

# market intelligence

## Anti-Corruption

Will increased international  
cooperation stem corruption?

John E Davis leads the global interview panel  
covering anti-corruption regulation and  
investigations in key economies

JUSTICE IS THE GREAT INTEREST OF MAN ON EARTH. WHEREVER  
HER TEMPLE STANDS, THERE IS A FOUNDATION FOR SOCIAL SECURITY  
GENERAL HAPPINESS AND THE IMPROVEMENT AND PROGRESS OF OUR RACE

Regulatory developments • Major investigations • 2016 trends  
Asia-Pacific • Europe • Latin America • North America



# ANTI-CORRUPTION IN SWITZERLAND

Dr Simone Nadelhofer is a partner at LALIVE and specialises in white-collar crime and regulatory investigations. She advises clients on compliance and remedial action and is regularly retained by corporate clients in large-scale cross-border investigations by Swiss and foreign authorities, including US authorities. She also assists clients in international legal or administrative assistance cases, as well as victims of crime in tracing and freezing of assets.

Simone Nadelhofer is a member of the Swiss Association of Experts in Economic Crime Investigation, the Zurich and Swiss Bar Association and the European Criminal Bar Association. She is vice chair of the Anti-corruption and the Rule of Law Committee (Ad Hoc) at the Inter Pacific Bar Association and a board member of the German-Swiss Lawyers' Association. Furthermore, she has recently been appointed to the expert board of the Master of Advanced Studies in Economic Crime Investigation at Lucerne Business School.

Dr Daniel Lucien Bühr is a partner at LALIVE and specialises in regulatory and banking law, white-collar crime and compliance-related investigations. He advises clients on best-practice risk and compliance management systems and leads complex cross-border legal and compliance projects. He also advises clients in competition law matters.

Daniel L Bühr is a member of the Swiss Association for Standardization and was a member of the technical committee on compliance management systems of the International Organization for Standardization. He is a co-founder and vice chair of Ethics and Compliance Switzerland, a not-for-profit organisation promoting effective integrity and compliance management in all organisations.

*What are the key developments related to anti-corruption regulation and investigations in the past year in your jurisdiction?*

**Simone Nadelhofer & Daniel Lucien Bühr:**

On 1 July 2016 the new articles 322-octies and 322-novies of the Swiss Criminal Code (SCC) entered into force, thereby making bribery in the private sector (commercial bribery) an ex officio crime in Switzerland. These new provisions are a paradigm shift in Switzerland given that commercial bribery was in the past only considered a criminal offence under the Federal Act on Unfair Competition and was only prosecuted upon complaint by a competitor. As a consequence of these changes, active (ie, offering of undue advantages) and passive (ie, acceptance of undue advantages) bribery in the private sector have now become crimes that must be investigated by the competent prosecution authorities ex officio as this is already the case for bribery of domestic and foreign officials (ie, irrespective of a complaint) if there is sufficient suspicion of misconduct.

As bribery offences may subsequently cause money laundering offences, and considering Switzerland's role as an international financial centre, it is important to mention that 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 force on 1 January 2016 and is based on the principle of a risk-based approach to be applied by financial intermediaries to adequately prevent, detect and report money laundering-related activities.

The tightening of Switzerland's anti-bribery laws is taking place in a worldwide environment of increased enforcement. Following the recommendations by the OECD Working Group

on Bribery and in the wake of the Panama Papers and corruption scandals involving FIFA, Petrobras and 1MDB, the Office of the Attorney General (OAG) has been taking rigorous action in a number of cases against individuals and corporate entities for suspected corruption and money laundering. According to the OAG's yearly Activity Report, the number of cases involving corruption of foreign officials has been steadily growing over the past years.

In September 2015, the Swiss Federal Office of Police introduced an anti-corruption reporting whistle-blowing platform, which invites the public to report actual or suspected corruption (<https://fedpol.integrityplatform.org>). Furthermore, Swiss banks are making more suspicious activity reports related to possible corrupt payments. Indeed, the latest statistics by the Money Laundering Reporting Office Switzerland (MROS) show that the reports on suspicious activities have increased by 35 per cent.

In 2015, the number of cases MROS referred to criminal prosecutors increased by 29 per cent compared with 2014.

