

Anti-Corruption Regulation

Contributing editor
Homer E Moyer Jr



2017

GETTING THE
DEAL THROUGH

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Switzerland

Daniel Lucien Bühler and Marc Henzelin

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 ratified the 2003 United Nations Convention against Corruption on 24 September 2009, with no reservation.

Switzerland is also party to the 1999 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 the 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, 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 (GRECO).

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.

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. This Convention allows for the restraining of assets suspected 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 legal 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 (the SCC) has seven provisions prohibiting acts of bribery.

The SCC first prohibits the active and passive corruption of domestic officials under articles 322-ter and 322-quater, respectively. These provisions prohibit the offering, promising or giving of 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 or her official activity, which is contrary to his or her duty or dependent on his or her 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 make them carry out their official duties (facilitating or 'grease' payments).

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

Articles 322-octies and 322-novies of the SCC prohibit the active and passive bribery of private individuals. These provisions prohibit the offering, promising or giving (respectively the demanding and acceptance) of an undue advantage to an employee, partner or shareholder, agent or other auxiliary person of a third party in the private sector, for an act or omission in its duty or discretion in the offender's or a third party's favour.

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 prohibited by article 322-septies of the SCC. The application of this provision requires an unlawful payment or an undue advantage (ie, any other measurable improvement of the beneficiary's situation, whether in economic, legal or personal terms) or the offer or promise of such an undue 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 or her discretion. The assessment of whether the 'advantage' given represents an 'undue advantage' for the foreign official shall be made based on 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 prohibited 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 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 and 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. The Federal Criminal Court held that a member of an autocratic regime who is not exercising an official function but who has the power to take decisions on behalf of the regime is considered a (de facto) public official.

5 Travel and entertainment restrictions

To what extent do your anti-bribery laws restrict providing foreign officials with gifts, travel expenses, meals or entertainment?

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 or given 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 permitted by staff regulations or if they are of minor value in conformity with social customs (article 322-decies(1) SCC).

6 Facilitating payments

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

Switzerland does not prohibit facilitating or 'grease' payments to foreign public officials. Swiss criminal law distinguishes between prohibited corruption, which induces public officials to breach their duty, and, on the other hand, the permitted granting of advantages, which induces public officials to perform a lawful act that does not depend on their discretionary power. However, granting of advantages to Swiss public officials (as well as receipt of payment by these officials) constitutes a criminal offence under Swiss 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 prohibits indirect corrupt payments through intermediaries under the following conditions: the person offering, promising or giving an undue advantage via an intermediary must, under the circumstances, recognise the risk of an indirect corrupt payment and accept or turn a blind eye on the likelihood of a corrupt advantage.

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) SCC, a company can be convicted for organisational weakness, irrespective of a criminal conviction of an employee but only in the presence of evidence for an act of bribery, provided the company is responsible for failing to take all the reasonable and necessary organisational measures that were required in order to prevent such offences.

In a decision of 11 October 2016, the Swiss Supreme Court specified the requirements for corporate criminal liability pursuant to article 102(2) SCC. The Swiss Post Ltd was acquitted because of lack of an offence committed by an employee. According to the Swiss Supreme Court, mandatory prerequisite for a company to be liable under article 102(2) SCC is the commission of a criminal offence within a company in the exercise of its commercial activities and if employees, even if their identity is unknown, fulfilled the objective and subjective elements of the criminal offence of bribery (or money laundering, etc). The predicate criminal offence must furthermore be a result of the organisational compliance failure of the company. In the absence of strong (yet not full) evidence for at least one predicate offence, there is no corporate criminal liability under article 102(2) SCC.

9 Successor liability

Can a successor entity be held liable for bribery of foreign officials by the target entity that occurred prior to the merger or acquisition?

Article 102 SCC does not make any reference to such a situation. However, as article 102(4) construes the term 'undertaking' as a legal (and not an economic) term, Swiss courts are likely to deny the liability of a successor entity after a merger or acquisition if employees of the target undertaking (or business unit) had committed bribery of foreign officials prior to the merger. The main reason for the preponderant view within the legal doctrine is that according to the concept of a legal entity, such entity can only be held liable for a criminal offence that took place within and by employees of that specific legal entity.

