in these press releases and annual reports.[33] Almost two thirds of these communications deal with proceedings relating to offences such as terrorism, criminal mismanagement or money laundering. Here, only cases of criminal mismanagement and money laundering are included where no reference to corruption was made (n = 196; 63.4%; see Figure 1).[34]

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32 The annual report 2023 will not be accessible until April 2024.

33 Of the 309 communication contributions, 169 (54.7%) refer to press releases and 140 (45.3%) refer to annual reports. While all annual reports report on several criminal cases, press releases - with a few exceptions - are written about *one* specific criminal case. In the case of the annual reports, the code for a case was only assigned once, even if the OAG communicated several times on the case in the report. Besides, we have adopted the OAG's strategy of summarising individual proceedings that are closely related into a 'complex of proceedings' for communication purposes. This applies, for example, to proceedings relating to the Brazilian 'Petrobras/Odebrecht' corruption scandal.

34 Cases consisting of numerous individual proceedings were analysed as follows: The case was categorized as a 'corruption case' only if corruption was identified as the focal point by authorities such as the OAG. Nonetheless, other offences such as fraud and criminal mismanagement are also investigated in some individual proceedings. Consequently, the collection of proceedings connected to FIFA wasn't classified as a corruption case as the OAG assigned this case to the 'General white-collar crime' offence area (see annual report 2022). In contrast, cases such as Petrobras/Odebrecht, 1MDB (see also FINMA, https://www.finma.ch/de/news/2016/10/20161011-mm-falcon/, last visited on 30.11.2023), the Arab Spring, and Uzbekistan were categorized as corruption cases.

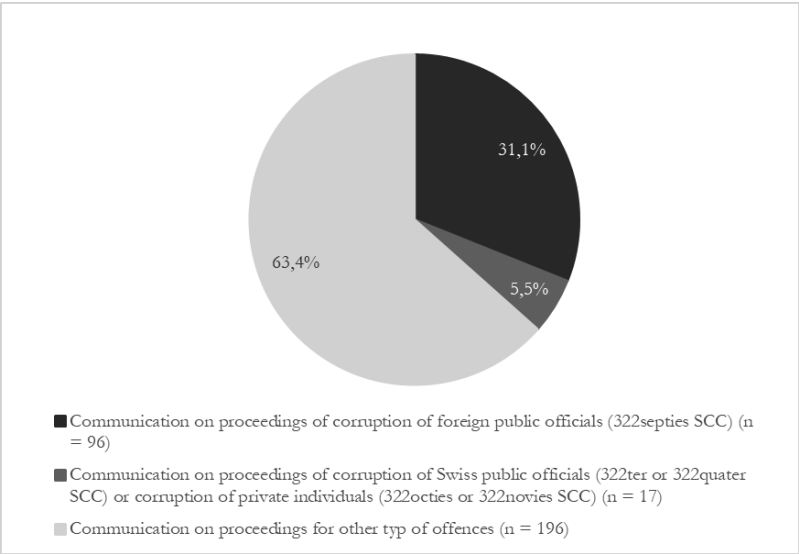

Figure 1 Number of communications on proceedings depending on the type of offence (n = 309)

24. An additional 17 communications (5.5%) pertain to instances of bribery involving Swiss public officials (322ter or 322^{quater} SCC) or private individuals (322^{octies} or 322^{novies} SCC). Notably, the subject of 96 communications involves the bribery of foreign public officials (322^{septies} SCC) committed by individuals or legal entities, which encompasses cases of transnational corruption. This accounts for 31.1% of all communications released by the OAG during the reviewed period.

25. Within the 96 analysed communications regarding transnational corruption, the OAG made a total of 20 cases public including 1MDB, ABB, Alstom, Anglo-Leasing, the 'Arab Spring', Gunvor, Petrobras/Odebrecht, SBM-Offshore, SICPA, Siemens, SNC-Lavalin, and the multifaceted cases associated with Uzbekistan (for a comprehensive list, see Table 3 in the appendix).

