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Contributing Editors:
Jonathan Pickworth & Jo Dimmock

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Switzerland

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Lenz & Staehelin

Introduction

In the 2015 "Corruption Perception Index" of Transparency International, Switzerland ranked 7th out of 168 countries. And still, even though Switzerland is perceived to be one of the least corrupt countries in the world, it is still 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 (see below).

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 relatively 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, "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 the section entitled "Cross-border issues").

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 several 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

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(see below the section entitled "Brief overview of the law and enforcement regime"). Since 1 July 2016, bribery in the private sector has also been governed by the SCC and – apart from minor cases – prosecuted *ex officio*.

Brief overview of the law and enforcement regime

Until recently, bribery of public officials and bribery in the private sector were 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 official, an officially-appointed expert, translator or interpreter, an arbitrator, or a member of the armed forces*" (Article 322ter SCC), including private individuals who carry out a public function (Article 322^{decies}(2) 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* was exclusively regulated by the Federal Law against Unfair Competition ('UCA'; Article 4a). Unlike the bribery of public officials, bribery of private individuals was pursued under criminal law only upon complaint (Article 23 UCA). As of 1 July 2016, however, bribery of private individuals was also included in the SCC – in addition to the provisions in the UCA, which remain in force.

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 as an act by which an employer, company member, agent or any other auxiliary to a third party in the private sector is offered, promised, or granted any undue advantage for that person or a 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 322^{octies} SCC; 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} and Article 322^{novies} 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 permitted under public employment law or contractually approved by a third party as well as negligible advantages that are common social practice are not undue (Article 322^{decies}(1) SCC). This would typically include small Christmas or

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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 of 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 322^{octies} (1) and Article 322^{novies} (1) SCC; Article 23 UCA). In minor cases in the private sector, the offence is only prosecuted upon complaint (Article 322^{octies} (2) and Article 322^{novies} (2) SCC).

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.

Overview of enforcement activity and policy during the last year

In Switzerland, the number of reported corruption cases is rather limited. Statistics show a total of 10 to 20 convictions 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 still relatively rare. Nevertheless, there has been a rise in ongoing investigations in recent years and 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 the below section entitled "Overview of cross-border issues"). Another interesting case is the 'Ben Aissa' case relating to the bribery payments to Saadi Gaddafi, the son of the former Libyan dictator Muammar Gaddafi.

In October 2014, Mr. Riadh Ben Aissa, the former head of global construction at the Canadian engineering and construction firm SNC-Lavalin, was sentenced to three years in prison on charges of bribery of a foreign public official (Article 322^{septies} SCC), criminal mismanagement (Article 158 SCC) and money laundering (Article 305bis SCC).

The Swiss Federal Criminal Court held that Mr. Ben Aissa paid briberies to Saadi Gaddafi in order to secure a construction project and other benefits for SNC-Lavalin.

A particularly interesting aspect of this case is that the Federal Criminal Court characterised Saadi Gaddafi as a *de facto* public official and applied Article 322^{septies} SCC by stating that, even though Saadi Gaddafi did not hold any office or official function in the relevant field, he was a member of the ruling family and had the *de facto* power to grant SNC-Lavalin the requested benefits. This decision is of fundamental importance with regard to dictatorial regimes, where *de facto* power is often not congruent with official power. During the investigations, the Office of the (federal) Attorney General ('OAG') confiscated CHF 40m worth of assets, including properties in Switzerland and France that were used to launder the proceeds of the crimes. The unlawful payments were made from bank accounts in Switzerland. This was the (only) nexus to Switzerland and was sufficient to give rise to the OAG's investigation (see the below section entitled "Overview of cross-border issues").

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Another noteworthy aspect is that since September 2015, Swiss law enforcement has a new instrument to help combat corruption. The web-based platform www.fightingcorruption.ch enables anyone with information on possible acts of corruption to report their suspicions anonymously to the police. Law enforcement agencies hope the website will provide them with a new investigative approach to fight corruption at the national and international level. The new reporting system was put into operation by the Federal Office of Police (fedpol) on behalf of the OAG.

Law and policy relating to issues such as facilitation payments and hospitality

The giving and accepting of undue advantages is currently only punishable when a Swiss public official is concerned (see the above section entitled "Brief overview of the law and enforcement regime"). Over the last decade, Swiss courts have sentenced individuals for giving or accepting undue advantages in about a dozen cases altogether. In a recent decision, the Federal Criminal Court held in September 2015 that a public official who accepts 40 lunch invitations from long-standing suppliers is culpable for accepting undue advantages.

With regard to hospitality, the SCC expressly states that advantages permitted under public employment law or contractually approved by a third party as well as negligible advantages that are common social practice are not undue (see the above section entitled "Brief overview of the law and enforcement regime"). While there is no statutory definition of what negligible means, one would assume that gifts of up to around 100 Swiss francs are common social practice.