10 Civil and criminal enforcement

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

There is criminal enforcement of Switzerland's foreign bribery laws. Civil enforcement exists indirectly by way of disgorgement of profits under articles 70 and 71 SCC.

In case of mutual legal assistance requests by foreign enforcement agencies regarding bribery of foreign officials, 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 who committed a corruption offence abroad if the act is also liable to prosecution at the place of performance or no criminal law jurisdiction applies at the place of performance; 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 (IMAC) 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 (the PILA) are fulfilled (article 25 et seq PILA). Additionally, the PILA provides that the law of the market where the effects of the unfair act occurred determines the law applicable to the claims (article 136 PILA).

11 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 (the 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.

Bribery and money laundering offences are investigated by the Federal Office of the Attorney General (the OAG) if the offence has mainly been committed in a foreign country or in several cantons with none of them being clearly predominant (article 24(1) of the Swiss Criminal Procedure Code (the SPC)). The cantonal prosecutors are competent with regard to all other (domestic) investigations into bribery and money laundering. On 1 January 2016, a Memorandum of Understanding concerning the cooperation based on article 38 of the Federal Act on the Swiss Financial Market Supervisory Authority (FINMASA) between the Swiss Financial Market Supervisory Authority (FINMA) and the OAG came into force. The Memorandum highlights the importance of collaboration between federal enforcement agencies in combating corruption. FINMA's main mandate consists in the administrative prudential supervision of regulated financial institutions, whereas the OAG is competent for the prosecution of criminal offences in the competence of the Swiss Confederation.

12 Leniency

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

There is no statutory mechanism or established practice (yet) regarding corporate self-reporting. However, the OAG welcomes and promotes corporate self-reporting of suspected or actual corruption (and other predicate offences under article 102 SCC). Since 2015, the attorney general and senior prosecutors of the OAG have been making public statements inviting companies to self-report misconduct. In case of self-reporting, companies shall benefit from their full cooperation.

According to the public statements, companies that self-report shall not be blocked from doing business with public bodies and shall not be put out of business. Essentially, the forthcoming practice of the OAG seems to mean that companies that self-report, fully cooperate and remediate and disgorge illicit profits may in principle benefit from a declination under article 53 SCC – release from penalty in case of redress – and/or may see the monetary sanctions mitigated in consideration of their cooperation and taking into account their economic capacity.

In practice, companies, through their external counsel, can seek informal guidance from the OAG on a 'no-name' basis with a view to filing a self-report. However, once the OAG has gained evidence of suspected or actual misconduct on its own, self-reporting is not possible any more, and the company, in the event an investigation is opened, may face a subpoena, dawn raids and custody of officers (all this was for instance the case in the Alstom investigation).

The Office of the Attorney General is receiving more and more suspicious activity reports from banks and information from the public anti-corruption whistle-blowing site of the Swiss Federal Police. Also, mutual legal assistance has gained significant importance as a source of information in recent years.

Once an investigation has been opened, companies and individuals can ask for the application of a simplified procedure, which allows the defendant to negotiate a plea bargain with the prosecutor. The prerequisite is that the defendant agrees on facts, offences and the fine with the prosecutor and recognises (where applicable) civil claims (article 358 et seq SCPC). Subsequently, the plea bargain has to be approved by a court in a summary trial. If no settlement agreement can be reached with the prosecutor or if the court refuses to approve the settlement, all evidence provided by the company or the individual within this special procedure is put aside and cannot be used within an ordinary criminal procedure to be plead by a newly appointed prosecutor.

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

13 Dispute resolution

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

See question 12.

Bribery cases may also be resolved by:

- release from penalty or abandonment of proceedings if the case is of minor relevance within the meaning of article 52 SCC;
- release from penalty or abandonment of proceedings if the offender has made good for the loss, damage or injury or has made every reasonable effort to do good the wrong that has been caused, provided that the interests of the public and, where applicable, of the victims are preserved (article 53 SCC);
- way of summary penalty order, which is a procedure without a court trial. This procedure is applicable only if the defendant accepts liability for the offence or if his or her responsibility has otherwise been established (article 352 et seq SCPC) and if the sentence is either a monetary fine, a limited monetary penalty of 540,000 Swiss francs maximum, community service of no more than 720 hours or a custodial sentence of no more than six months.