26. Conversely, no public communication exists regarding cases such as Dredging International, despite the issuance of a Summary Penalty Order by the OAG for transnational corporate corruption in 2017. Apparently, the OAG opts to publish only a curated selection of

cases. However, the criteria used for this selection have not been communicated explicitly.

27. The OAG's website enumerates the legal basis for its media activities and further refers to the general recommendations of the Swiss Conference of Public Prosecutors.[35] Due to the very general nature of these guidelines, the selection criteria in individual transnational corruption cases remain unclear. It is possible that the OAG disseminates information to the public based on more detailed internal directives or informal checklists. However, since such directives or checklists are not publicly disclosed and comprehensive information about all corruption proceedings conducted since 2011 is also not publicly accessible and thus unavailable for research, the scope and nature of proceedings that are made transparent versus those intentionally kept confidential remain uncertain.[36]

28. Regarding the prominence of cases in communication, a distinct pattern emerges. A significant majority of the communications (62 out of 96 communication contributions; 64.6%) pivot around four principal cases. Specifically, the OAG recurrently reports, spanning several years, on the Petrobras/Odebrecht proceedings (19 communications in total), 1MDB (17), the 'Arab Spring' (15 communications), and Uzbekistan (11). From our perspective, these qualify as 'heavy communication' cases.[37] Notably, these cases do not just involve allegations of corruption against prominent individuals; they also encompass a vast number of individual

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35 See BLÄTTLER/SCHNEBLI, N 25 f.

36 The published statistics in the annual reports are not a suitable data basis for making a reliable quantitative statement about the proportion of publicised cases, as our impression is that the statistics record the procedural complexes as numerous individual proceedings, but the communication is summarised as a procedural complex. In addition, there are only offence-specific categories for ongoing criminal investigations, but not for concluded criminal investigations, which make it impossible to identify the recently concluded proceedings relating to corruption.

37 Given our study's scope, starting from 2011, it remains a possibility that five additional 'heavy communication' cases exist. These cases only yielded between three and six communication contributions in our study. However, this might be due to their proceedings' initiation occurring before 2011 (Alstom, the Anglo-Leasing affair, Siemens, and SNC-Lavalin).

proceedings. For instance, the Petrobras/Odebrecht and 1MDB cases alone encompass more than 60 and 40 individual proceedings respectively.

29. To address the timing of the OAG's disclosures regarding corruption cases, we conducted an analysis of the communication contributions relative to the specific stage within the proceedings. Additionally, we documented the reason behind each communication, delineating the reporting occasion for the communication. The outcomes of this examination are delineated in Table 1.

Reporting occasion	Number of communi-cations	Stage of proceeding	Number of communi-cations
Opening of the proceeding	6	Opening	6
General update on the current proceeding	17	During proceeding	47
Internal OAG matters (resources, organisation)	11	During proceeding	
Operational meetings with foreign authorities	8	During proceeding	
International mutual legal assistance	4	During proceeding	
Indictment	3	During proceeding	
Repatriation of funds to the country of origin	2	During proceeding	
Interrogations or searches of premises	1	During proceeding	
Other procedural action	1	During proceeding	
Summary Penalty Order or Summary Penalty Order *and* abandoning proceedings order (with/without restitution under art. 53 SCC)[38]	5	Conclusion	9

[38] The Summary Penalty Order and the abandoning proceedings order are often communicated in the same press release.

Court judgement	2	Conclusion
Abandoning proceedings order	1	Conclusion
Internal OAG matters (resources, organisation)	1	Conclusion

Table 1 Number of communications related to the four 'heavy communication' cases depending on reporting occasion and stage of proceedings (n = 62)[39]

30. The findings demonstrate the proactive communication initiatives undertaken by the OAG *during* the proceedings. Within the 62 communication contributions, 47 belong to this classification. Communications during this phase primarily offer the public general updates concerning the status of the investigations or they inform on internal OAG matters such as the building of task forces for the investigation of the biggest cases (Petrobras/Odebrecht and 1MDB). Additionally, certain communications entail details regarding specific investigative actions such as operational meetings with foreign authorities or requests for mutual legal aid.

