

# Switzerland

Marc Henzlin and Daniel Lucien Bühr

LALIVE

## 1 International anti-corruption conventions

### To which international anti-corruption conventions is your country a signatory?

Switzerland is a signatory to three international anti-corruption conventions.

Switzerland first ratified the 2003 United Nations Convention against Corruption on 10 December 2009, with no reservation.

Switzerland is also part of the 1998 Council of Europe Criminal Law Convention on Corruption and its 2003 Additional Protocol, both ratified on 31 March 2006. However, Switzerland made several reservations regarding this convention. In particular, it reserved its right not to apply section 12 of the convention (trading in influence) – to the extent that this offence is not punishable under Swiss law – as well as its right to apply section 17(1)(b) and (c) (applying to extraterritorial jurisdiction) only where an act is also punishable in the country where it was committed and the offender is in Switzerland and will not be extradited to a foreign state. Switzerland is also a member of the Council of Europe's Group of States against Corruption.

Switzerland is also a party to the 1997 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, ratified on 31 May 2000, and the United Nations Convention against Corruption, ratified on 24 September 2009.

In addition to these conventions, on 31 May 2000, Switzerland has also ratified the 1990 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of Proceeds of Crime. In particular, this Convention allows for the restraining of assets alleged to be the proceeds of crime and provides for the confiscation of those assets and the recognition of foreign judgments ordering confiscation.

Moreover, Switzerland is a party to a number of bilateral treaties in matters of mutual assistance that facilitate the seizure, confiscation and repatriation of proceeds of crimes (which include corruption).

## 2 Foreign and domestic bribery laws

### Identify and describe your national laws and regulations prohibiting bribery of foreign public officials (foreign bribery laws) and domestic public officials (domestic bribery laws).

The Swiss Criminal Code (SCC) has five provisions prohibiting acts of bribery.

The SCC first criminalises the active and passive corruption of domestic officials under articles 322-ter and 322-quater respectively. These provisions prohibit offering, promising or giving an undue advantage (respectively soliciting, receiving a promise of or accepting such an advantage) to a member of a judicial or other authority, a public official, an officially-appointed expert, translator or interpreter, an arbitrator or a member of the armed forces, for that persons' benefit or for anyone else's benefit, in order to cause him or her to carry out or to fail to carry out an act in connection with his official activity which is contrary to his duty or dependent on his discretion.

Furthermore, articles 322-quinquies and 322-sexies of the SCC prohibit the granting of an advantage to a public official as well as the acceptance by public officials of an advantage which is not due to them in order to carry out their official duties (facilitating or 'grease' payments).

Active and passive corruption of foreign public officials are punished under article 322-septies of the SCC.

In addition to the SCC, active and passive bribery in the private area became an offence under article 4a of the Unfair Competition Act (introduced on 1 July 2006) but it is a misdemeanour, meaning that Switzerland cannot prosecute acts of money laundering in Switzerland of the proceeds of private corruption committed abroad, as money laundering in Switzerland can only be prosecuted for the proceeds of a crime (maximum sentence of three years at least).

## Foreign bribery

### 3 Legal framework

#### Describe the elements of the law prohibiting bribery of a foreign public official.

Bribery of a foreign public official is punished by article 322-septies of the SCC. The application of this provision requires an unlawful payment or an advantage (ie, any other measurable improvement in the beneficiary's situation, whether in economic, legal or personal terms) or the offer or promise of such a payment or advantage in order to cause that official to act in breach of his or her public duties or to act or take a decision within his discretion. Knowing if the 'advantage' given represents an 'undue advantage' for the foreign official shall be assessed by the terms of the legislation of the country concerned. It is important to specify that a bribe paid to cause a foreign official to act in accordance with his or her public duties (facilitating or 'grease' payments) is not punishable under this provision.

### 4 Definition of a foreign public official

#### How does your law define a foreign public official?

Under Swiss law, the definition of foreign public officials includes, as required by the OECD's Convention, the officials of a foreign state or a foreign authority, the officials of international organisations, regardless of their nationality. The definition of a 'public official' under article 322-ter of the SCC also applies for article 322-septies; it therefore includes all foreigners acting as members of a judicial or other authority, public officials, officially appointed experts, translators or interpreters, arbitrators or members of the armed forces. It is important to specify here that private persons performing official duties shall be treated as public officials (article 322-octies of the SCC), including when they act for public companies active in the private sector.