*What lessons can compliance professionals learn about government enforcement priorities from recent enforcement actions?*

**SN & DB:** In recent years, Swiss prosecution authorities have focused their efforts on the enforcement of anti-corruption and anti-money laundering regulations against both corporations and individuals, and increased their resources. A company commits a criminal offence if the company is found to have an organisational weakness in its structures and processes that allowed severe crimes such as bribery of foreign officials to be committed by its employees during the course of the company's activities. Owing to the significant increase of corruption-related investigations into corporations by the OAG, effective and systematic corporate risk and compliance management have become even more important in Switzerland. Board and executive committee members, as well as compliance professionals, should have state-of-the-art risk and compliance management systems in place.

Furthermore, compliance professionals should continue to raise awareness within small and medium-sized enterprises – with international business activities but often (too) modest internal control mechanisms – of the importance of effective compliance measures to prevent the payment of bribes to foreign public officials. The corporate criminal offence is particularly relevant to small and medium-sized companies, and particularly so to those with international business activities.

The OAG, when assessing a company's compliance system, relies on generally accepted best practice. It further takes into account domestic and international standards.

***“A company commits a criminal offence if the company is found to have an organisational weakness in its structures and processes that allowed severe crimes such as bribery of foreign officials to be committed by its employees.”***



*“The term ‘politically exposed person’ has been extended to include leading members and senior executives of intergovernmental organisations.”*

iStock.com/MatteoCozzi

In the event of suspected or actual serious misconduct, the organisation should conduct an internal investigation and establish the facts. On the basis of these facts, the board or executive committee members must take a decision on how to treat the risks, if the internal investigation confirms the initial suspicion. The option of self-reporting to the competent authorities needs to be assessed. Full cooperation with the authorities’ investigation and effective remediation are considered as mitigating factors. In these circumstances, the defendant may benefit from a fast-track procedure by Swiss enforcement agencies.

*What are the key areas of anti-corruption compliance risk on which companies operating in your jurisdiction should focus?*

**SN & DB:** All organisations should focus on the implementation and maintenance of effective risk and compliance management systems to comply with the above-mentioned new provisions on the criminalisation of bribery in the private sector. Companies in the financial services sector (but not in that sector alone), and traders in particular, should be aware of the (new) provisions of the Anti-Money Laundering Act (AMLA). Under the revised AMLA, 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). Business relationships with domestic PEPs or parties related to them, and with PEPs of international organisations and international sports associations, are not, as such, considered as increased-risk business relationships. However, such business relationships are subject to increased duties in case of further risk factors such as high cash flows from and to the account, and unusual transactions. In contrast, business relationships with foreign PEPs or PEP-related parties are always considered as increased-risk business relationships and have to be assessed with a higher degree of diligence.

*Do you expect the enforcement policies or priorities of anti-corruption authorities in your jurisdiction to change in the near future? If so, how do you think that might affect compliance efforts by companies or impact their business?*

**SN & DB:** If anything, we expect the Swiss criminal prosecution authorities to increase their anti-bribery and anti-money-laundering enforcement. As a result of the improved effectiveness of mutual legal assistance proceedings, prosecution authorities will in future have access to more information.



*Have you seen any recent changes in how the enforcement authorities handle the potential culpability of individuals versus the treatment of corporate entities? How has this affected your advice to compliance professionals managing corruption risks?*

**SN & DB:** Both individuals and companies can be held liable for bribery of a foreign or domestic official and now, as of 1 July 2016, additionally for bribery in the private sector. As mentioned before, in accordance with article 102(2) SCC, a company commits a criminal offence if the company is found to have an organisational weakness in its structures and processes that allowed severe crimes such as bribery of foreign officials to be committed by its employees during the course of the company's activities.

Furthermore, according to article 102(1) SCC, the company is also liable if a crime has been committed in the process of a business activity and it is not possible – because of the company's organisational weakness – to identify the employee responsible.

The corporate criminal offence was introduced into the SCC in 2003 and while this offence remained a dead letter for many years, prosecutors have started applying this provision and have been bringing charges against corporations for a few years now. Enforcement authorities are now prosecuting individuals as well as companies in the event of serious crimes. It is important to bear in mind that under the SCC, a company may be fined up to 5 million Swiss francs and illicit profits may be confiscated. For instance, the OAG is conducting multiple investigations and has recently opened a number of criminal proceedings against Swiss banks for corruption and money laundering.

We continue to advise board and executive committee members, as well as compliance professionals, to implement and maintain all adequate and necessary organisational measures to prevent corporate misconduct.

Since FINMA's decision of 24 October 2014, in which it imposed an occupational ban on the CEO of a Swiss bank for market manipulation, FINMA's activities have been focused on senior management. The OAG is also increasingly holding senior management accountable.