31. Other procedural steps, such as the opening of proceedings, receive infrequent communication. Despite the opening of over 100 individual proceedings for the Petrobras/Odebrecht and 1MDB cases alone since 2014 and 2015, respectively, these commencement events were only publicly disclosed on six occasions.

32. Official decisions marking the conclusion of proceedings were likewise communicated rarely, amounting to eight communications. It is not clear whether the reluctance to communicate decisions stems from the absence of further decisions in individual proceedings of these complex cases, or if it's a deliberate communication strategy employed by the OAG.

33. The data analysis reveals instances where cases are communicated only once, akin to what could be termed 'single communication' cases. Among the 20 cases reviewed, 11 cases fall into this category (e.g., ABB, SBM Offshore, and several cases anonymised by the

[39] In terms of reporting occasion, each communication contribution could only be assigned to one category.

OAG such 'Greece, armaments business', 'Italy-India, aerospace industry', 'Angolagate', or 'Nigeria_self-disclosure'). Of these eleven cases, all except one were initiated during the period under scrutiny. However, our analysis indicates that the OAG communicates these proceedings solely on one occasion. Most frequently, it discloses information regarding the conclusion of proceedings, i.e., about issuing Summary Penalty Orders, no-proceedings orders or abandonment of proceedings orders (see Table 2). Unlike the 'heavy communication' cases, which receive ongoing communication throughout the proceedings, insights into the 'single communication' cases are conveyed to the public much later in the proceedings.

Reporting occasion	Number of communi-cations	Stage of proceeding	Number of communi-cations
Opening of the proceeding	2	Opening	2
General update on the current proceeding	1	During proceeding	2
Internal OAG matters (resources, organisation)	0	During proceeding	
Operational meetings with foreign authorities	0	During proceeding	
International mutual legal assistance	0	During proceeding	
Indictment	1	During proceeding	
Repatriation of funds to the country of origin	0	During proceeding	
Interrogations or searches of premises	0	During proceeding	
Other procedural action	0	During proceeding	
Summary Penalty Order or Summary Penalty Order *and* abandoning proceedings order	6	Conclusion	9

(with/without restitution under art. 53 SCC)[40]		
Court judgement	1	Conclusion
No-proceedings order[41]	2	Conclusion
Internal OAG matters (resources, organisation)	0	Conclusion

Table 2 Number of communications related to the 'single communication' cases depending on reporting occasion and stage of proceedings (n = 13).[42]

34. The third aspect of our research investigates the level of transparency in communicating about the nature and specifics of offenses committed. This inquiry involved a thorough analysis of the press releases and annual reports, revealing significant variability in the portrayal of these offenses. The examination underscores inconsistencies in the presentation of criminal behaviour, highlighting the OAG's varying approaches to disclosing details about the commission of offenses.

35. The OAG's communications related to ongoing cases typically offer limited details about the offenses. This approach aligns with the OAG's commitment to respect their duty to confidentiality (art. 73 CrimPC) and to uphold the fundamental rights of individuals under investigation, ensuring a careful balance between public disclosure and the protection of the rights of the accused. This is especially evident in press releases that announce the initiation of proceedings,[43] operational meetings, or requests for mutual legal

40 The Summary Penalty Order and the abandoning proceedings order are often communicated in the same press release.

41 No-proceedings orders are assigned to the category 'conclusion of proceedings', although from a strict legal perspective, any proceeding has been opened in such cases.

