

THE ANTI-BRIBERY AND
ANTI-CORRUPTION
REVIEW

NINTH EDITION

Editor
Mark F Mendelsohn

THE LAWREVIEWS

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PREFACE

The covid-19 pandemic has had a monumental and disruptive effect on practically all aspects of business, politics, law and daily life in nearly every corner of the globe. For companies conducting cross-border business, and legal practitioners who advise them, corruption remains a substantial risk area. And with national governments engaging in large-scale economic stimulus programmes and contracting on an emergency basis with a wide range of suppliers of critical goods and services, the opportunities for fraud, corruption and abuse are replete. The current global health crisis unfolded onto a world stage that is dynamic and roiling with anti-corruption activity and developments. This ninth edition of *The Anti-Bribery and Anti-Corruption Review* presents the views and observations of leading anti-corruption practitioners in jurisdictions spanning the globe, including new chapters covering Indonesia and Spain. The comprehensive scope of this edition of the Review mirrors that dynamism.

Over the past year, countries across the globe continued to investigate and prosecute a range of corruption cases – many involving heads of state and senior officials – strengthen their domestic anti-bribery and anti-corruption laws, and adopt important new law enforcement policies and guidance documents, though tumultuous international relations, rising economic competition and the effects of the pandemic are combining to threaten international cooperation and the progress of cross-border investigations more generally.

This past year saw French-headquartered Airbus SE reach a US\$3.9 billion coordinated corporate bribery and export controls resolution with authorities in France, the United Kingdom and the United States. The wide-ranging allegations involved alleged bribery of government officials in more than a dozen countries, as well as US export controls-related offences, and now other jurisdictions from Ghana to Malaysia are pressing forward with their own investigations. At the same time, the 1MDB scandal continues to play out, with still further US asset forfeiture actions, criminal charges against a major US Republican fundraiser for allegedly acting as an unregistered foreign agent in an attempt to illegally lobby the Trump administration to drop its probe into the 1MDB corruption scandal and an appeal by former Malaysian prime minister Najib Razak against his convictions on bribery and money-laundering charges and the resulting 12-year prison term. And in Brazil, which has for many years been a hotbed of anti-corruption investigations, President Jair Bolsonaro has taken the controversial step of ending his country's long-running Car Wash probe, following the resignation of his justice minister who, as judge, had previously presided over the probe.

Given the political turmoil and the global health crisis confronting us in the remainder of 2020 and into 2021, this book and the wealth of country-specific learning that it contains will help guide practitioners and their clients when navigating the perils of corruption in

foreign and transnational business, and in related internal and government investigations. I am grateful to all of the contributors for their support in producing this highly informative volume.

Mark F Mendelsohn

Paul, Weiss, Rifkind, Wharton & Garrison LLP

Washington, DC

October 2020

SWITZERLAND

*Grégoire Mangeat and Hadrien Mangeat*¹

I INTRODUCTION

Given the federal system of government in Switzerland, comparable to some extent to the US system, corruption offences can be prosecuted both by prosecutors at the cantonal level (26 cantons) and by the Office of the Attorney General of Switzerland (OAG) at the federal level. Cantonal and federal prosecutors apply the anti-bribery and anti-corruption statutes contained in Title Nineteen of the Swiss Criminal Code (SCC),² which prohibit bribery of Swiss public officials (Article 322 *ter* to Article 322 *sexies* SCC) and foreign public officials (Article 322 *septies* SCC), as well as bribery of private individuals (Articles 322 *octies* and 322 *novies* SCC).

Switzerland remains viewed as one of the least corrupt countries in the world.³ In recent years, very few domestic cases have made the headlines, but major cases related to bribery of foreign public officials have resulted in convictions of both individuals and companies. Companies benefited from the lack of corporate criminal liability statutes for a long time, then from the lack of enforcement of such statutes, but criminal authorities seem to be picking up the pace to some extent. For instance, the OAG has put in place a task force dedicated to corporate criminal liability, which could potentially increase the number of convictions in the years to come. As a general trend, during the past 10 years, most major convictions of companies for corruption have occurred as a result of plea agreements.

II DOMESTIC BRIBERY: LEGAL FRAMEWORK

i Elements

With respect to Swiss public officials, the SCC prohibits the act of bribing or accepting a bribe, as well as the act of granting or accepting an advantage. The distinction between these two categories of offenses is the following: while bribery (Articles 322 *ter* and 322 *quater* SCC) is in a relationship of ‘exchange’ with the undue advantage, the granting of an advantage (Articles 322 *quinquies* and 322 *sexies* SCC) refers to unjustified favours given

1 Grégoire Mangeat is a partner and Hadrien Mangeat is a counsel at Mangeat Attorneys at Law LLC.

2 In German, French, Italian, Romansh and English: <https://www.admin.ch/opc/fr/classified-compilation/19370083/index.html>.

3 Ranked fourth out of 180 countries in 2020 by Transparency International: <https://www.transparency.org/en/countries/switzerland>.

or accepted without any concrete consideration in return. In this latter category, it does not matter whether or not the public official has accepted the advantage or whether or not the advantage has an influence on his or her behaviour.⁴

Article 322 *ter* SCC forbids any person from offering, promising or giving to a Swiss public official (or to a third party) an undue advantage in order to cause the official to carry out or to fail to carry out an act in connection with his or her official activity. The act must be contrary to the official's duty or dependent on his or her discretion. The passive behaviour of the Swiss public official is prohibited under Article 322 *quater* SCC (demanding, securing the promise of or accepting an undue advantage for himself or herself or for a third party).

