

Update

Newsflash June 2016

Revised anti-bribery and corruption law – Increased duties for companies and boards of directors

On 1 July 2016 revised rules on anti-bribery and corruption law will enter into force. The revisions aim at improving the basis to combat corruption in the business sector (so-called private sector bribery). Notably, individuals and companies may be punished cumulatively. Under the new rules, companies and their boards should take appropriate internal measures to prevent private sector bribery.

Overview

Since years the fight against corruption has been in constant progress, in Switzerland as well as abroad. The current revisions of the anti-bribery and corruption law have been triggered in particular by corruption scandals in international sports organizations, such as FIFA. However, the scope of the new rules which will enter into force on 1 July 2016 goes beyond the sports sector and covers all private business areas.

The key provisions of the new anti-bribery and corruption rules can be summarized as follows:

- › The Swiss Penal Code (PC) will include two new offenses regarding private sector bribery. First, any person who offers, promises or grants an undue advantage to an employee, agent, partner or other auxiliary person of a third party in connection with such person's professional or commercial activity with the purpose to have such person carry out or fail to carry out an act contrary to duty or within the

person's discretion will be liable to prosecution (so-called *active private sector bribery*).

Second, any person who takes bribes by soliciting or accepting an undue advantage (bribe) will be liable to prosecution (so-called *passive private sector bribery*).

- › Until now private sector bribery was regulated by the Unfair Competition Act (UCA). A punishment under the UCA required that the bribery lead to a distortion of competition. Thus, under the UCA, the supplier of automotive components who – after the conclusion of a supply contract – pays at the time of delivery of the components a bribe to the customer's employee responsible for quality control in order that such employee overlooks the deficient quality of the components would not be liable to prosecution. Under the new rules on corruption, this link between private sector bribery and unfair competition has been removed. As from the entry into force of the new rules, bribery of private individuals will therefore constitute a

criminal offense regardless of whether it has any effect on competition. Under the new rules, the above-mentioned supplier of automotive components would therefore be liable to prosecution, regardless of whether the supplier is in competition with other suppliers.

- › The new private sector bribery offense will in general be a so-called public offence (*Offizialdelikt*), which means that it will be prosecuted *ex officio*. Only in "light" cases (*leichte Fälle* or *cas de peu de gravité*) prosecution will require a complaint by the injured party. The new rules do not contain a definition for "light" cases. In the parliamentary debate on the revised rules it was mentioned that a "light" case requires that the crime amount is only a few thousand Swiss francs, the safety and health of other persons is not affected, the crime is not conducted repeatedly or by a gang and the bribery is not linked to the forgery of documents. Until a judicial practice has developed, there remains some uncertainty regarding this element.
- › Besides the individuals involved in the bribery, the business itself (irrespective of its legal form) may also incur criminal liability if the business failed to take all reasonable and necessary organizational measures to prevent corruption.
- › Prosecution requires that the bribery act took place in Switzerland, whereby it is sufficient that the bribery is performed only partially in Switzerland (e.g. if the promise, offer or acceptance of an undue advantage is made in Switzerland). The required link to Switzerland may already be established if the bribing person is staying in Switzerland at the time when such person instructs a money transfer. Further, depending on the circumstances, the use of a Swiss bank account may already be sufficient for a punishable offense in Switzerland.

Increased risk of prosecution

Under the previous rules of the UCA hardly any procedures relating to private sector bribery were undertaken. The main reason for this may be that until now a complaint by the injured party was

required to start a procedure. Such complaint was rarely made, not least because the affected companies preferred an internal solution.

Because of the new rules on private sector bribery (now prosecuted *ex officio*) there is an increased risk that the public prosecutor will initiate a procedure. Pursuant to the dispatch of the Federal Council (*Botschaft*) on the revised anti-bribery and corruption law, the Federal Council expects prosecution relating to private sector bribery to increase.

What does this mean for organizations doing business in Switzerland?