42 In terms of reporting occasion, each communication contribution could only be assigned to one category.

43 In fact, art. 74 CrimPC allows to prosecutorial authorities, courts and to the police, with the consent of the courts, to provide the public with information on pending proceedings where this is required. According to let. c this is required to correct inaccurate reports or rumours, and according to let. d it might also be required due to the special importance of a case. When informing, the authorities must

assistance.[44] Within these press releases, the OAG primarily outlines its ongoing or concluded procedural steps or communicates broader strategies aimed at combating transnational corruption, such as emphasizing the close collaboration among global criminal justice authorities.

36. Hence, these communications tend to emphasize the operational actions of the OAG rather than delving into the alleged criminal conduct of the implicated companies and individuals subject to prosecution. Often, it is merely the indication of abstract elements of the offenses or solely the criminal law statute suggesting the proceedings' focus on transnational corruption. Hence, the public receives a notably ambiguous depiction of the potential criminal activities, even in cases where investigations have been conducted for an extended period already at the time of communication.[45]

37. In some cases, the OAG maintains a notably restrained approach in communications released following the issuance of Summary Penalty Orders. For instance, the 'first ever instance of a company voluntarily reporting itself to the OAG'[46] was not disclosed through a press release but was exclusively communicated within the annual report sharing merely superficial details. Notably, the company in question was solely referenced in a completely anonymized manner, devoid of any disclosed names or specific industry sectors.[47]

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preserve the presumption of innocence and the personal privacy of the persons concerned. Cf. SCHOBER, 321.

44 See, for example, the press releases of 22 October 2019 (Petrobras/Odebrecht), 9 April 2019 (Petrobras/Odebrecht), 10 July 2018 (1MDB), 24 May 2016 (1MDB/Bank BSI AG), 12 October 2015 (Arab Spring/Tunisia) or 20 June 2014 (Anglo-Leasing).

45 See the communication on Petrobras/Odebrecht in the annual report 2020, 19 and annual report 2021, 20, or on 1MDB in the annual report 2020, 18.

46 Annual report 2017, 20.

47 Other examples of the anonymised presentation of a company are Nitrochem/Ameropa and SNC-Lavalin. While Nitrochem/Ameropa was only referred to as 'a Swiss company' (annual report 2016, 22), SNC-Lavalin was described either as a 'listed Canadian construction engineering company' or as a 'Canadian construction company' (annual report 2012, 12, and annual report 2014, 14 respectively; own translation from the German annual report, as there is no official annual report available in English).

However, newspaper reports had already made the name of the company public (KBA-NotaSys).[48] Additionally, the communication lacks any explicit references to the actual perpetration of the offense. Similar to press releases concerning ongoing proceedings, the sole indication of corruption rests upon the mention of the criminal law statute at the beginning of the communication contribution: 'At the end of 2015, a company reported itself to the OAG in connection with possible bribery offences in Nigeria (art. 102 para. 2 in conjunction with art. 322septies SCC)'.[49]

38. Yet, the typical content of communications concerning the issuance of Summary Penalty Orders or the abandonment of proceedings (including those with/without restitution in accordance with art. 53 SCC) includes essential information such as the professional position of the suspect in the company, the countries implicated, the duration of the corrupt activities, and the specific sectors within the companies that were affected.[50]

39. By way of illustration: In the SICPA SA case, the communication included the information that a former sales manager of the company had 'paid bribes to high-ranking officials in the Colombian and Venezuelan markets between 2009 and 2011', and that organisational deficiencies particularly in the 'areas of corporate governance, risk management and compliance' had made it possible to 'bribe public officials'. There is, however, no clarification of the scope of the bribe payments, of the specific conduct accused as bribery, or of the specific organisational deficiencies of the company.

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48 See Neue Zürcher Zeitung of 24 February 2017, https://www.nzz.ch/wirtschaft/korruptionsaffaere-schweizer-tochter-von-koenig-bauer-zahlt-millionenstrafe-ld.147640, or Handelszeitung of 24 February 2017, https://www.handelszeitung.ch/konjunktur/korruptionsaffaere-firma-zahlt-dem-bund-millionen-1349188.

