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Switzerland

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Introduction

In the 2013 "Corruption Perception Index" of Transparency International, Switzerland ranked 7th out of 177 countries. And still, even though Switzerland is perceived to be one of the least corrupt countries in the world, it is affected by corruption. Switzerland's unique political system, which is governed by the militia system and contains a lot of small decision-making bodies, is vulnerable to nepotism and 'trading in influence'.

Switzerland is also a preferred base for non-governmental organisations. In particular, about 60 sports organisations have their headquarters in Switzerland, e.g. the International Olympic Committee (IOC), the World Football Federation (FIFA), the Union of European Football Associations (UEFA), the International Ski Federation (FIS) and the International Cycling Union (UCI). In connection with awarding big sporting events such as the FIFA World Cup, those organisations are regularly faced with allegations of corruption.

Above all, however, the biggest challenge in the fight against corruption are enterprises based in Switzerland that do business abroad where they are confronted with corruption. The small size of Switzerland and the accordingly restricted opportunities of doing business within its borders impels a lot of small and medium-sized enterprises ('SMEs') to operate abroad. According to a recent study of the OECD, '40% of Swiss SMEs operating abroad are confronted with bribery of public officials'.

But this problem is not limited to SMEs. The attractive Swiss tax regime, as well as its geographical position in the middle of Europe, has encouraged international companies to relocate their headquarters to Switzerland. When those companies operate in foreign countries, they face the same corruption issues as their smaller counterparts (see below section, 'Cross-border issues and corporate criminal liability').

These challenges are dealt with by a quite comprehensive anti-corruption law set out in the Swiss Criminal Code ('SCC'). The SCC, in turn, is subject to a steady development driven by three multilateral instruments in the fight against corruption of which Switzerland is a part: the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions; the Council of Europe's Criminal Law Convention on Corruption; and the UN Convention against Corruption.

These instruments have already led to three substantial reforms of the SCC. In 2000, provisions regarding the active bribery of foreign public officials and regarding the granting and acceptance of an undue advantage were introduced. In 2003, corporate criminal liability for bribery offences was introduced and, in 2006, the prohibition of bribery was extended to passive bribery of foreign public officials as well as to passive bribery in the private sector (see below section, 'Brief overview of the law and enforcement regime').

Indeed, the next reform is already in the legislative pipeline. The planned reform targets bribery in the private sector (see below section, 'Proposed reforms / The year ahead').

Brief overview of the law and enforcement regime

General legal basis

In Switzerland, bribery of public officials and bribery in the private sector are governed by two different legal acts.

The bribery of *public officials* is governed by the SCC. The SCC defines a public official as a "*member of a judicial or other authority, a public employee, an expert, translator or interpreter employed by any authority, an arbitrator or a member of the armed forces*" (Article 322ter SCC), including private individuals who carry out a public function (Article 322^{octies} (3) SCC). Persons in this category are "foreign public officials" when they act for a foreign state or an international organisation (Article 322^{septies} SCC). This includes employees of state-owned or controlled legal entities.

By contrast, bribery of *private individuals* is regulated by the Federal Law against Unfair Competition ('UCA'; Article 4a). Unlike the bribery of public officials, bribery of private individuals is pursued under criminal law only on complaint (Article 23 UCA).

Swiss law sanctions both so-called active and passive bribery. In the case of public officials, *active bribery* is an act by which an official is offered, promised, or granted any undue advantage, for his own benefit or for the benefit of any third party, for the commission or omission of an act in relation to his official duties that is contrary to his duties or depends on the exercise of his discretionary powers (Article 322ter SCC). Active bribery in the private sector is described similarly in Article 4a(1)(a) UCA. *Passive bribery* occurs when a person solicits, elicits a promise of, or accepts an undue advantage, for his own benefit or for the benefit of a third person, for the commission or omission of an act that is contrary to his duties or depends on the exercise of his discretionary powers (Article 322^{quater} SCC; Article 4a(1)(b) UCA).

In a narrow sense, bribery is defined as an act whereby a person offers, promises or gives a private individual or a public official an undue advantage in exchange for a specific act. In a broader sense, bribery also includes any acts whereby a person offers, promises or gives a person an undue advantage in exchange for a future behaviour which is not directly linked to a specific act (Article 322^{quinquies} to 322^{sexies} SCC) as well as payments done with the intention to speed up the execution of administrative acts to which the payer is legally entitled ('facilitation payments'). The giving and accepting of undue advantages according to Article 322^{quinquies} to 322^{sexies} SCC are only punishable when a Swiss public official is concerned. In contrast, facilitation payments may be punishable as bribery (and thus irrespective of whether a Swiss or a foreign official is concerned) if the payment influences the discretion of the public official.