14 Patterns in enforcement

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

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

Switzerland has been active in freezing and spontaneously returning to states the assets belonging to former heads of states or politicians, in particular after the Arab Spring.

Switzerland has also been particularly active in fighting money laundering in its territory, including in seizing and confiscating the proceeds of bribery. For this purpose, Switzerland is using the statutory system for the filing of suspicious activity reports by banks and other financial intermediaries and mutual legal assistance by prosecutors to foreign states, once assets obtained illegally or by improper means are discovered in Switzerland.

Since 2015, the Federal Criminal Police and the OAG also rely on information received through the web-based platform www.fightingcorruption.ch, which enables anyone to report suspected or actual corruption.

From 1 January 2016, new rules against money laundering have been in force. They widened the scope of application of the rules

on PEPs (politically exposed persons) and introduced material tax offences as predicate offense of money laundering (article 305-bis SCC), strengthening the message to financial intermediaries that in Switzerland all proceeds of crime, including corrupt payments, must be reported to the Federal Money Laundering Reporting Office (MROS).

15 Prosecution of foreign companies

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

Under Swiss criminal law, article 102(2) SCC, it is an offence if a company does not take all necessary and reasonable organisational (compliance) measures required to prevent (among other offences) active bribery of domestic and foreign officials by its employees. Foreign companies are subject to Swiss jurisdiction if they are ultimately responsible for compliance with the law by a Swiss subsidiary.

16 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 or her 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 that 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 Swiss francs (article 102 SCC). In corruption cases, de facto the fines for companies are disgorgement of profits and the public statement by the OAG on its investigation and the outcome (declination, criminal order or indictment).

17 Recent decisions and investigations

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

In 2016, a large number of bribery cases, mainly regarding bribery of foreign officials, were under investigation by the OAG. The cases mainly relate to Brazil, Malaysia, Greece, Kenya, Kazakhstan and Ukraine. Also, the Office of the Attorney General of Switzerland opened a number of criminal investigations against Swiss banks in 2016 for suspected organisational compliance failures to prevent the laundering of corrupt monies (1MDB, Petrobras, etc).

Against the background of the substantial number of Petrobras/Lava Jato-related investigations, the Brazilian and Swiss attorney generals deepened the cooperation between their respective agencies with the aim of speeding up the ongoing proceedings.

On 21 December 2016, the Office of the Attorney General convicted the Brazilian company Odebrecht SA and one of its subsidiaries, Construtora Norberto Odebrecht SA (CNO), for organisational failure to prevent bribery of foreign officials under article 102(2) SCC and fined Odebrecht 4.5 million Swiss francs and ordered disgorgement of more than 200 million Swiss francs' illicit profits.

Odebrecht SA and its subsidiary CNO were convicted for not taking all reasonable and necessary organisational measures required to prevent bribery of foreign public officials (article 322-septies SCC) and money laundering (article 305-bis SCC). As a result, the conviction, which took the form of a summary penalty order, compromised a fine of 4.5 million Swiss francs, the forfeiture of assets and compensation payments.

The OAG held that Odebrecht created slush funds in order to pay bribes. The bribes were made to government officials, their representatives and political parties in order to win business and projects. The criminal conduct was directed by the highest levels of the company and included a complex, multilevel procedure obscuring the identification of the origin of these funds.

The *Odebrecht* case is important because it demonstrates the OAG's determination to investigate highly complex cases and to also hold large foreign companies accountable for organisational failures under article 102(2) SCC. In its decision, the OAG followed recent case law by the supreme court (in the *Postfinance* case) which requires prosecutorial evidence for at least one predicate offence (without the need though of a conviction of an employee) to hold the company accountable for the organisational compliance failure. Also, the OAG for the first time stated that the economic viability of a company constitutes a limit for the disgorgement of illicit profits under articles 70 and 71 SCC.

On 1 July 2016, the amendment to the Swiss Criminal Code came into force, which applies to all undue payments promised, offered or paid to private sector employees (including individuals employed by international sports organisations, many of which have their headquarters in Switzerland). The new *ex officio* crime of commercial bribery is regulated in two new articles of the SCC (see also the answer to questions 2 and 29).