49 Annual report 2017, 20.

50 See the press releases, for example, for SICPA SA (27 April 2023), ABB (2 December 2022), Uzbekistan (24 June 2019), Petrobras/Odebrecht (21 December 2016), or Siemens (12 November 2013).

40. In contrast, the communication regarding the Gunvor case is notably more thorough and detailed, distinguishing itself significantly from previous instances.[51] The press release dated on October 17, 2019, not only delineates the affected divisions, akin to the SICPA case, but also provides an intricate portrayal of the company's deficiencies. Public disclosure of the OAG sheds light on the company's specific inadequacies such as the absence of a 'code of conduct to give a clear signal and guidance to its employees on their activities', the lack of 'an internal audit procedure [or of] a staff member to take charge of identifying, analysing or reducing the risk of corruption', and the disregard of 'warning signs' and 'other irregularities […] including authorisation being given for a substantial number of payments to third party offshore companies unrelated to oil activities'.

41. Additionally, the OAG reveals the objective behind the bribe payments (securing 'access to the petroleum markets in the Republic of Congo and Ivory Coast') and quantifies the extent of the offense ('several tens of millions of US dollars'). Additionally, it provides valuable perspectives on effective preventive strategies, including the careful selection and oversight of local business intermediaries. Consequently, this communication shares the same level of detail and comprehensiveness as those typically employed in press releases pertaining to charges against individuals.[52]

42. To conclude, in our analysis of the communications from the Office of the Attorney General (OAG), we have identified four key observations:

43. The OAG appears to follow a selective method in its case communications, which lacks clarity for the public. The specific criteria that guide this selection process, if they exist, are not

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51 The OAG has published comparably detailed communications for the cases of SBM Offshore (press release of 23 November 2021), Siemens (annual report 2013, 11, available only in German), Alstom (press release of 22 November 2011).

52 See the press releases, for example, for Uzbekistan (28 September 2023), Gunvor (26 September 2023) or for proceedings relating to the Branisko tunnel construction project in Slovakia (10 August 2022).

publicized, leaving uncertainties about the OAG's adherence to any established guidelines and the nature of these guidelines.

44. In many communication contributions, the OAG's predominantly focus on reporting its own operational activities, resource requirements, and workload. This contrasts starkly with the level of detail provided about the specific criminal activities under investigation. Notably, this approach is more pronounced in ongoing, high-profile cases such as Petrobras/Odebrecht or 1MDB. It seems that the OAG's strategy is to satisfy public interests about these prominent cases without revealing excessive, case-specific details, balancing the information dissemination with the concurrent management of multiple cases.

45. The OAG shows a tendency to disclose comprehensive details about the offenses, including their execution methods, predominantly at the end of proceedings, especially when announcing procedural decisions. This indicates a preference for more transparent communication at the conclusion of a case which is coherent with the approach described in N 35.

46. There is a noticeable inconsistency in the level of detail provided in the portrayal of criminal behaviour. Some cases, particularly as they near conclusion, are described in vivid, thorough detail, while others are presented with minimal and vague information. This disparity in the depth of communication is perplexing, especially since it occurs even in cases where the penalties imposed on the companies are similar. This inconsistency suggests another form of selective transparency within the OAG's communications strategy.

III. Concluding discussion

47. The global efforts of many countries to optimise their criminal justice systems to combat corruption, especially transnational corporate corruption, more effectively lead towards an 'administrativisation' of criminal law (N 3 ff.) which is deployed, in case of transnational corporate corruption proceedings, 'back stage' (N 6 f.). This assimilation has an impact on transparency in criminal justice, notably due to avoidance of public court trials. Interestingly, it runs against a strong general tendency towards more transparency

that can be observed worldwide, in various legal and societal domains (N 7 ff.).