Under the new rules, in addition to the individuals offering or receiving bribes, the business organization itself might be held directly liable to prosecution if the business failed to take all organizational measures that are required and reasonable to prevent bribery (or if the responsible person within the business cannot be identified). Consequently, business organizations themselves are exposed to a prosecution risk that is not insignificant.

However, unlike the UK Bribery Act, which puts the burden of proof on the business organization to demonstrate adequate policies and procedures, Swiss law requires the prosecutor to prove the organizational deficiency.

In case of a conviction, a business may be subject to a fine of up to CHF 5 million. In addition, profits stemming from a business deal concluded through bribes may be seized. In any event, a criminal investigation on private sector bribery may entail serious reputational damage for the affected business as well as an internal loss of confidence.

What should Swiss companies and their boards of directors do?

The requirements for the measures to be taken by business organizations to prevent corruption are high. The public prosecutors set far-reaching requests for compliance programs of internationally operating companies. The mere existence of a control system is not sufficient; it is crucial that such system is effectively implemented in the day-to-day operations and monitored.

Within the company, the board of directors (or equivalent for other legal forms) is responsible for the overall management of the company. This task may not be delegated. According to Swiss corporate law, the board of directors must take the necessary measures to ensure that the applicable laws and internal regulations and guidelines are complied with by the entire corporate organization.

Specifically this means:

- › The board of directors should conduct a *risk analysis* which includes, among others, the business model, the business processes and the distribution channels, the business partners as well as the geographic field of activity of the corporate group.
- › Based on the risk analysis, the internal corporate structures of the group should be defined and the necessary guidelines and *compliance manual* or *code of conduct* should be implemented, covering not only employees, but also agents, representatives and suppliers.
- › Further, it should be ensured that the employees are made aware of the risks, adequately informed about the guidelines and manuals and trained accordingly (*staff trainings*).
- › Finally, *monitoring systems* and *control mechanisms* should be implemented that are appropriate for the company's risk profile (this may include the set-up of a reporting office for whistleblowers).
- › If in spite of compliance and monitoring systems a breach occurs, the board of directors will have to ensure that the cause and dimension of such breach are discovered promptly (so-called internal investigation) and that the necessary measures are taken (including any disciplinary sanctions, revisions to policies and procedures, etc.). Regulated entities (such as banks, financial intermediaries, insurers or pharmaceuticals) may have to inform, or involve, the competent regulator.

Small and mid-sized companies also have a need for action, whether they operate internationally

or not. For internationally operating companies having foreign subsidiaries or distributors and business partners, the challenge is that they need to comply not just with Swiss law, but also with foreign regulations (such as the UK Bribery Act or the US Foreign Corrupt Practices Act).

Ongoing review and update

The set-up and implementation of a compliance system that is appropriate for an internationally operating company is a complex and demanding process that needs to be continuously monitored, improved and adapted to the changing landscape. When expanding the business activities, one has to assess whether the measures already implemented need to be amended.

ISO Anti-bribery standard certification

Certification of anti-bribery compliance programs will soon be possible under the draft proposed ISO 37001 anti-bribery management systems standard, to be published later in 2016.

The ISO standard requires that anti-bribery measures be implemented in a reasonable and proportionate manner taking into account the size, structure, location and sector of activity in which a company operates. Certifiers will look at whether the organization has adopted a written anti-bribery policy, demonstrated leadership from the top, engaged adequate, qualified anti-bribery compliance staff, introduced training programs, conducted bribery risk assessments and due diligence on projects and business associates, adopted financial and business controls, and put in place procedures for reporting and investigation.

Certification is not a guarantee against bribery, but it provides strong evidence that an organization has taken measures to prevent it. As such, certification can be a strong defense against allegations of bribery and better protect the business from the risk of corporate criminal liability.

For further questions regarding this matter (incl. anti-bribery risk assessment and the development of an action plan) please do not hesitate to contact us.

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