In all cases of corruption, advantages are not undue when allowed by staff regulations or when they are of minor value in conformity with social custom (Article 322^{octies} (2) SCC). This would typically include small Christmas or thank-you gifts, as long as such gifts are not given with the intention of influencing a public official's performance.

Individuals found guilty of bribing (either Swiss or foreign) public officials are sentenced to prison for a term of up to five years or a monetary penalty up to CHF 1,080,000 (Article 322ter and Article 322^{septies} SCC). When determining the amount of the monetary penalty, the court takes into account the culpability of the offender and his or her personal and financial

circumstances at the time of conviction (Article 34(1) and (2) SCC). Bribery in the private sector results in imprisonment for up to three years or a monetary penalty (Article 23 UCA). Depending on the circumstances, penalties may also include a prohibition from practising a certain profession (Article 67 SCC), or expulsion from Switzerland for foreigners as an administrative sanction (Article 62(b) and Article 63(1)(a), of the Federal Act on Foreign Nationals). Further, the court can order the forfeiture of assets deriving from corruption or intended to use for corruption (Article 70 SCC). Finally, Swiss criminal procedure law provides for the possibility that the person suffering harm from corruption may bring civil claims as a private claimant in the criminal proceedings.

Corporate criminal liability

In cases of corruption, it is primarily the *individual* ("natural person") who is liable to punishment and is prosecuted.

However, in addition to the liability of the acting individuals, Article 102 SCC establishes corporate criminal liability. Generally speaking, corporate criminal liability exists if, due to an inadequate organisation of the company, it is not possible to attribute a felony or misdemeanour (including bribery) that was committed in the exercise of commercial activities to any specific individual (Article 102(1) SCC). Furthermore, a company may also be punished irrespective of the criminal liability of any natural persons if the enterprise did not undertake all requisite and reasonable organisational precautions required to prevent the bribery of Swiss or foreign public officials or persons in the private sector (Article 102(2) SCC).

In both cases, the company is subject to criminal prosecution and a fine of up to CHF 5m. The amount of the fine is determined taking into account the seriousness of the offence, the degree of the organisational inadequacies, the loss or damage caused and the economic ability of the company to pay the fine.

The exact scope of the organisational measures required under Article 102(2) SCC is not defined by law. Clearly, it is insufficient to merely stipulate compliance rules (e.g. in a code of conduct). Rather, a company is required to show that its employees were made aware of, trained in and monitored regarding such rules. In general, Swiss prosecuting authorities take international good practice standards into account when determining the required compliance measures.

Jurisdiction and procedural issues

Bribery is subject to federal jurisdiction insofar as the offences are committed by a member of an authority or an employee of the Swiss Confederation or against the Swiss Confederation (Article 23(1)(j) Swiss Criminal Procedure Code ('CPC')), or if the offences have to a substantial extent been committed abroad, or in two or more cantons with no single canton being the clear focus of the criminal activity (Article 24(1) CPC).

Criminal investigations regarding bribery cases subject to federal jurisdiction are conducted by the Office of the (federal) Attorney General ('OAG'). All other investigations into bribery cases are handled by the competent cantonal law enforcement authorities, generally the cantonal public prosecutor's office.

Swiss anti-corruption law does not provide for credit or leniency during an investigation. However, cooperative behaviour of the accused person or entity may be taken into account when determining the sentence.

Further, there is no general mechanism to resolve corruption cases through plea agreements, settlement agreement or similar means without trial. However, in all cases of corruption

(bribery as well as the giving or accepting of advantages according to Articles 322ter through 322^{septies} SCC), criminal prosecution, judicial proceedings or the imposition of a penalty can be waived in *de minimis* cases (Article 52 SCC). Further, the competent authority shall refrain from prosecuting or punishing an offender if the latter *"has made reparation for the loss, damage or injury or made every reasonable effort to right the wrong that he has caused"* and the interests of the general public and of the persons harmed in prosecution are negligible (Article 53 SCC). In addition, under certain circumstances, there is no need for full-fledged criminal proceedings and they may be substituted by accelerated or summary judgment proceedings.

Overview of enforcement activity and policy during the past two years

In Switzerland, the number of reported corruption cases is rather limited. Statistics show a total of 10 to 20 cases on average per year, the majority of which are relatively minor domestic cases. Cases dealing with transnational corruption (other than in the context of a foreign request for international mutual assistance) are rare. Nevertheless, there are some investigations and decisions that are noteworthy and might be regarded as a sign that foreign and transnational corruption is increasingly under scrutiny by Swiss enforcement authorities.

A leading case in this regard is the 'Alstom' decision (see below, section 'Cross Border Issues and Corporate Criminal Liability'). Another interesting case is the 'SIT' case relating to the construction of the Yamal Pipeline.

In November 2013, the OAG concluded a criminal investigation into the Swedish company Siemens Industrial Turbomachinery (SIT) after SIT had admitted inadequate enforcement of compliance regulations in relation to Yamal gas pipeline projects and paid reparation and compensation for unlawfully obtained profits.