48. Yet, transparency is crucial for criminal justice. Indeed, several goals are pursued by rendering criminal justice public and thereby transparent: control of power, predictability of law enforcement, and dissuasion as well as confirmation of law-abidingness based on criminal law theories (N 14 f.).

49. Hence, the importance of other platforms offering alternative options to establish transparency is increasing (N 12). Prosecutorial authorities in various countries witness pressure to construct transparency in settlement procedures. Their making of transparency takes various forms and the approaches chosen differ considerably from one country to another (N 17). However, complex interactions within multi-jurisdictional settlement procedures as well as the fact that decisions are being asynchronously communicated by prosecutorial authorities and courts regarding criminal procedures being led in parallel against individuals and corporations do affect the making of transparency and provoke tensions with various rights of defendants.[53] Resulting discrepancies render the anonymization efforts of one institution senseless if others communicate more openly at an earlier stage already. In addition, public sharing of facts is part of negotiations between prosecutorial authorities and defendants in settlement procedures. While the advantages for both sides, the prosecution and the defendant, are evident, this kind of alliance to create secrecy is to clear detriment of transparency and undermines deterrent and expressive messages of criminal justice.

50. Our empirical evaluation focuses on the OAG's communication contributions and shows both, the making of transparency as well as the making of intransparency.

51. First, the making of intransparency results from our finding that there is a lack of systematic publication of settlements in cases of transnational corporate corruption, unlike the practice of foreign counterparts to systematically list and publish the concluded

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53 MACMANUS/CONROY, N 36; GOETZ STAEHELIN/LEMBO N 25 ff.; KINZER, N 47 ff.

settlements. This strategy stands out as a clear and definitive approach, enabling consistent tracking of law enforcement practices in this field, thereby fulfilling all the objectives inherent in the principle of transparency.[54] In the absence of systematic publication within a publicly accessible database, public awareness of these settlements hinges on the information dissemination practices of the OAG, rendering their existence virtually indiscernible.

52. A systematic listing and publication of Summary Penalty Orders involving corporations would alleviate the pressure on the OAG (and cantonal prosecutors) regarding public communication demands. However, it would also remove one of the few incentives for corporations to self-report and cooperate within the Swiss legal system, as it would lead to their full identity being publicly exposed.

53. We therefore propose that a database could be created, for example by the Federal Department of Justice and Police, akin to the existing one for the anti-racism criminal norm, which is managed by the Federal Commission against Racism.[55] In this publicly accessible database, not the Summary Penalty Order itself would be included, but features such as the facts assessed by the authority to constitute the incriminated behaviour, the facts that have led the authority to conclude that the corporation has failed to take all the reasonable organisational measures that are required in order to prevent the offence, and (mitigating and aggravating) factors relevant to determining the sanction. This could be accomplished without disclosing the identity of the concerned corporation.

54. Such a database enhances transparency and fulfills the requirements for predictability and legal certainty, while also respecting the confidentiality of the implicated companies. Furthermore, it offers valuable insights to at-risk companies about the types of behavior considered criminally relevant by prosecuting authorities and the sanctions imposed.

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[54] This transition from secrecy to transparency have also undergone deferred prosecution agreements and non-prosecution agreements in the US, see DAVIS, 826.

[55] https://www.ekr.admin.ch/dienstleistungen/d522.html (last visited on 30.11.2023).

55. Secondly, our analysis highlights a discernible selectivity in the OAG's communication of cases. While various factors may justify this selective approach, the absence of disclosed criteria introduces an element of opacity and provokes questions regarding the equitable treatment of defendants.

56. As of the making of transparency, it appears that the OAG's approach is less influenced by criminal law theories and more by an 'administrativisation' perspective, where the focus is predominantly on bureaucratic considerations such as operational activities, resource management, and workload. This result is certainly due to the fact that annual reports have become one essential communication form, and that in some high-profile cases, communication occurs already during the proceedings, that is at a stage that does not allow to reveal details on the offences. However, there are significant exceptions, particularly evident in the OAG's communications at the conclusion of proceedings. During these pivotal moments, especially when announcing procedural closures, the OAG shifts its focus to provide detailed information about offenses, locations, involved parties, and occasionally the methods of execution.