### 4 Definition of a foreign public official

#### How does your law define a foreign public official?

Swiss law prohibits offering any 'undue advantage' to a public official, which is any ascertainable enhancement (legal, economical or personal) in the beneficiary situation. It can take any form in particular; a payment, (more or less hidden, for example an excessive fee for a service), a benefit in kind (for example a gift of a valuable object, including travel), the promise of a promotion, supporting an election, etc. It must, however, be paid to induce the foreign official to act in breach of his or her public duties or to exercise his or her discretion in favour of the corrupting party or of a third party.

However, advantages are not undue if allowed by staff regulations or if they are of minor value in conformity with social custom (article 322-octies 2 SCC).

## 6 Facilitating payments

### Do the laws and regulations permit facilitating or 'grease' payments?

Switzerland does not criminalise facilitating or 'grease' payments to foreign public officials. Swiss criminal law distinguishes between proper corruption, which induces public official to breach their duty and granting or acceptance of a benefit, which induces public officials to perform a lawful act that does not depend on their discretionary power (ie, a lawful act). The latter is not prohibited by the legislation affecting corruption of foreign public officials (article 322-septies SCC) which only prohibits proper corruption. On the contrary, similar payment to Swiss public officials (as well as receipt of payment by those officials) constitute an offence under Swiss criminal law.

## 7 Payments through intermediaries or third parties

### In what circumstances do the laws prohibit payments through intermediaries or third parties to foreign public officials?

Swiss criminal law explicitly prohibits payments through 'third parties' (article 322-quater SCC) under the following conditions: the public official is aware of the advantage given to a third party and there is a link between this advantage and a breach of his or her duties by the official. There is no requirement that the official obtains an indirect benefit.

## 8 Individual and corporate liability

### Can both individuals and companies be held liable for bribery of a foreign official?

Both individuals and companies can be held liable for bribery of a foreign official. Indeed, in accordance with article 102 (2) CSS, the company can be convicted irrespective of the criminal liability of natural persons, provided the company is responsible for failing to take all the reasonable organisational measures that were required in order to prevent such an offence.

## 9 Civil and criminal enforcement

### Is there civil and criminal enforcement of your country's foreign bribery laws?

According to criminal law, Switzerland does not enforce foreign bribery laws but it can accept the delegation of prosecution by foreign states (article 85 Law on Mutual Legal Assistance). Swiss law pursues anyone that committed a corruption offence abroad if the act is also liable to prosecution at the place of commission or no criminal law jurisdiction applies at the place of commission; and if the person concerned remains in Switzerland and is not extradited to the foreign country (article 7 (1) SCC). Furthermore, the Federal Act on International Mutual Assistance in Criminal Matters, provides that a state may obtain urgent interim relief prior to the transmission to Switzerland of a formal request for mutual assistance, provided that it announces its intent to forward such a request (article 18 IMAC).

According to civil law, a foreign judgment will be recognised and enforced if the conditions of the Swiss Private International Law Act are fulfilled (article 25-ss PILA). Furthermore, the PILA provides that the law of the market where the effects of the unfair act occurred (article 136 PILA) determines the law applicable to the claims.

## 10 Agency enforcement

### What government agencies enforce the foreign bribery laws and regulations?

In matters of international cooperation, the central authority appointed in Switzerland, in accordance with article 29 of the Council of Europe Corruption Treaty, is the Federal Office of Justice (FOJ), an agency of the Federal Department of Justice and Police. The FOJ is the central authority that cooperates with national and international authorities in matters involving legal assistance and extradition.

With regards to domestic criminal investigations, bribery and money laundering cases generally fall within the jurisdiction of the Swiss Confederation and are conducted by the Office of the (federal) Attorney General if the offence has been committed mainly in a foreign country or in several cantons with none of them being clearly predominant (article 24(1) of the Swiss Criminal Procedure Code (SCPC)). The relevant cantonal law enforcement authorities handle all other investigations into bribery and money-laundering cases.

