

Some Aspects of Settlement Arrangements

Antitrust, Commercial fraud, Litigations Commissions

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Settlement Arrangements**

National Report of Switzerland

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3. QUESTIONNAIRE FOR CRIMINAL PROCEDURES

3.1 General issues

3.1.1 Does your jurisdiction provide for settlement procedures with the prosecution authorities and / or the Courts in criminal procedures?

Within the Swiss criminal Jurisdiction, more specifically under the Swiss federal criminal procedure code (“CPC”), one can deduct three different special procedures which could be considered as settlement procedures:

- conciliation proceedings (private settlement proceedings) (Article 316 CPC)
- summary penalty order (Article 352 CPC)
- accelerated proceedings (Article 358 CPC)

a. Conciliation proceedings (private settlement proceedings)

The conciliation proceeding is an amicable dispute settlement proceeding which is held and organized by the prosecutor (the conciliator)¹, who has a decisional power in case of failure of the proceedings².

During these proceedings the prosecutor may propose solutions to the parties. The main purpose of conciliation proceedings are to allow the parties involved in the dispute to confront their arguments and to reach a peaceful settlement, mainly by withdrawing their claim³.

b. Summary penalty order

The summary penalty order is a proceeding decision by the prosecutor with respect to Article 352 of the CPC. The order can be considered as a judgment awarded by the prosecutor, and therefore an offer made by the criminal authorities⁴.

Once the order is issued, the accused has two choices, either to accept it or to oppose it (Article 354 CPC).

c. Accelerated proceeding

The accelerated proceeding is an innovation introduced under the CPC, which allows the prosecutor, through a negotiation process between the parties involved in the dispute and based on a prior admission by the accused, to

¹ CR CPP - PERRIER, art. 316, N 1 and N 2.

² CR CPP - PERRIER, art. 316, N 2.

³ Yvan JEANNERET / André KUHN, *Précis de procédure pénale*, Stämpfli, 2013, p. 386-387.

⁴ CR CPP - GILLIÉRON/KILLIAS, art. 352, N 1.

submit a pre-agreed indictment (bringing of charges) to the court for judgment⁵.

Within these proceedings, the prosecutor has an important margin of appreciation regarding the case and can most notably omit in favor of the accused to consider some facts or to proceed with some standard instruction acts⁶. This margin of appreciation provides the prosecutor important possibilities to offer incentives to the accused and therefore to benefit from the latter's cooperation.

3.1.2 Are settlement procedures a well-accepted part of criminal procedures in your jurisdiction or are they considered as being critical with regard to the function of a criminal procedure aiming at the "search for the truth".

Essentially, conciliation proceedings are aimed to assist the parties to settle their dispute consensually in a peaceful atmosphere; it allows them to reach a win-win solution, rapidly and with less cost, through withdrawing their claim⁷. Therefore, once a settlement is reached within the framework of a conciliation proceeding, the search for the truth is no more an objective. In fact, in such circumstances the parties consensually put an end to the proceeding and therefore agree to cease the search for the truth. In fact when such settlement is reached, the search for the truth ends with the parties consent. Meanwhile, these proceedings are well-accepted, because they allow the parties to settle their dispute through creative solutions which cannot be referred to within standard proceedings, such as a letter of apology by the accused.

Regarding the summary penalty order, it is considered to contain some failures; most notably it is believed that the order issued through violation of some important proceeding rights of the accused, such as the right of the latter to public/contradictory debate⁸. Violation of the proceeding rights of the accused also affects the search for the truth and the establishment of the facts, considering that these rights have also as their objective to guarantee an accurate search for the truth. However this failure is considered to be compensated through the right of rejection of the order by the accused; in fact it is assumed that the latter consents himself to waive his rights when he accepts the decision⁹.

As for the accelerated proceedings, it is considered to disregard the right of the accused to not self-incriminate¹⁰. In addition, under such proceedings, when it

⁵ CR CPP - PERRIN, Intro. Art. 358-362, N 1.

⁶ CR CPP - PERRIN, Intro. Art. 358-362, N 17.

⁷ CR CPP - PERRIER, art. 316, N 4.