The OAG investigated the circumstances behind contracts awarded to the Swedish company, acquired by Siemens in 2003, for the supply of gas turbines during the construction of the pipeline, which runs from the gas fields on the Russian Yamal peninsula to Western Europe. In the course of the project, initiated by Russia's largest natural gas production company, bribes were paid to senior executives of the Russian state-owned company. SIT made the unlawful payments between 2004 and 2006 via bank accounts held by the end recipients in Switzerland. This was the (only) nexus to Switzerland and was sufficient to give rise to the OAG's investigation (see below section, 'Cross-border issues and corporate criminal liability').

SIT accepted that it had not taken all the required and reasonable organisational steps to prevent bribes being paid to foreign public officials in connection with projects to build compressor stations and to supply gas turbines for the Yamal pipeline network. In particular, it admitted basic failures in checking consultancy agreements. Therefore, the company was found guilty of organisational offences under Article 102 SCC. SIT paid reparation of CHF 125,000 in the form of a donation to the International Committee of the Red Cross (ICRC).

As a consequence, the OAG closed the investigation into SIT based on Article 53 SCC mentioned above and at the same time ordered the forfeiture of unlawfully obtained assets. The profits unlawfully obtained from the projects concerned amounted to USD 10.6m. The OAG ordered SIT to pay a corresponding sum in compensation to the state (based on Article 71(1) SCC). SIT complied with the order and paid the compensation.

Cross-border issues and corporate criminal liability

According to Article 3 SCC, anyone who *commits* an offence in Switzerland is subject to Swiss Criminal Law. Article 8 SCC further specifies that an offence is considered to be committed both at the place where the person concerned acts or unlawfully omits to act, and at the place where the offence has taken effects. Even attempts to commit or omit are sufficient. However, mere preparatory acts are not deemed sufficient to trigger jurisdiction in Switzerland. As an example, the opening of a bank account in Switzerland with the intention to use it to pay or to receive bribes in the future, does not yet give jurisdiction to Swiss authorities.

The place of commission is broadly construed. For instance, as the SIT case mentioned above has confirmed, it may suffice to establish Swiss jurisdiction if the only connection to Switzerland is the existence of a Swiss bank account from which − or to which − the bribe was paid, even though all persons involved were acting outside Switzerland, and all negotiations took place outside Switzerland.

Of particular interest are cross-border issues in the context of corporate criminal liability. In these cases, Swiss authorities may claim a wide jurisdiction.

As mentioned above, a corporation can be held liable under the SCC if specific prerequisites are met. According to Article 102(2) of the SCC, a company is penalised irrespective of the criminal liability of any natural persons and with a fine of up to CHF 5m if:

- the offence committed is *inter alia* an active bribery offence, and
- the company is responsible for failing to take all the reasonable organisational measures that were required in order to prevent such an offence.

In cross-border cases, Swiss corporate criminal liability is deemed to be applicable not only when the bribery offence was committed in Switzerland, but also if the only place where the company failed to take all the reasonable organisational measures is within Switzerland. This may be the case, if the lack of organisation occurred (at least partially) in Switzerland. It is not necessary that the company is headquartered in Switzerland. Instead, it may be sufficient if only a branch of an international company group is located in Switzerland.

Corporate criminal liability in combination with the offence of bribery of a foreign official may lead to a very broad jurisdiction of Swiss authorities and even allow for extraterritorial jurisdiction, with the only connection to Switzerland being the lack of organisation.

This constellation was at the core of the recent case of the French-based Alstom Group ('Alstom'). Alstom has its headquarters in Paris, France. It mainly operates in the fields of power generation and the transport markets and is active in over 100 countries. In order to receive construction contracts in foreign countries, in particular in Asian and African countries, Alstom hired so-called "consultants". These consultants acted as intermediaries and were responsible for building up relationships with foreign governments and companies. For their services, the consultants received a 'success fee' that was calculated as a percentage of the mediated contracts.

Alstom was aware of the fact that consultants may be exposed to corruption. Therefore, Alstom implemented specific anti-corruption measures. First, internal compliance rules were adopted. According to those rules, consultants had to show in detail what services they provided for Alstom. Second, Alstom Network Switzerland Ltd ("Alstom Switzerland"), which has its registered office in Switzerland, was established. Alstom Switzerland's purpose was to act as an intra-group compliance service provider, i.e. to ensure that the consultants conformed to the internal compliance rules, and to transfer payments to these

consultants via Alstom Switzerland's Swiss bank accounts. However, these anti-corruption measures did not work properly. In at least three cases, the consultants used part of their salaries, which were paid by Alstom Switzerland, to bribe foreign officials in Latvia, Tunisia, and Malaysia, the purpose of which was to win contracts and, in some cases, to avoid claims against Alstom for breaching contracts.