## 11 Leniency

### Is there a mechanism for companies to disclose violations in exchange for lesser penalties?

Companies or individuals can ask for the opening a simplified procedure, which allows them to negotiate a plea bargain with the Prosecution Service. The prerequisite is that the offender agrees on facts, offences and sentences with the Prosecutor and that he recognises (where applicable) the civil claims (article 358 ff. SCPC). The plea bargain has to be subsequently agreed by a court in a summary trial.

If no solution is found, all documents provided by the companies or the individuals within this frame are destroyed and cannot be used within an ordinary criminal procedure and the Prosecutor in charge cannot be the one who negotiated the plea bargain.

In a normal criminal proceeding, the company's conduct in the course of the proceedings can be taken into account by the court in determining the appropriate sanction.

## 12 Dispute resolution

### Can enforcement matters be resolved through plea agreements, settlement agreements, prosecutorial discretion or similar means without a trial?

See under 11 supra.

Bribery cases may also be resolved:

- by exemption from punishment or abandonment of proceedings if the case is of minor relevance within the meaning of article 52 SCC ;
- by exemption from punishment or abandonment of proceedings if the offender has made reparation for the loss, damage or injury or made every reasonable effort to right the wrong that he or she has caused provided that the interests of the general public and, where applicable, of the persons harmed, in the prosecution are negligible (article 53 SCC);
- by way of summary penalty order, which is a procedure without a trial. This procedure is workable only if the offender accepts liability for the offence or if his or her responsibility has otherwise been satisfactorily established (article 352 ff. SCPC) and if sentences provided are appropriate in the case (a monetary penalty of no more than 180 daily penalty units; community service of no more than 720 hours; a custodial sentence of no more than six months) ;

## 13 Patterns in enforcement

### Describe any recent shifts in the patterns of enforcement of the foreign bribery rules.

Between 2000 and 2006, Switzerland extended and tightened its bribery rules. Switzerland also substantially contributed to the drafting of the OECD Convention of 1997 on Combating Bribery of Foreign Public Officials in International Business Transactions.

For many years, Switzerland was keen on freezing and spontaneously returning assets belonging to former heads of States or politicians, in particular after the Arab Spring.

Switzerland was also particularly active in fighting money laundering in its territory, including in seizing and confiscating the proceeds of bribery. For this purpose, Switzerland is using a system of suspicious activities reports by banks and spontaneous assistance by prosecutors to foreign States once money obtained illegally or by improper means is discovered in Switzerland.

At the end of 2014, the Swiss parliament toughened its rules against money laundering. This sends an important signal to corporate Switzerland that foreign bribery is considered a serious offence under Swiss law and would be henceforth penalised.

## 14 Prosecution of foreign companies

### In what circumstances can foreign companies be prosecuted for foreign bribery?

Under Swiss law, the defective organisation of the company to take all the reasonable organisational measures that were required in order to prevent bribery, is a necessary requirement for establishing corporate criminal liability. A foreign company is subject to criminal prosecution in the place where the acts of bribery were committed or where the defective organisation of the company occurred, for example, in a branch of the company.

Unlawful payment via Swiss bank accounts could establish corporate criminal liability.

## 15 Sanctions

### What are the sanctions for individuals and companies violating the foreign bribery rules?

Any person who offers a bribe to a foreign public official to obtain an advantage which is not due to him is liable to a custodial sentence not exceeding five years or to a monetary penalty up to 1 million Swiss francs, or both. The sanction may include prohibition from practising a profession (article 67 SCC), publication of the judgment (article 68 SCC), and expulsion from Switzerland for foreigners as an administrative sanction (article 62(b) and article 63(1)(a) of the Federal Act on Foreign Nationals). The court shall order the forfeiture of those assets which have been acquired through the commission of an offence (article 70 SCC).

A company that has not taken all the reasonable and necessary precautions to prevent bribery within its internal organisation is penalised irrespective of the criminal liability of any natural persons and is liable to a fine not exceeding 5 million francs (article 102 SCC).