⁸ Yvan JEANNERET / André KUHN, *Précis de procédure pénale*, Stämpfli, 2013, p. 415.

⁹ Yvan JEANNERET / André KUHN, *Précis de procédure pénale*, Stämpfli, 2013, p. 416.

¹⁰ CR CPP - PERRIN, Intro. Art. 358-362, N 3.

comes to the establishment of the facts, instead of a search for the truth, the parties negotiate the facts and disregard the truth¹¹.

3.1.3 Are settlements commonly used in criminal procedures in your jurisdiction?

As for the summary penalty order, it is very commonly used in the Swiss criminal procedure; in practice it covers almost 90% of all Switzerland's non-abandoned proceedings¹².

In relation to the accelerated proceeding, even so it is always demanded by the accused, if at the same the conditions of a summary penalty order are met, the prosecutor has the choice and could therefore disregard the accused's request¹³. In practice, when the prosecutor has this choice, he issues a summary penalty order, considering that it does not require a formal negotiation process¹⁴. Therefore it seems that the institution of the accelerated proceedings is less used.

Regarding conciliation proceedings, the situation is completely different; in fact the CPC provides for two categories of such proceedings: non-compulsory conciliation and compulsory conciliation¹⁵. The conciliation is non-compulsory, when the proceedings relate to an offence that is prosecuted only on complaint (Article 316 I CPC). Conversely, the conciliation is compulsory when consideration is being given to an exemption from punishment due to reparation being made in accordance with Article 53 Swiss Criminal Code ("SCC") (Article 316 II CPC); therefore, in accordance with the text of the CPC, the prosecutor has only an obligation to proceed with conciliation whenever these conditions are fulfilled¹⁶. However, regarding the non-compulsory conciliation, even if the prosecutor has no obligation to proceed with it, it is deducted from the intention of the lawmaker that the prosecutor may only omit to proceed with such proceedings if the possibility of settlement is considered to be impossible in advance¹⁷. It is important to mention that before the CPC, in some Cantons, the prosecutor was always required to proceed with conciliation when the conditions of such proceedings were met¹⁸.

¹¹ CR CPP - PERRIN, Intro. Art. 358-362, N 3.

¹² Yvan JEANNERET / André KUHN, *Précis de procédure pénale*, Stämpfli, 2013, p. 415.

¹³ CR CPP - PERRIN, Intro. Art. 358-362, N 18.

¹⁴ CR CPP - PERRIN, Intro. Art. 358-362, N 18.

¹⁵ Yvan JEANNERET / André KUHN, *Précis de procédure pénale*, Stämpfli, 2013, p. 387.

¹⁶ FF 2006, p. 1251 (Memo of the Swiss Parliament in relation to Article 316 CPC).

¹⁷ FF 2006, p. 1251 (Memo of the Swiss Parliament in relation to Article 316 CPC).

¹⁸ CR CPP - PERRIER, art. 316, N 16.

3.2 Procedural issues

3.2.1 What are the conditions for settlements in criminal procedures?

a. Conciliation proceedings (private settlement proceedings)

The only condition required for a non-compulsory conciliation is that the offence subject to the proceedings should be prosecuted only on complaint (Article 316 I CPC).

As for the compulsory conciliation, it applies if there are considerations given to an exemption from punishment due to reparation being made in accordance with Article 53 SCC (Article 316 II CPC). The conditions of application of Article 53 SCC are that (1) the requirements for a suspended sentence, in accordance with the Article 42 SCC, are fulfilled, and (2) the interests of the general public and of the persons harmed in prosecution are negligible.

b. Summary penalty order

A summary penalty order can be issued if (Article 352 II CPC):

- the accused has accepted responsibility for the offence in the preliminary proceedings or if his or her responsibility has otherwise been satisfactorily established; and
- having taken account of any suspended sentence or parole order that must be revoked, it honors any of the following sentences as appropriate:
 - a fine;
 - a monetary penalty of no more than 180 daily penalty units (the monetary penalty can have a maximum amount of 540,000 CHF in total¹⁹);
 - community service of no more than 720 hours;
 - a custodial sentence (prison) of no more than 6 months.

c. Accelerated proceeding

Accelerated proceedings may apply if prior to the indictment (bringing of charges) (Article 358 I and II CPC):

- the accused makes a request to the public prosecutor to conduct accelerated proceedings;
- the accused admits the matters essential to the legal appraisal of the case and recognizes, at least in principle, the civil claims; and
- the public prosecutor does not request a custodial sentence of more than five years.