*How have developments in laws governing data privacy in your jurisdiction affected companies' abilities to investigate and deter potential corrupt activities or cooperate with government inquiries?*

**SN & DB:** Companies located in Switzerland must comply with the Swiss Data Protection Act (DPA) and Swiss Employment Law.

If a company decides to conduct an internal investigation and wishes to disclose its findings abroad, on the principle that personal data

*Have you seen evidence of increasing cooperation by the enforcement authorities in your jurisdiction with authorities in other countries? If so, how has that affected the implementation or outcomes of their investigations?*

**SN & DB:** Swiss authorities are in general willing to cooperate with their foreign counterparts, both in formal statutory processes and in an informal way. These ways of cooperation include international administrative and mutual legal assistance. Switzerland is a member of Interpol and has an association agreement with the European Union's Schengen framework.

Statistically, the number of judicial assistance requests from other countries to the OAG that were granted has slightly decreased from 2014 to 2015. At the same time, the number of such mutual legal assistance requests to the Swiss Financial Market Supervisory Authority (FINMA) that were granted has increased significantly in recent years.

While Switzerland does not extradite Swiss nationals against their will, Swiss authorities are usually ready to extradite foreigners. In the past year, the Swiss Department of Justice has granted extradition in a number of corruption-related legal assistance cases (eg, FIFA and Petrobras). Most of these decisions were unsuccessfully appealed at the Swiss Supreme Court.

## THE INSIDE TRACK

*What are the critical abilities or experience for an adviser in the anti-corruption area in your jurisdiction?*

In addition to a solid legal knowledge, in particular with regard to corporate criminal offences and business acumen, a good understanding of the enforcement priorities and processes of the authorities and the interaction of criminal and administrative procedures are indispensable qualities for an adviser in the anti-corruption area in Switzerland. Furthermore, the adviser should anticipate and understand possible international implications of domestic criminal investigations and be able to effectively coordinate and supervise cross-border investigations.

*What issues in your jurisdiction make advising on anti-corruption compliance unique?*

Switzerland has an export-oriented economy and is one of the most important international financial centres, which increases the exposure to corruption and money laundering offences. At the same time, many companies, especially internationally active small and medium-sized enterprises, still have a way to go to implement effective risk and compliance management systems in line with best international practices.

Furthermore, with commercial bribery having recently become an *ex officio* crime, the exposure of companies active internationally has increased even further. We will follow the first investigations and prosecutions in this area with much interest.

*What have been the most interesting or challenging anti-corruption matters you have handled recently?*

We are advising a leading industrial manufacturer in a criminal investigation by the OAG for suspected bribery of foreign officials. In this case, the client decided to fully cooperate with the OAG and has implemented significant best-practice remedial efforts. Furthermore, we are advising clients in the context of an important corruption and money laundering case in an Asian country. The authorities of this country have requested mutual legal assistance in criminal matters from the Swiss authorities in relation to accounts held by offshore companies with Swiss banks.

**Simone Nadelhofer & Daniel Lucien Bühr**  
LALIVE  
Zurich  
[www.lalive.ch](http://www.lalive.ch)

cannot be transferred abroad without the implicit or explicit consent of the data subject, the company may only do so if a statutory exception applies. In particular, according to article 6 DPA, personal data may only be disclosed abroad if the jurisdiction in question has a sufficient level of protection of privacy. This is determined by whether or not the state in question has laws in place that meet the standards set out in Council of Europe treaty No. 108 (Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data of 1 October 1985). By this standard, the United States, for example, does not meet this requirement.

In the event of an investigation, it is important to note that Switzerland does not grant legal privilege to in-house counsel or compliance officers. The company should therefore always consider engaging external legal counsel in the event of an internal or external investigation to protect communication and work product under attorney-client privilege.

Under statutory law, individuals or companies accused of misconduct or a criminal offence are not obliged to cooperate with investigating authorities. This is due to the principles of *in dubio pro reo* and *nemo tenetur se ipsum accusare*. That being said, in the current investigations of the OAG against a bank for charges of money laundering, the Swiss Supreme Court recently (on 30 May 2016) decided to lift the seal on an internal memorandum that the bank had produced and the OAG had confiscated. The court weighed the public interest in the information contained in the document versus the defendant's interest to secrecy and decided that while the defendant does not have to incriminate him or herself, in this case the conditions of a rightful confiscation and disclosure were fulfilled. Arguably, the result would have been different if the document had been covered by attorney-client privilege.

*Also available online*



[www.gettingthedealthrough.com](http://www.gettingthedealthrough.com)



*Official Partner of the Latin American  
Corporate Counsel Association*



*Strategic Research Sponsor of the  
ABA Section of International Law*