In November 2011, after three years of investigation, Alstom Switzerland was held criminally liable as a company and was convicted for bribery of foreign officials, fined CHF 2.5m and a compensatory claim of CHF 36.4m was imposed. According to the relevant decision, Alstom Switzerland's overall anti-corruption measures were sufficient in theory. However, these measures were not well-implemented or enforced in practice. For instance, it was pointed out that the compliance unit was under-staffed in relation to the overall number of global employees. Furthermore, it was emphasised that the compliance staff were not trained and experienced enough.

Even though only the Swiss-based company Alstom Switzerland was fined, the authority also conducted its investigation against Alstom in France, irrespective of the fact that the parent company has its registered office outside of Switzerland and all bribes were paid outside of Switzerland. The Swiss authority claimed extraterritorial jurisdiction, as **the lack of organisational measures at least partially occurred** in Switzerland.

Criminal liability of companies and the extraterritorial jurisdiction as applied in Switzerland are comparable to the respective provisions in the UK. According to the UK Bribery Act, a company is criminally liable if part of a business of the company is carried out in the UK and the company does not have in place adequate procedures designed to prevent bribery of foreign officials (Sections 7(2) and (5)(b) of the Bribery Act 2010). Thus, the Swiss and the UK provisions are strikingly similar in this regard.

Proposed reforms / The year ahead

As mentioned before, the SCC has already been amended three times recently. The next revision, however, is already on its way as the Swiss Federal Council has proposed to the parliament a further reform of the Swiss anti-corruption law which in particular targets bribery in the private sector.

The current regime regarding private sector bribery is regularly discussed and criticised in Switzerland. This topic received special media attention in the context of the selection process for the FIFA World Cup in Russia (2018) and Qatar (2022), as there have been allegations of bribery. Even though the awarding body, FIFA, has its headquarters in Switzerland, the Swiss private bribery provisions were deemed inapplicable.

As a matter of fact, there is a lack of application of the current provisions. So far, there have not been any convictions for bribery in the private sector.

The reason for this is considered to be twofold. First, the provisions are, as outlined above, part of the Unfair Competition Act and, thus, only apply when private bribery has an effect on a competitive relationship. Therefore, for instance, bribery in a tender process for an international sporting event, such as the FIFA World Cup, does not fall within the scope of the provision. Second, the prosecution of such offences requires a formal complaint from a person who suffered harm due to the bribery act. This requirement of "no plaintiff, no judge" has the effect that certain forms of corruption are typically not punished.

According to the proposed bill, those weaknesses shall be eliminated. Private bribery shall become an *ex officio* crime, i.e. an offence which has to be prosecuted by the authorities

whether reported or not. Furthermore, the offence of private bribery shall be transferred to and included in the SCC. Accordingly, all cases of private bribery, notwithstanding their effect on a competitive relationship, would be covered by those provisions. As a consequence, bribery in the tender process of a sporting event would be within the scope of the future provisions. However, irrespective of the introduction of the private bribery offence into the SCC, the offence shall remain a misdemeanour with a maximum penalty of three years' imprisonment (while bribery of a public official and bribery of a foreign public official have a maximum penalty of five years' imprisonment). This may lead to a situation where private sector bribery will still not qualify as a predicate offence for money laundering, as money laundering is only punishable under Swiss criminal law if the assets that are "laundered" originate from a felony (like, for instance, bribery of a public official and bribery of a foreign public official).

In addition to the proposed reform of private sector bribery, there shall be an amendment to the offences of granting or accepting an undue advantage. In future, those offences shall also cover cases in which the undue advantage is given in favour of a *third party*.

Besides the proposed reforms, further amendments have been discussed but no action was deemed necessary by the Swiss Federal Council. The following two, discussed-but-declined amendments seem noteworthy:

First, the introduction of a specific offence of "trading in influence" (abuse of real or supposed influence with a view to obtaining an undue advantage) was discussed but eventually declined. It was argued that a specific offence is not required as the conduct is already covered by the bribery provisions in place. This does not always hold true. If the intermediary is not a public official and abuses his influence on a public official without giving or promising an undue advantage, the conduct is not penalised under Swiss law.

Second, it was discussed whether the scope of bribery of foreign public officials should be extended and also cover cases in which the foreign public official does not breach the law or a duty. In particular, it was argued that so-called "facilitation payments" to foreign public officials are currently not within the scope of the SCC. However, the Swiss Federal Council argued that an adaption of the offence is not necessary as, according to the Federal Council, facilitation payments could already be penalised under the current provision if construed broadly.

The coming year will show whether the parliament will agree to the proposed bill in this form or another. As of now, it seems that the bill should pass the parliament, with the only disputed point being the transformation of the private bribery into an *ex officio* offence.

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