¹⁹ CR CPP - GILLIÉRON/KILLIAS, art. 352, N 15.

However, it is important to mention that the accused does not have a right to be treated under accelerated proceedings²⁰. The prosecutor decides whether to conduct such proceedings; if he decides to disregard the accused request for accelerated proceedings, he does not need to provide a statement of reasons and his decision is considered as final (Article 358 I CPC). Where the CPC provides that a decision is final, there is no appellate remedy in respect of that decision, and therefore the accused has no right of appeal against such decisions (Article 380 CPC).

3.2.2 Can a settlement be reached at any time of the procedure (investigation and court proceeding) or is this option restricted to a certain stage (e.g. only in the investigative procedure)?

a. Conciliation proceedings (private settlement proceedings)

Conciliation proceedings can take place when the case is pending before the prosecutor (Article 316 I CPC). However, once the proceedings are pending before the court, the latter is still entitled to summon the parties for conciliation (Article 332 II CPC).

b. Summary penalty order

The summary penalty order may be ordered by the prosecutor at the earliest before the beginning of the investigation phase (Article 309 IV CPC). It should be noted that under this hypothesis, the summary penalty order is issued on the basis of the preliminary investigation by the police and without any hearing of the accused by the prosecutor²¹. The summary penalty order can be issued, at the latest, at the conclusion phase of the investigation (Article 318 I CPC). It should be mentioned that after the investigation phase, the prosecutor is no more in charge of the case, and therefore has no more the authority to issue such an order (Article 61 (a) CPC).

c. Accelerated proceeding

Accelerated proceedings may be requested, at earliest, at the beginning of the preliminary proceedings, and at the latest, before the notification of the indictment (bringing of charges) by the prosecutor to the court (Article 358 I CPC). In fact, on receipt of the indictment (bringing of charges) by the court, the proceedings become pending before the court (Article 328 I CPC)²². Once the proceedings are pending before the court, the authority passes to the latter and the prosecutor is no more in charge of the proceedings (328 II CPC).

²⁰ CR CPP - PERRIN, art. 359, N 1.

²¹ Yvan JEANNERET / André KUHN, *Précis de procédure pénale*, Stämpfli, 2013, p. 420.

²² CR CPP - PERRIN, art. 358, N 3.

3.2.3 Which parties of the criminal procedure have to be involved in the settlement discussions?

a. Conciliation proceedings (private settlement proceedings)

The parties involved in the conciliation proceedings are: the prosecutor (before the pendency of the proceeding before the court, Article 316 I CPC) / the judge (after the pendency of the proceeding before the court, Article 332 II CPC), the accused, and the person suffering harm from the offence (including the victim) or eventually the private claimant.

If the accused fails to attend the hearing, the prosecutor shall immediately proceed with the investigation (Article 316 IV CPC). However, if the claimant fails to attend the hearing, the complaint is deemed to have been withdrawn (Article 316 I CPC). However, a victim has the right to refuse to be confronted with the accused, and therefore to refuse to participate in the conciliation proceedings (Article 152 III CPC)²³. Under the CPC, a victim is a person suffering harm whose physical, sexual or mental integrity has been directly and adversely affected by the offence (Article 116 I CPC).

b. Summary penalty order

The parties involved in a summary penalty order proceeding are the prosecutor, who can issue the order, and the accused, who may accept or decline it.

c. Accelerated proceeding

The parties involved in accelerated proceedings are the prosecutor, the private party and the accused. It is important to mention that, when accelerated proceedings apply, a defense lawyer must be appointed to represent the accused (Article 130 (e) CPC).