## 16 Recent decisions and investigations

### Identify and summarise recent landmark decisions or investigations involving foreign bribery.

In 2014, dozens of corruption cases were running in foreign corruption cases, in particular several important cases related to Greece, Kenya, Kazakhstan, Ukraine, Uzbekistan. In April 2014, the Office of the Attorney General of Switzerland opened criminal investigations into money laundering in the context of the corruption scandal concerning the Brazilian oil company Petrobras. A request for mutual assistance was sent to Brazil. The investigations are still ongoing.

Concerning amendments to current Swiss law, the Parliament is working on a more efficient way to punish the persons working in international sports organisations (more than 50 per cent of these have chosen to locate their headquarters in Switzerland). This amendment will consist in the modification of article 4a of the Unfair Competition Act. Nowadays, this provision only allows criminal authorities to prosecute an individual for private bribery when a complaint has been filed. The new provision will allow the authorities to introduce automatic prosecutions when a case of private bribery occurs without such complaint. Furthermore, the Money Laundering Act will be amended to qualify senior civil servants of international sports bodies in Switzerland as 'politically exposed persons'. This new status will permit Swiss authorities to keep a wary eye on them and their finances will be scrutinised.

A recent judgment of the Federal Court of 16 May 2014 should, according to Michael Lauber, Attorney General of Switzerland, facilitate the cooperation between Swiss judicial authorities and their foreign counterparts. In its decision No. 1C\_126/2014, the Federal Court held that Swiss authorities could forward information outside of a formal mutual assistance procedure, even though they did not open a criminal investigation themselves. In fact, before this decision, a part of the legal doctrine considered that the so-called spontaneous provision of information necessarily implies that an investigation has previously been opened in Switzerland. Thus, this doctrine generally believes that this new case law 'goes too far'. However, it has to be specified that the spontaneous exchange of information with foreign countries is limited to information which is not covered by a legally protected secret, such as bank secrecy. This new decision of the Federal Court may accelerate the exchange of information in cases of international corruption, where the formal procedure of mutual assistance is generally too long to be effective.

## Financial record keeping

## 17 Laws and regulations

### What legal rules require accurate corporate books and records, effective internal company controls, periodic financial statements or external auditing?

All legal entities and all sole proprietorships and partnerships that have achieved sales revenues of at least 500,000 Swiss francs in the past financial year are obliged to keep accounts and file financial reports in accordance with the provisions of articles 957 et seq. of the Code of Obligations. The accounting principles and requirements are complete, truthful and

systematic recording of transactions and circumstances, documentary proof for individual accounting procedures, clarity, fitness for purpose given the form and size of the undertaking and verifiability of the financial information.

The accepted accounting standards are IFRS, IFRS for SMEs, Swiss GAAP FER, US GAAP and IPSAS (the latter for public sector entities). In regulated sectors such as financial services, special rules apply.

Effective internal controls are explicitly and implicitly required by a number of statutes. The most important is article 716a of the Code of Obligations which states that the Board of Directors of a Swiss stock corporation bears (among others) responsibility for the organisation of the accounting, for financial control and financial planning systems as required for the management of the company and must supervise the persons entrusted with managing the company, in particular with regard to compliance with the law and internal directives.

Articles 727 et seq. of the Code of Obligations on external auditors apply to all enterprises regardless of their legal organisation and state a general duty to appoint external auditors. However, the scope of the external audit depends on the type (publicly traded versus private) and size of the enterprise. The auditors must examine whether:

- the annual (consolidated) accounts comply with the statutory provisions, the articles of association and the chosen set of financial reporting standards,
- the motion made by the board of directors to the general meeting on the allocation of the balance sheet profit complies with the statutory provisions and the articles of association and
- there is an internal control system.

## 18 Disclosure of violations or irregularities

### To what extent must companies disclose violations of anti-bribery laws or associated accounting irregularities?

A statutory reporting duty regarding violations of anti-bribery laws and related accounting irregularities does not exist under Swiss law. General reporting duties regarding legal or compliance, reputational and operational risks do, however exist in regulated sectors, such as the financial services sector. In addition, under the Federal Act on Combating Money Laundering and Terrorist Financing in the Financial Sector, financial intermediaries must notify the authorities if they suspect money-laundering activities.

Should the external auditors find that there have been infringements of the law, they must give notice to the board of directors in writing and inform of any material infringements at the general shareholders' meeting.