57. Yet another selective approach results from our findings, as there is a noticeable variation in the level of detail provided in the OAG's descriptions of criminal behaviour. While some cases are communicated with minimal and vague information, others receive thorough and vivid descriptions – but they never reach the degree of detail the Swiss Financial Market Supervisory Authority deploys, citing for example even from email exchanges from wrongdoers in their press release announcing the sanctioning of Falcon Private Bank Ltd. in the 1MDB affair.[56]

58. In sum, these findings indicate towards an authority who is – like its homologues – in search of an adequate way to manage transparency and public communication in criminal cases. While immediately realisable improvements are certainly feasible by establishing internal guidelines combined with publicly accessible

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[56] https://www.finma.ch/en/news/2016/10/20161011-mm-falcon/ (last visited on 30.11.2023).

directives as of the noticed selections, other improvements, such as the creation of the proposed publicly accessible database, are more important in terms of workload and organisation, and need the support from other institutions.

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Abbreviations

art.	article(s)
BT-Drs.	Bundestag–Drucksache
cf.	*confer*
cit.	cited
CrimPC	Swiss Criminal Procedure Code of 5 October 2007 (RS 312.0)
ECHR	European Convention of Human Rights
édit./eds.	éditrices/editor(s)
e.g.	*exempli gratia*, for example
f./ff.	and the following page(s)
FIFA	Fédération internationale de football association (French for International Association Football Federation)
FINMA	Swiss Financial Market Supervisory Authority
i.e.	*id est*, that is
1MDB	1Malaysia Development Berhad
N	note
N	Total number of cases (population) [statistical term]
n	foot note
n	Sample [statistical term]
no.	number
OAG	Office of the Attorney General of Switzerland
para.	paragraph(s)
RS	Recueil systématique (French for systematic collection)
SCC	Swiss Criminal Code of 21 December 1937 (RS 311.0)
US	United States

Appendix

Case's name	Industrial sector of the suspects or offenders	Year of the opening of the proceeding by the OAG
ABB	Engineering	2019
Alstom	Engineering	2009
Anglo-Leasing	Unknown	2009
Angola Gate	Unknown	2014[57]
Anonymised by OAG [contextual information: Slovakia, tunneling project Branisko]	Construction	2006
Anonymised by OAG [contextual information: Greece, armaments business]	Banking	2012
Anonymised by OAG [contextual information: Italy-India, aerospace industry]	Unknown	2012
Anonymised by OAG [contextual information: Malaysia, commodity trading]	Banking	2013
Anonymised by OAG [contextual information: Geneva, Ecuador, Commodity trade]	Commodity trade	2021
Arab Spring (complex of proceedings)	Unknown	2011
Gunvor	Commodity trade	2011
KBA-NotaSys (completely anonymised by OAG [contextual information: Nigeria, self-disclosure])	Engineering	2015

[57] For this case, the OAG issued a no-proceedings order. The year, therefore, refers to the issuing of this order, not to the opening of the proceeding.

Nitrochem/Ameropa (completely anonymised by OAG [contextual information: Norway, Libya, Swiss company])	Unknown	2012
Petrobras/Odebrecht (complex of proceedings)	Petroleum industry, engineering, construction, (petro)chemicals	2014
SBM Offshore	Petroleum industry	2020
SICPA	Security printing	2015
Siemens	Engineering	2005
SNC-Lavalin (partly anonymised by OAG)	Construction	unknown
Uzbekistan (complex of proceedings)	Telecommunicat ion (amongst others)	2012
1MDB (complex of proceedings)	Banking sector (amongst others)	2015

Table 3 Overview of proceedings involving transnational corruption communicated by the OAG during 2011 and 2023 (listed in alphabetical order)