In this context it is important to note that the (Anti-)Money Laundering Act has been tightened as well, with effect as of 1 January 2016. Under the new provisions, senior officials of international organisations and senior civil servants of international sports bodies in Switzerland qualify as 'politically exposed persons' (PEPs). This new regulation forces Swiss banks to manage legal risks associated with this group of individuals much more closely.

No decisions have yet been rendered under the new provisions.

The OAG investigation against a Swiss bank regarding suspected laundering of money of a Malaysian political leader in the context of lodging concessions is ongoing. On 30 May 2016, the Federal Supreme Court rendered a decision on the OAG's request for the unsealing of a memorandum seized during the search of the bank's premises. The memorandum had been established on request of FINMA. The bank argues that the memorandum is privileged and should remain sealed. Furthermore, the accused bank claims that the memorandum does not constitute potential relevant evidence. In its decision, the Federal Supreme Court approved the request of the OAG for the unsealing of the memorandum. The prerequisites according to article 197 SCPC are fulfilled. First, there is reasonable suspicion that UBS has committed an offence. The memorandum is of particular relevance for the OAG's investigation since it contains the bank's documents and summarises them with regard to the presumed money laundering case. If the memorandum were not unsealed, the original documents would have to be secured, reviewed, seized and evaluated. This would neither be in the interest of the bank nor in the public interest of an efficient criminal investigation; insofar, the unsealing of the memorandum was qualified as reasonable. Furthermore, the unsealing does not harm UBS's secrecy interests. In particular, the removal of the seal is in accordance with the bank's right not to incriminate itself. The compulsory freezing of evidence, as done in the present case during the search of premises, is, therefore, in accordance with this right. The fact that the document in question was created by UBS upon FINMA's request for information was judged irrelevant.

In December 2015, the Federal Criminal Court heard a case of active and passive bribery of foreign public officials involving four international companies (Siemens, Gazprom, ABB and Alstom) and managers of two companies. In connection with a US\$170 million contract for the supply of turbines for compressor stations along the Gazprom Yamal-Pipeline, an ABB subsidiary in Sweden (which was later sold to Alstom and then to Siemens) allegedly paid bribes to two Gazprom managers who allegedly rigged the award of tenders in ABB's favour. ABB – and later the new owners of the Swedish company – allegedly paid bribes amounting to US\$7.3 million, covered as consultancy fees, to a shell company in Cyprus. The Cyprus-based company allegedly forwarded part of the fees to the Gazprom managers and part of the fees to ABB managers. In its decisions of 1 April 2016 and 12 July 2016, the Federal Criminal Court held that three Gazprom managers who received bribes from the former country president of ABB Russia were not guilty of passive bribery of a foreign public official. Likewise, ABB Russia's former country manager was not guilty of active bribery of a foreign public official. The reason for the Criminal Chamber's acquittal was that the ABB and Gazprom managers do not qualify as public officials in a formal sense because they were not involved in a state organisation. Furthermore, they could also not be considered as public officials according to a functional approach as Gazprom did not

have its monopoly status back then and could thus not be regarded as an enterprise of the public sector. Accordingly, they did not perform a public task. Gazprom was granted a monopoly on 18 July 2006 and, therefore, only after the recommendations for gas turbines were made. The private report of Golovko et al illustrates that the Russian Law on the Supply of Gas of 31 March 1999 contains rules on the government's competence to establish the reliability and quality data for the gas transport via gas distribution networks. Thus, only the latter was regulated by the state, meaning Gazprom had an autonomous scope within this limit.

On 23 May 2016, the OAG opened criminal proceedings against BSI SA bank and on 12 October 2016 against Falcon Private Bank Ltd for corporate criminal liability under article 102(2) SCC. The decision to open proceedings was based on information disclosed in the criminal proceedings in the 1MDB case and on regulatory offences sanctioned by FINMA in its decision of 23 May 2016. The OAG suspects organisational compliance failures to prevent money laundering at both banks permitted the bribery and/or money laundering offences to occur.

Financial record keeping

18 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.

19 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.

20 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 SCC – 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.