3.2.4 Which party can take the initiative for a settlement: The court / the prosecutor / the accused or all of them?

a. Conciliation proceedings (private settlement proceedings)

Conciliation proceedings could only be initiated by the prosecutor / the judge, through summoning the parties involved in the dispute (Article 316 I CPC).

b. Summary penalty order

A summary penalty order is a proceeding decision, and therefore it may only be issued by the prosecutor; consequently only the latter can take the initiative to proceed with such order (Article 352 CPC).

²³ CR CPP - PERRIER, art. 316, N 22.

c. Accelerated proceeding

The initiative to request for accelerated proceedings is only recognized for the accused; however, in practice, the Prosecutor often proposes to the accused to proceed with such a request²⁴.

3.2.5 Please explain the formalities that have to be met for a valid settlement. What are the consequences of a formally invalid settlement?

a. Conciliation proceedings (private settlement proceedings)

Whenever during conciliation hearings a settlement is reached, it should be mentioned on the record and signed by the parties involved in the conciliation (the prosecutor/judge, the accused, and the person suffering harm from the offence (including the victim) or eventually the private claimant) (Article 316 III CPC)²⁵. Once the agreement is mentioned on the record and signed by the parties, the authority in charge must abandon the proceedings and should issue, in accordance with the Article 320 CPC, a proceeding abandoning order (Article 316 III CPC). The ground for the proceeding abandoning order should either be:

- the withdrawal of the complaint, and therefore the lack of conditions required for the proceedings to remain pending (Article 319 I (d) CPC); or
- the application of a statutory regulation, specifically Article 53 of the SCC, which allows the authority to omit to bring charges or to impose a penalty against the accused (Article 319 I (e) CPC).

As for the form and general content of the proceeding abandoning order, it is governed by Articles 80 and 81 (Article 320 I CPC); it must be written, contain a statement of the grounds of reason, and separately awarded²⁶.

If the order has not been validly issued, the parties may contest it to the objections authority within 10 days (Article 322 II CPC). If the objection authority decides to admit the objection to a proceeding abandoning order, it shall issue instructions to the prosecutor to continue the proceedings (Article 397 III); the authority may also revoke the order, or even issue a new one²⁷.

b. Summary penalty order

As to the summary penalty order, it must contain the following items to be valid (Article 353 I CPC):

- the name of the authority issuing the order;

²⁴ CR CPP - PERRIN, art. 358, N 1.

²⁵ CR CPP – PERRIER, art. 316, N 36..

²⁶ Supreme Court decision 6B_79/2012, 13.08.2012.

²⁷ CR CPP - ROTH, art. 322, N 8.

- the name of the accused;
- a description of the act committed by the accused;
- the offence constituted by the act;
- the sanction;
- notice of the revocation of a suspended sentence or of parole with a brief statement of the reasons;
- the costs and damages due;
- details of any seized property or assets that are to be released or forfeited;
- reference to the possibility of rejecting the order and the consequences of failing to reject the order;
- place and date of issue;
- the signature of the person issuing the order.

If the accused has accepted the civil claims of the private claimant, this shall also be recorded in the summary penalty order; if civil claims have not been accepted by the accused, they must be referred to the civil court (Article 353 II CPC).

Once the summary penalty order is issued, the order must be immediately notified to the persons and authorities that are entitled to reject it (Article 353 III CPC). The accused, other affected persons (for example under some circumstances the private claimant²⁸), if so provided, the Office of the Attorney General of Switzerland or of the Canton in federal or cantonal proceedings respectively are entitled to reject the order (Article 354 I CPC). However, the summary penalty order is not required to be notified to the person who reported the crime to the authorities²⁹. A summary penalty order that has not been notified or correctly notified to those it should have been is considered to be invalid³⁰.

In relation to an invalid summary penalty order, the power to decide regarding its validity belongs to the court of first instance (Article 356 II CPC). If the summary penalty order is invalid, the court shall revoke it and refer the case back to the prosecutor, and order new preliminary proceedings to be conducted (Article 356 V CPC).

²⁸ CR CPP - GILLIÉRON/KILLIAS, art. 353, N 12.

²⁹ CR CPP - GILLIÉRON/KILLIAS, art. 353, N 12.