## 19 Prosecution under financial record keeping legislation

### Are such laws used to prosecute domestic or foreign bribery?

The violation of bookkeeping laws is a criminal offence (article 251 of the Swiss Criminal Code - falsification of documents) and a violation of ancillary provisions aimed at ensuring proper bookkeeping. The violation of bookkeeping duties may trigger administrative sanctions in regulated industries, such as financial services.

## 20 Sanctions for accounting violations

### What are the sanctions for violations of the accounting rules associated with the payment of bribes?

The falsification of documents in the sense of article 251 of the Swiss Criminal Code may result in imprisonment for up to five years and/or a fine of up to 1 million Swiss francs.

## 21 Tax-deductibility of domestic or foreign bribes

### Do your country's tax laws prohibit the deductibility of domestic or foreign bribes?

Switzerland's federal and cantonal tax laws explicitly exclude tax deductibility of bribes paid to domestic or foreign public officials. Bribes paid to private persons are tax-deductible.

**Update and trends**

On 30 April 2014, the Federal Council submitted its legislative project regarding an intensification of the fight against private commercial bribery to Parliament. The Federal Council proposes that private commercial bribery become a criminal offence and be prosecuted ex officio.

The main reason for the proposed changes are that Switzerland is host to a number of international sports associations and a platform for major economic and financial interests and that to date, as a result of the requirement of a criminal complaint by a competitor, no single conviction has occurred.

In future, private commercial bribery shall be an ex officio criminal offense because, according to the Federal Council, the prosecution of private commercial bribery is a matter of public interest.

According to the proposal, the offence of granting or accepting an undue advantage shall be extended to advantages granted to or accepted by third parties.

**Domestic bribery****22 Legal framework**

**Describe the individual elements of the law prohibiting bribery of a domestic public official.**

Articles 322-ter et seq. of the Swiss Criminal Code prohibit bribery of domestic public officials. The elements of (active) bribery of domestic public officials are:

*a person offers, promises or gives an undue advantage to a member of a judicial or other authority, a public official, an officially appointed expert, translator or interpreter, an arbitrator, or a member of the armed forces or to a third party, in order to cause that public official to carry out or to fail to carry out an act in connection with his official activity which is contrary to his duty or dependent on his discretion.*

Minor advantages that are common social practice do not qualify as undue advantages.

According to article 322-quinquies of the Criminal Code, the elements of the (lesser) offence of granting an undue ('facilitating') advantage to a domestic public official are:

*a person offers, promises or gives to a member of a judicial or other authority, a public official, an officially-appointed expert, translator or interpreter, an arbitrator or a member of the armed forces an advantage which is not due to him in order that he carries out his official duties.*

All criminal offences, including the offence of bribery of a Swiss public official, require mens rea, ie, either intent or wilful blindness (dolus eventualis).

**23 Prohibitions**

**Does the law prohibit both the paying and receiving of a bribe?**

Both active and passive bribery and granting of undue advantages to domestic public officials are prohibited by the Criminal Code and are subject to the same level of fines.

**24 Public officials**

**How does your law define a public official and does that definition include employees of state-owned or state-controlled companies?**

The law defines public officials as members of an authority who pursue an official activity. Employees of state-owned or state-controlled companies may qualify as public officials, if and to the extent they pursue an official activity.

**25 Public official participation in commercial activities**

**Can a public official participate in commercial activities while serving as a public official?**

Yes, to the extent that the participation is financial only and does not create a conflict of interests. No, or within narrow limits, if the participation in commercial activities involves employment of labour.

**26 Travel and entertainment**

**Describe any restrictions on providing domestic officials with gifts, travel expenses, meals or entertainment. Do the restrictions apply to both the providing and receiving of such benefits?**

According to article 322-octies of the Criminal Code, minor and commonly accepted social advantages and which are authorised by administrative regulations are licit. Under the Ordinance on Federal Employees and the guidance of the Federal Office of Personnel regarding prevention of corruption, staff members of the Federal Administration may not accept gifts in the course of their work, unless they are small in nature (valued no more than 200 Swiss francs) and are socially or traditionally motivated. During procurement or decision-making processes, even small and socially or traditionally motivated benefits are not permitted.