In general, however, there has been a growing public awareness of corruption and of hospitality in particular. As an example, Twint, a subsidiary of Swiss Post (the national postal company), has recently been criticised publicly because it gave journalists at a press conference credit of 100 Swiss francs to test a newly launched payment application for smartphones. In response to increased public pressure, the signatory companies of the Pharma Cooperation Code have committed to publicly disclose each year on their websites the pecuniary benefits which they granted in the previous year to professionals (primarily physicians and pharmacists) as well as healthcare organisations (in particular hospitals and research institutes).

Key issues relating to investigation, decision-making and enforcement procedures

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 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 agreements 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^{novies} SCC), criminal prosecution, judicial proceedings or the imposition of a penalty can

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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 fully fledged criminal proceedings and they may be substituted by accelerated or summary judgment proceedings.

Overview of cross-border issues

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 effect. 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 Ben Aissa 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.

A corporation can be held liable under the SCC if specific prerequisites are met (see the below section entitled "Corporate liability for bribery and corruption offences"). 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 very broad jurisdiction for Swiss authorities and even allow for extraterritorial jurisdiction, with the only connection to Switzerland being the lack of organisation.

Such circumstances were at the core of the 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.

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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.

Corporate liability for bribery and corruption offences

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.

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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.

Proposed reforms / The year ahead

As mentioned before, the SCC has been amended with effect as of 1 July 2016 to target bribery in the private sector.

The formerly applicable regime regarding private sector bribery was 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. Indeed, in March 2015 the OAG opened criminal proceedings against persons unknown in connection with the allocation of the 2018 and 2022 Football World Cups after a criminal complaint was filed by FIFA in late 2014. The opening of the OAG's investigation was based on information contained in a report commissioned by FIFA as well as on information taken from a mutual legal assistance request from the US Department of Justice (DOJ). Based on the latter, several football officials and suspected bribers were arrested in Zurich by order of the Swiss Federal Office of Justice in May 2015 and were placed in detention pending extradition as part of criminal investigations of the US Attorney's Office for the Eastern District of New York.

However, even though the awarding body, FIFA, has its headquarters in Switzerland, the Swiss private bribery provisions were deemed inapplicable and the investigations by the OAG are being conducted on the grounds of suspicion of criminal mismanagement and of money laundering, but not of private bribery. As a matter of fact, there was a lack of application of the former provisions – there had not been any convictions for bribery in the private sector at all.

The reason for this was twofold. First, the provisions were, as outlined above, only contained in the Unfair Competition Act and, thus, only applicable 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, did not fall within the scope of the provision. Second, the prosecution of such offences required a formal complaint from a person who suffered harm due to the bribery act. This requirement of "no plaintiff, no judge" had the effect that certain forms of corruption were typically not punished.

Those weaknesses were the driving force behind the newly enacted provisions in the SCC targeting bribery in the private sector (Article 322^{octies} and Article 322^{novies} SCC). By this amendment, private bribery has become an *ex officio* crime, i.e. an offence which has to be prosecuted by the authorities, whether reported or not. The only exemption is "minor cases" – the definition of which yet has to be established by jurisprudence. Furthermore, as the offence of private bribery was included in the SCC, all cases of private bribery, notwithstanding their effect on a competitive relationship, are now covered. As a consequence, bribery in the tender process of a sporting event would be within the scope of the new provisions. However, irrespective of the introduction of the private bribery offence into the SCC, the offence remains 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

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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 reform of private sector bribery, there was an amendment to the offences of granting or accepting an undue advantage (Article $322^{quinquies}$ and Article 322^{sexies} SCC). Since 1 July 2016, those offences also cover cases in which the undue advantage is given in favour of a *third party*.

Besides these enacted 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 the first effects, if any, of the reform of private sector bribery.

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Marcel Meinhardt
Tel: +41 58 450 80 00 / Email: marcel.meinhardt@lenzstaehelin.com
Dr. Marcel Meinhardt specialises in handling and managing internal investigations and in advising and representing companies *vis-à-vis* the authorities. He has broad experience in both contentious and non-contentious matters. He heads the practice groups for "regulatory and competition law" as well as "internal investigation and white collar crimes".
Marcel holds a degree in law from the University of St. Gallen (1990), a doctorate from the University of Zurich (1996), and LL.M. degrees from the New York University School of Law (1994) and the College of Europe (1995). Marcel was admitted to the Bar in 1992.

Fadri Lenggenhager
Tel: +41 58 450 80 00 / Email: fadri.lenggenhager@lenzstaehelin.com
Fadri Lenggenhager is an associate with Lenz & Staehelin in Zurich. His practice focuses on litigation and arbitration as well as regulatory compliance. Fadri also practised as a member of the dispute resolution team in Lenz & Staehelin's Geneva office and the international arbitration practice group of Wilmer Cutler Pickering Hale & Dorr in London. He holds degrees in Political Science (2003), International Management (2003) and Law (2005) from the University of St. Gallen and an LL.M. degree (2011) from the University of California, Davis School of Law. Fadri was admitted to the Zurich Bar in 2007.

Lenz & Staehelin

Bleicherweg 58, 8027 Zurich, Switzerland
Tel: +41 58 450 80 00 / Fax: +41 58 450 80 01 / URL: http://www.lenzstaehelin.com

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