21 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 SCC may result in imprisonment for up to five years or a fine of up to 1 million Swiss francs, or both.

22 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. With the entry into force of the new articles of the SCC relating to commercial bribery, bribes paid to commercial persons are not tax deductible any longer.

Domestic bribery

23 Legal framework

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

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

- (i) *a person offers, promises or gives an undue advantage*
- (ii) *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,*
- (iii) *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 SCC, the elements of the (lesser) offence of granting an undue ('facilitating') advantage to a domestic public official are:

- (i) *a person offers, promises or gives*
- (ii) *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*
- (iii) *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, namely, either intent or wilful blindness (dolus eventualis).

24 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 SCC and are subject to the same level of fines. The same applies with regard to commercial bribery.

25 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. The Federal Supreme Court recently confirmed this view in a case regarding the manager of the public servants' pension fund of the Canton of Zurich. In light of the *Gazprom* case mentioned in question 17, the Criminal Chamber held that public officials can be defined in a formal or a functional way. The former refers to a person who is involved in a state organisation, while the latter confirms the definition above (ie, that an individual who pursues an official activity with the public authorities or in public enterprises can also be defined as a public official). It thus confirmed that employees of state-owned or state-controlled companies are qualified as such. In order for a company to be state-controlled, the majority of shares must be state-owned. This prerequisite was not fulfilled in the case of *Gazprom* at the time of the alleged bribery.

26 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 interest. No, or within narrow limits, if the participation in commercial activities involves employment of labour.

27 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-decies of the SCC, 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.

28 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). The Federal Criminal Court held in autumn 2015 that a public official who accepts 40 lunch invitations from long-standing suppliers is culpable for accepting undue advantages.

29 Private commercial bribery

Does your country also prohibit private commercial bribery?

Until 1 July 2016, private bribery used to be prosecuted only in case of a restriction of competition under the Unfair Competition Act (UCA) as a misdemeanour based on article 4a UCA and only upon complaint by a competitor. Since 1 July 2016, private bribery is prosecuted ex officio under article 322-octies SCC (active private bribery) and article 322-novies SCC (passive private bribery). The elements of (active) private bribery are the following:

- (i) *a person offers, promises or gives*

Update and trends

The fight against domestic and international corruption remains a high priority of regulators and prosecutors in Switzerland. The OAG publicly stated that it is not only continuing to investigate companies for suspected organisational failures to prevent the bribery of foreign officials but that it will also investigate the individuals who bribed foreign officials as well as intermediaries, including banks, for money laundering and organisational failures to prevent bribery of foreign officials and money laundering. At the same time, the OAG is promoting self-reporting by companies suspecting bribery of foreign officials by their managers. The advantages to companies that self-report are that they shall not be blocked from doing business with public bodies and shall not be put out of business. Essentially, the emerging practice of the OAG seems to indicate that companies that self-report, fully cooperate, remediate and disgorge the illicit profits may under certain conditions benefit from a declination (under article 53 SCC – release from penalty in case of redress – or by way of a lenient criminal order) and may see the monetary sanctions mitigated in consideration of their cooperation and their economic capacity.

Under the Swiss Criminal Code, companies are criminally liable if because of poor organisational compliance measures they failed to prevent money laundering and bribery. Recent case law requires that prosecutors establish the organisational failure and – on a strong (yet not full) evidential basis – causal individual criminal conduct. In ongoing and future corporate criminal investigations, prosecutors are thus

likely to benchmark the organisational compliance measures against accepted best compliance practice and investigate individual criminal conduct even more.

In summary, companies facing bribery risks should review the effectiveness of their overall and in particular their anti-bribery organisational compliance measures. They can benchmark their anti-bribery compliance health status against international standards such as ISO 19600 – Compliance management systems and ISO 37001 – Anti-bribery management systems. In its introduction, ISO 19600 says: ‘In a number of jurisdictions, the courts have considered an organisation’s commitment to compliance through its compliance management system when determining the appropriate penalty to be imposed for contraventions of relevant laws. Therefore, regulatory and judicial bodies can also benefit from this International Standard as a benchmark.’ Inevitably, companies in Switzerland will be held accountable to international compliance management best practices and standards, and members of corporate bodies and managers will be even more exposed to investigations into their acts and omissions in case of suspected corporate misconduct.