³⁰ CR CPP - GILLIÉRON/KILLIAS, art. 353, N 14.

c. Accelerated proceeding

Before proceeding with the accelerated proceedings, the prosecutor should, at first, make sure that all the conditions of Article 358 CPC are fulfilled³¹.

As to the proceedings before the prosecutor, the latter should prepare a negotiated indictment (bringing of charges), and communicate it to the parties; the parties must declare within ten days whether they consent (irrevocable consent) to the indictment (bringing of charges) or not (Article 360 II CPC):

- if any party rejects the indictment (bringing of charges), the prosecutor must conduct ordinary preliminary proceedings (Article 360 V CPC).
- if the prosecutor has the consent of the parties, it shall submit the negotiated indictment (bringing of charges) with the proceeding files to the court of first instance (Article 360 IV CPC).

As for indictment (bringing of charges), it should contain (Article 360 I CPC):

- the details required in accordance with Articles 325 and 326 CPC;
- the sentence; any measures; instructions related to the imposition of a suspended sentence; the revocation of suspended sentences or parole;
- the ruling on the civil claims made by the private claimant; and
- the ruling on costs and damages; a notice to the parties that by consenting to the indictment, they waive their rights to ordinary proceedings and their right of appeal.

Once the indictment (bringing of charges) is submitted to the court, the latter shall summon the parties for a hearing (Article 361 I CPC). At the hearing, the court shall inquire and establish whether (Article 361 III CPC):

- the accused admits the matters on which the charges are based; and
- this admission corresponds to the circumstances set out in the files.

If the requirements for a judgment in the accelerated proceedings are fulfilled, the court shall issue a judgment that sets out the offences, sanctions and civil claims contained in the indictment, together with a brief statement of reasons for the fulfillment of the requirements for the accelerated proceedings (Article 362 II CPC).

However, if the court considers that:

- the conditions of such proceedings are not fulfilled, the court shall declare the proceedings null (Article 362 I (a) CPC);

³¹ CR CPP - PERRIN, art. 359, N 3.

- if the court decides that the requirements for a judgment in the accelerated proceedings are not fulfilled, it may return the files to the prosecutor and ordinary preliminary proceedings must be conducted; this decision is non-contestable (Article 362 III CPC). It is important to mention that whenever the CPC provides that a decision is non-contestable, there is no appellate remedy in respect of that decision (Article 380 CPC).

3.2.6 Will the settlement be executed itself or will the settlement results only become part of the final court judgment?

a. Conciliation proceedings (private settlement proceedings)

As mentioned above (See question 3.2.5), when a settlement is agreed within a conciliation proceeding, the authority in charge must issue a proceeding abandoning order (Article 316 III CPC; Article 320 CPC applicable through Article 329 IV CPC). The proceeding abandoning order is equivalent to a final verdict of acquittal (Article 320 IV CPC).

b. Summary penalty order

Unless a valid rejection is filed, the summary penalty order becomes a final judgment (Article 354 III CPC)³².

c. Accelerated proceeding

If the requirements for a judgment in an accelerated proceedings are fulfilled, the court shall issue a judgment (final judgment) that sets out the offences, sanctions and civil claims contained in the indictment (bringing of charges), together with a brief statement of reasons for the fulfillment of the requirements for the accelerated proceedings (Article 362 II CPC).

3.2.7 Is it possible to settle any relevant question or is the settlement procedure restricted to certain questions only (e.g. settlement only with regard to a minimum / maximum sentence; no settlements with regard to the question of guilt)?

a. Conciliation proceedings (private settlement proceedings)

The non-compulsory conciliation is limited only to offences that are prosecuted on complaint (Article 316 I CPC).

However, the compulsory conciliation is limited to situations where Article 53 of the SCC is applicable (See question 3.2.1) (Article 316 II CPC).

b. Summary penalty order

The scope of a summary penalty order is limited by the quantum of the penalty, as mentioned above (See question 3.2.1)³³. The actual tendency is to

³² ATF 92 IV 161, JdT 1967 IV 9.

