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Commercial bribery an *ex officio* crime in Switzerland

SWITZERLAND

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At the end of September 2015, the Swiss Parliament amended the Criminal Code; namely it added Articles 322^{octies} and 322^{novies}, thereby making commercial bribery an *ex officio* crime in Switzerland. The new provisions, which will likely enter into force on 1 July 2016, are a paradigm shift given that commercial bribery is currently considered a criminal offence only under the Federal Act on Unfair Competition and is prosecuted only upon complaint by a competitor.

As a consequence of these changes in the Criminal Code, any person who offers, promises or gives an employee [...] in the commercial sector an advantage which is not due to him/her, or offers, promises or gives such an advantage to a third party, in order to cause the employee to carry out an act in connection with his/her professional activity, which is contrary to his/her duty or dependent on his/her discretion, is liable to a custodial sentence of up to three years or to a monetary penalty. In minor cases, the act is pursued only upon complaint.[1]

Active (ie, the offering of undue advantages) and passive (ie, the acceptance of undue advantages) bribery in the private sector will become crimes, which must be investigated by the competent prosecution authorities if there is sufficient suspicion for misconduct.

Regarding corporate offences, Article 102 of the Swiss Criminal Code has been amended as well: in cases of active commercial bribery by employees, the undertaking is criminally liable if it has failed to take all necessary and adequate measures required to prevent commercial bribery (criminal offence of organisational deficiency). Accordingly, undertakings under investigation have to prove that they had adequate compliance measures in place to (generally) prevent crimes such as (inter alia) commercial bribery. Undertakings convicted under Article 102 of the Criminal Code are subject to fines of up to CHF 5m and disgorgement of illicit profits.

The tightening of Switzerland's anti-bribery laws is taking place in an environment of increased enforcement. In September 2015, the Swiss Federal Police introduced an anti-corruption reporting platform which invites the public to report actual or suspected corruption.[2] Also, Swiss banks – propelled by the FIFA and Petrobras investigations – are making more suspicious activity reports related to possible corrupt payments. According to the public statements of officials, the Office of the Attorney-General is now receiving more information regarding actual or suspected corporate corruption and it explicitly invites undertakings to self-report actual or suspected corruption.

Revision of Swiss anti-money laundering legislation

Swiss anti-money laundering legislation has been tightened by the Federal Act of 2012 on the implementation of the Revised FATF Recommendations against Money Laundering. The revised law entered into effect on 1 January 2016.

The new legislation is based on the principle of a risk-based approach in order to adequately prevent and detect money laundering related activities. One of the consequences is that in specific cases, persons outside the financial sector are subject to the Anti-Money Laundering Act (the 'AMLA'). More precisely, persons trading with goods and thereby accepting payments of more than 100,000 Swiss Francs in cash now have to comply with the AMLA's due diligence duties and have to report suspicious activities to the competent authority, the Money Laundering Reporting Office Switzerland ('MROS'). If a cash payment of more than 100,000 Swiss Francs occurs, the trader has to identify the contractual party and the beneficial owner and establish documentary evidence. In case there is suspicion of money laundering, additional investigations into the business background are necessary. If the suspicion is confirmed, a report must be filed with MROS.

Another crucial change relates to financial intermediaries' reporting duty to MROS in case of qualified tax offences committed after 1 January 2016, which now qualify as

predicate offences to money laundering. With respect to direct taxes, a qualified tax offence occurs if the avoided tax exceeds 300,000 Swiss Francs per fiscal year (Article 305bis (1) of the Swiss Criminal Code). These rules also apply to tax offences committed abroad.

In the past, financial intermediaries had to immediately freeze assets reported to MROS. Under the new law, financial intermediaries must only freeze accounts if MROS informs the financial intermediary that the report has been forwarded to public prosecution authorities (Articles 9 and 10 AMLA). Accordingly, pending such information, customer orders can be executed even if the underlying assets were reported to MROS. An exception applies to assets linked to terrorist activities, which must be immediately frozen.

Under the new anti-money laundering law, the term 'politically exposed person' ('PEP') has been extended to include leading members and senior executives of intergovernmental organisations or international sports associations (Article 2a AMLA). On the one hand, business relationships with foreign PEPs or PEP-related parties are always considered as increased-risk business relationships and have to be further investigated by the bank. On the other hand, business relationships with domestic PEPs or parties related to them and with PEPs of international organisations as well as international sports associations, are only subject to increased duties in case of further risk factors such as high cash flows from and to the account and unusual transactions.

Finally, it is worth noting that the Swiss Parliament recently rejected a proposal of the Swiss Government according to which financial intermediaries would have had the duty to examine whether clients are tax compliant.

Notes

1 The procedural requirement of a criminal complaint only applies in minor cases, ie, if – according to the parliamentary debate – the amount at stake is less than a few thousand Swiss Francs.

2 New anti-corruption reporting platform, Press Release Office of the Swiss Attorney-General, 15 September 2015 https://fedpol.integrityplatform.org/index.php.

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Recent developments in Thai anti-corruption laws and enforcement

The enforcement of anti-corruption laws in Thailand has historically focused on the liability of officials; however, there are important indicators of greater scrutiny of private party dealings with government agencies.

Thai anti-corruption laws criminalise the giving of a benefit to an official with an intent to induce such an official to act or fail to act *in a manner contrary to his or her function* (section 144 of the Criminal Code and section 123/5 of the Organic Act on Counter-Corruption).

Officials face much tougher restrictions on their ability to wrongfully demand, accept or agree to accept a payment *regardless of whether their subsequent exercise or non-exercise of their official function is wrongful or not* (section 149 of the Criminal Code, section 123/2 of the Organic Act on Counter-Corruption and section 6 of the Act on Offences Committed by Officials of State Organisations or Agencies). For this reason, prosecutors have typically pursued the offending official and, on occasion, sought to enjoin the private party giver of the benefit as a 'supporter' of the offence, liable for two-thirds of the principal's penalty (under section 86 of the Criminal Code).

The pursuit of the 'official' as principal and private party as 'supporter' was evident in a recent case involving state enterprise, MCOT, and allegations that an MCOT official was paid a bribe of THB744,659 (approximately US$21,276) in order to conceal the use of advertising slots, and therefore deprive MCOT of advertising revenue, for the benefit of Rai-som Co. Ltd (the '*MCOT Case*'). On 29