Given the clear statements made by senior representatives of the OAG in 2016 and in the light of the *Odebrecht* order, companies confronted with actual or suspected bribery should assess the option of self-reporting to take advantage of the benefits of the emerging settlement process and to treat the legal risks.

- (ii) *an employee, a partner or shareholder, an agent or other auxiliary to a third party in the private sector,*
- (iii) *an undue advantage for an act or omission in its duty or discretion in the offender’s or a third party’s favour.*

Article 322-novies covers the passive offence, that is, if the aforementioned persons working in the private sector request, elicit the promise of or accept such undue advantage. Active and passive bribery in the private sector is considered a misdemeanour, and in consequence 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 felony (statutory sentence of five years or more).

30 Penalties and enforcement

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

As regards corruption of public officials, bribery sanctions for individuals are imprisonment for up to five years or a monetary fine of up to 1.08 million Swiss francs, or both. 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. According to the aforementioned newly passed laws described under answer 29, private commercial bribery can be punished by a maximum of a three-year jail sentence or by a monetary penalty. In minor cases, the offence can only be prosecuted if a complaint is filed. ‘Minor cases’ refer to cases where the crime sum amounts to only a few thousand Swiss francs, where the security and health of third parties is not in jeopardy and where there is no connection to offences including the falsification of documents.

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 their directors and employees. Companies can be fined up to 5 million Swiss francs. As a rule, illicit profits are forfeited (see question 16).

31 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, and the Federal Criminal Court held

in 2015 that a public official who accepts 40 lunch invitations from long-standing suppliers is culpable for accepting undue advantages.

32 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 September 2015, the Federal Criminal Court sentenced a Swiss public official responsible for IT procurement at the Federal Government for the offence of acceptance of undue advantages by accepting 40 invitations to lunch from a supplier (*Insieme* case). The main defendant was sanctioned with a custodial sentence of 16 months and a monetary penalty of 27,000 Swiss francs. The Federal Criminal Court upheld its strict approach in a decision dated 6 December 2016, sentencing a Swiss public official responsible for IT procurement at the Federal Office for the Environment for active and passive bribery and misconduct in public office with a custodial sentence of two-and-a-half years and a monetary fine. The main defendant being an external project manager was also held liable for passive bribery of a public official because of the fact that he had crucial influence in the discharge of the federal government’s office and was paid by the government.

On 18 November 2014, the International Federation of Football Associations (FIFA), 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. In May 2015, the Office of the Attorney General opened criminal proceedings against unknown persons based on the suspicion of criminal mismanagement and money laundering in connection with the assignments of the 2018 and 2022 Football World Championships. In the course of these proceedings, electronic data and documents were seized at FIFA’s headquarters in Zurich.

In 2015, US federal prosecutors disclosed cases of corruption by officials and associates related to FIFA. In May 2015, 14 people were indicted in connection with an investigation conducted by the Federal Bureau of Investigation and the Internal Revenue Service Criminal Investigation Division concerning wire fraud, racketeering and money laundering. The OAG initiated a criminal procedure against unknown for money laundering by way of transactions through Swiss bank accounts. On 27 May 2015, several FIFA officials were arrested at the Hotel Baur au Lac in Zurich. On 24 September 2015, a criminal procedure against FIFA’s then president was initiated, being suspected of having committed criminal mismanagement according to article 158 SCC and potential misappropriation pursuant to article 138 SCC.

In the context of the FIFA corruption procedure, the Swiss Supreme Court upheld the decision of the US Department of Justice on 2 May 2016, authorising the extradition of a Nicaraguan FIFA official to the United States as well as the subsequent extradition to the Nicaraguan authorities on the grounds that he was involved in a corruption conspiracy and had committed passive bribery.

As mentioned in the answer to question 17, the criminal order of the OAG against Odebrecht SA of 21 December 2016 confirms that Swiss and foreign companies with activities in Switzerland that systematically fail to prevent the bribery of foreign officials by their employees risk being investigated by the OAG for the criminal corporate offence of organisational failure under article 102(2) SCC. They are therefore more than ever exposed to fines and disgorgement of profits.

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