# LALIVE

**Marc Henzelin**  
m.henzelin@lalive.ch

Rue de la Mairie 35  
PO Box 6569  
1211 Geneva 6  
Switzerland  
Tel: +41 58 105 2000  
Fax: +41 58 105 2060

**Daniel Lucien Bühr**  
dbuhr@lalive.ch

Stampfenbachplatz 4  
PO Box 212  
8042 Zurich  
Switzerland  
Tel: +41 58 105 2100  
Fax: +41 58 105 2160  
www.lalive.ch

**27 Gifts and gratuities**

**Are certain types of gifts and gratuities permissible under your domestic bribery laws and, if so, what types?**

Yes (see answer above). Giving a chocolate box worth 50 Swiss francs or US\$50 to a public official for his or her speech at a public seminar would be a commonly accepted social practice. However, meals at expensive restaurants or any kind of entertainment are not commonly accepted social practice and may qualify as bribery or the granting of an undue advantage (ie, the illicit granting of a facilitation payment).

**28 Private commercial bribery**

**Does your country also prohibit private commercial bribery?**

Under article 4a of the Unfair Competition Act, active and passive bribery in the private sector (private bribery) constitute a criminal offence. The elements of (active) private bribery are that:

*a person offers, promises or gives to a private sector employee, a shareholder, an agent or to a third party, an undue advantage in order to cause that private sector person to carry out or to fail to carry out an act in connection with his employment or business activity which is contrary to his or her duty or dependent on his or her discretion.*

Private bribery is prosecuted upon demand of a competitor.

**29 Penalties and enforcement**

**What are the sanctions for individuals and companies violating the domestic bribery rules?**

The bribery sanctions for individuals are imprisonment for up to five years and/or a monetary fine of up to 1.08 million Swiss francs. Other criminal and administrative law measures are prohibition from practising a profession, forfeiture of assets that have been acquired through the commission of an offence and expulsion from Switzerland for foreigners.

Under article 102 of the Criminal Code, companies are responsible for failing to take all reasonable organisational measures required in order to prevent bribery (and certain other criminal offences) by its directors and employees. Companies can be fined up to 5 million Swiss francs. As a rule, illicit profits are forfeited.

**30 Facilitating payments**

**Have the domestic bribery laws been enforced with respect to facilitating or 'grease' payments?**

Yes. In about a dozen instances, courts have sentenced individuals for granting or accepting undue advantages. In a recent case involving the Federal Administration, the Office of the Attorney General on 16 April 2014 opened an investigation against a public official for accepting bribes and undue advantages.

**31 Recent decisions and investigations**

**Identify and summarise recent landmark decisions and investigations involving domestic bribery laws, including any investigations or decisions involving foreign companies.**

On 16 April 2014, the Office of the Attorney General began prosecuting a federal public official for passive bribery and acceptance of undue advantages. This federal investigation has led to a number of administrative investigations at federal and cantonal level into IT procurement practices and possible other cases of supposed bribery and undue advantages.

On 27 August 2014, the Supreme Court of the Canton of Zurich confirmed a six-year prison sentence for passive bribery against the former head of asset management of the public servants' pension fund of the Canton of Zurich as well as sentences for active bribery against financial advisers. The case relates to the 20 billion Swiss francs pension fund of the public servants of the Canton of Zurich, formerly managed by a public official of the Canton of Zurich, who, according to the Supreme Court of the Canton of Zurich, accepted bribes and undue advantages in an amount of around 1 million Swiss francs.

On 1 September 2014, the Office of the Attorney General confirmed its intention to indict a current as well as a former senior Gazprom employee for passive bribery and two individuals for active bribery. The case concerns the construction of the Yamal pipeline from Siberia to Germany and the procurement of turbines. Allegedly, bribes were paid by companies in Cyprus from their Swiss bank accounts.

On 18 November 2014, FIFA, the Fédération Internationale de Football Association, filed a criminal complaint with the Office of the Attorney General, submitting to the Office the report of the investigatory chamber of the FIFA Ethics Committee together with a criminal (bribery) complaint. The Office of the Attorney General expressed its intention to inform the public in due time about further steps.