³³ CR CPP - GILLIÉRON/KILLIAS, art. 352, N 13.

enlarge the scope of issuance of such orders, and this through using different means available to decrease the penalty for a given criminal behavior³⁴.

c. Accelerated proceeding

The accelerated proceedings are excluded whenever the prosecutor is willing to request a custodial sentence of more than five years (Article 358 II CPC); otherwise there are no limits for the application of such proceedings³⁵.

3.2.8 Is it necessary for reaching a settlement to admit being guilty? If so, will the confession remain valid in case the settlement eventually fails?

a. Conciliation proceedings (private settlement proceedings)

No admission of guilt is required for conciliation proceedings.

b. Summary penalty order

The prosecutor can issue a summary penalty order, if the responsibility of the accused has been satisfactorily established (Article 352 I CPC). Therefore an admission of guilt by the accused for the offence in preliminary proceedings is not necessary; however an admission of guilt may be sufficient for the prosecutor to issue a summary penalty order³⁶.

c. Accelerated proceeding

As mentioned above (See question 3.2.1), one of the conditions for the application of accelerated proceedings is for the accused to admit the matters essential to the legal consideration of the case. The admission of the accused should be sufficiently understandable and precise; a conditional admission by the accused is not acceptable³⁷. However, when the court refuses to proceed under accelerated proceedings, statements made by the parties for the purpose of accelerated proceedings may not be used in any subsequent ordinary proceedings (Article 362 IV CPC); all declarations and admissions made by the accused in this regard and until the decision of the judge refusing accelerated proceedings cannot not be used in ordinary proceedings³⁸.

³⁴ CR CPP - GILLIÉRON/KILLIAS, art. 352, N 14.

³⁵ CR CPP - PERRIN, art. 358, N 15.

³⁶ CR CPP - GILLIÉRON/KILLIAS, art. 352, N 10.

³⁷ CR CPP - PERRIN, art. 359, N 3.

³⁸ CR CPP - PERRIN, art. 359, N 11.

3.3 Enforcement of settlement

3.3.1 Is the settlement binding for the criminal court or is it possible - and under which conditions – to deviate from the settlement in its final judgment?

a. Conciliation proceedings (private settlement proceedings)

As it is mentioned earlier, the proceeding abandoning order is considered as a final verdict of acquittal (See question 3.2.6). Therefore, after the settlement, no criminal file shall never be submitted to the court.

b. Summary penalty order

As mentioned earlier, the summary penalty order is considered as final judgment (See question 3.2.6). Therefore, the criminal case will never even be submitted to the court.

c. Accelerated proceeding

The settlement reached between the parties under accelerated proceedings is not binding for the court, and in order for the outcome to be effective, the court should approve it (Article 360 CPC)³⁹. The court has the authority to deviate from the settlement, if it considers (Article 362 al. 1 CPC):

- the conduct of accelerated proceedings was not lawful and reasonable; or
- the requested sanctions are inequitable, considering that the charge does not correspond to what should have been deducted from the main hearing and the files of the case.

3.3.2 Is a settlement / a court decision based on a settlement always subject to appeal or can the parties agree to waive the right of appeal?

a. Conciliation proceedings (private settlement proceedings)

Once a proceeding abandoning order is issued, the criminal file is withdrawn and it shall never be submitted to court. In addition, if a complaint is withdrawn, it may not be filed again (Article 33 II SCC), even if the latter fails to comply with the settlement agreement⁴⁰. However, in practice, if the settlement agreement is supposed to be performed subsequently, in order to guarantee its safe execution, the authority in charge may only suspend the proceedings (Article 314 I letter c CPC)⁴¹. The suspension term is limited to 3 months, and it can only be extended for another 3 months (Article 314 II CPC).

Considering the above, the only possibility to contest conciliation settlements would be an appeal against the proceeding abandoning order (Article 322 II

³⁹ CR CPP - PERRIN, art. 360, N 1.

⁴⁰ CR CPP - PERRIER, art. 316, N 42.

⁴¹ CR CPP - PERRIER, art. 316, N 34.

CPC). Regarding the person suffering harm from the offence or eventually the private claimant, they may file an appeal, in accordance with the Article 382 I CPC, only if they have a legitimate interest in the quashing or amendment of the proceeding abandoning order. It is important to mention that the Swiss Supreme Court, in a recent decision, denied the legitimate interest for a person suffering harm from the offence to appeal against a proceeding abandoning order, arguing that there were no grounds for the application of Article 53 SCC⁴².

b. Summary penalty order

The accused may oppose a summary penalty within 10 days after its receipt (Article 354 I CPC). When the rejection is filed by the accused, in accordance with Article 354 II CPC, it does not need to contain a statement of grounds.

Once such rejection is filed, the prosecutor must gather additional evidence required to assess the rejection (Article 355 I CPC). Upon the gathering of evidence, the public prosecutor shall decide to either (Article 355 III CPC):

- stand by the summary penalty order;
- abandon the proceedings; or issue a new summary penalty order; or
- bring charges in the court of first instance.

c. Accelerated proceeding

In case of accelerated proceedings, once the court has approved the settlement, it becomes a judgment (Article 360 IV CPC). The only grounds available for an appeal against this judgment are that a party did not consent to the indictment (bringing of charges) or that the judgment does not correspond to the indictment (bringing of charges). This approach is very understandable considering that the objective in accelerated proceedings is not to establish the real facts, but to limit oneself to negotiated facts⁴³.

However, accelerated proceedings may sometimes lead to an error on the facts, for example, when someone admits guilt to protect somebody else; whenever the untrue facts are related to the innocence or guilt of the person who has been condemned by the verdict, the judgment may be revised⁴⁴.

⁴² Supreme Court decision 6B_466/2009, c. 1.2.2..

⁴³ CR CPP - PERRIN, art. 362, N 13.

⁴⁴ CR CPP - PERRIN, art. 362, N 18.

3.4 Confidentiality and privilege

3.4.1 Does the individual / company being damaged by criminal behavior have a right of access to the criminal files in order to gather evidence for potential damage claims?

Parties, including the private claimant (Article 104 I (b) CPC), may inspect the documents relating to the criminal proceedings at the latest following the first interview with the accused (Article 101 I CPC).

The individual /company who has been damaged by a criminal behavior could become a private claimant if she is a person suffering harm from the offence, and has expressly declared that she wishes to participate in the criminal proceedings as a criminal or civil claimant (Article 118 I CPC). Is considered as a person suffering harm from an offence under the CPC a person whose rights have been directly violated by the offence (Article 116 I CPC). It is important to mention that a person entitled to file a criminal complaint is deemed in every case to be a person suffering harm (Article 116 II CPC).

3.4.2 What impact does the criminal court's decision that the accused is guilty have on potential damage claims? Will a civil court be bound by the criminal court's decisions and vice versa?

The Swiss code of obligation (“**SCO**”) has established the principle of independence of the civil court from the criminal court⁴⁵. According to Article 53 II SCO, the civil court is not bound by the verdict of the criminal court regarding the establishment of fault or the quantification of damages. Article 53 SCO is not a provision which is only applicable for matters related to the SCO; it is applicable to the entire Swiss civil law⁴⁶.

Even if Article 53 SCO does not extend the independence of the civil court to other sections of a verdict, for example the facts, it cannot be deducted that the civil court is bound by the criminal court's verdict for these other sections; in fact, considering that the Swiss federal procedure law does not contain any provisions in this regard, the general principle of independence of jurisdictions applies⁴⁷. Therefore, a civil judge is not bound by an earlier criminal court verdict in the same case⁴⁸.

However, a person suffering harm, as a private claimant, may submit civil claims based on the offence within the criminal proceedings. This right is also attributed to the relatives of the victim, provided they bring their own civil claims against the accused (Article 122 I CPC). In such situation, the matter becomes pending

⁴⁵ CR CO I - WERRO, art. 53, N 1.

⁴⁶ ATF 66 II 80, c. 1 p. 83, JdT 1940 I 583 ss, 584.

⁴⁷ CR CO I - WERRO, art. 53, N 4; see also Supreme Court decision 4C.400/2006, c. 4.

⁴⁸ ATF 125 III 401, c. 3, JdT 2000 I 110.

before the criminal court (Article 122 III CPC and Article 39 of The Swiss civil procedure code).

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