Article 322 *quinquies* SCC forbids any person from offering, promising or giving to a Swiss public official an undue advantage (for himself or herself or for a third party) in order to cause the public official to carry out his or her official duties. The passive behaviour of the Swiss public official is prohibited under Article 322 *sexies* SCC (demanding, securing the promise of or accepting an undue advantage for himself or herself or for a third party).

ii Prohibition on paying and receiving

As described above in Section II.i, Articles 322 *ter*, 322 *quater*, 322 *quinquies* and 322 *sexies* SCC prohibit both procuring and accepting undue advantages.

iii Definition of public official

Public officials are defined broadly under Title Nineteen SCC as public servants⁵ (appointed or employees of any public administration), members of the judicial, executive or legislative branches, officially appointed experts, translators, interpreters and arbitrators, and members of the armed forces.

Under Article 322 *decies* Paragraph 2 SCC, private individuals who fulfil official duties are subject to the same provisions as public officials. The employees of a state-owned or controlled company are not necessarily considered as public officials: the control operated by the state is a very strong clue, without being decisive.⁶ The determining factor is whether the state grants the company any special treatment or protections with respect to the competition, for example granting a monopoly on a certain activity.⁷

iv Undue advantage (gifts and gratuities, travel, meals and entertainment restrictions)

An advantage is defined broadly and includes any benefit, whether material or immaterial, that improves the situation of the public official, in particular: giving money, giving an object or providing an object to be used, giving real estate, providing services, paying for the services provided by a third party, providing a place to live and inviting for a vacation.⁸ An advantage can also result from an unbalanced contractual relationship: selling at an undervalued price, buying at an overrated price⁹ and granting a loan at conditions that are too advantageous.¹⁰

4 Swiss Federal Tribunal, case 6B_391/2017, § 5.2.

5 See Article 110 paragraph 3 SCC.

6 Ursula Cassani, *Droit pénal économique*, Helbing Lichtenhahn, 2020, p. 323 and cited references.

7 Ursula Cassani, *op. cit.*, p. 323 and cited reference.

8 Ursula Cassani, *op. cit.*, p. 326 and cited reference.

9 Swiss Federal Tribunal, case ATF 126 IV 141, pages 145–146.

10 Ursula Cassani, *op. cit.*, pp. 326–327; Swiss Federal Tribunal, case 6B_339/2011: where a loan was granted without interest.

Moreover, according to authors, an advantage can also take the form of an amelioration of the legal situation of the public official, for example renouncing filing a criminal complaint against him or her,¹¹ or an amelioration of his or her social status, for example, awarding him or her with a distinction or prize.¹²

An advantage is 'undue' when the public official has no legal basis to claim it.¹³ Under Article 322 *decies* SCC, 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.

At the federal level, in general, public employees can accept advantages that are common social custom and (cumulative condition) whose value does not exceed 200 Swiss francs.¹⁴ If the employee cannot refuse a donation for reasons of politeness, and if the acceptance of the donation serves the general interest of the Confederation, he or she shall hand it over to the competent authority.¹⁵ Employees shall decline any invitation that may restrict their independence and freedom of action, and they shall refuse invitations to travel abroad without the written consent of their superior.¹⁶ Moreover, when federal public employees are involved in a purchasing or decision-making process and if the negligible advantage or invitation is offered by an actual or potential bidder, a person participating in or affected by the decision-making process, or if it is impossible to exclude any link between the granting of the benefit or the invitation and the purchasing or decision-making process, employees are prohibited from accepting the negligible advantage or the invitation.¹⁷

In Geneva, public employees are prohibited from soliciting or accepting for themselves or others gifts or other benefits because of their official position.¹⁸ In particular, soliciting or accepting a cash benefit entails immediate dismissal, without prejudice to the penal consequences.¹⁹ Benefits that are personally and immediately consumable, such as lunches and aperitifs, are admissible during working hours and on working days, subject to the authorisation of the superior to the invited public official. Accepting invitations or trips in the evening or during weekends entails immediate dismissal, unless exceptionally and expressly authorised by the superior. Usual commercial gifts in kind received at the place of work or at home, such as chocolate, wine or promotional items are allowed to be shared by the entire department, or even exceptionally to be kept by the public official who received the gift with the express authorisation of the superior.

v Public official participation in commercial activities

There is no general rule forbidding public officials from participating in commercial activities. In this matter, cantonal public officials are governed by their respective cantonal rules, and federal public officials are governed by federal statutes. For example, federal public employees

11 Ursula Cassani, *op. cit.*, p. 327 and cited reference.

12 Ursula Cassani, *op. cit.*, p. 327 and cited reference.

13 Ursula Cassani, *op. cit.*, p. 327.

14 Article 93 Paragraph 1 of the Ordinance on State Personnel.

15 Article 93 Paragraph 3 of the Ordinance on State Personnel.

16 Article 93a Paragraph 1 of the Ordinance on State Personnel.

17 Article 93 Paragraph 2 and Article 93a Paragraph 2 of the Ordinance on State Personnel.

18 Article 25 of the Regulations under the General Law on the Staff of the Cantonal Administration, the Judiciary and Public Medical Institutions.

19 01.07.06 *Avantages octroyés au personnel de l'administration cantonale par des tiers* (18 December 2012): <https://www.ge.ch/document/010706-avantages-octroyes-au-personnel-administration-cantonale-tiers>.

must require an authorisation in order to exercise any paid or unpaid activity outside of their public function, if the activity might present a risk of conflict of interest.²⁰ If any risk of conflict of interest cannot be ruled out, no authorisation is granted.²¹ In the canton of Geneva, the same kind of rules apply.²²

That said, both at the federal and cantonal level, members of the parliament are elected volunteers who, in most cases, are professionally active in the public or private sectors in addition to their elected positions.

vi Political contributions

Switzerland lags behind its European neighbours when it comes to political contributions. In fact, except in some cantons, there is no law governing this kind of funding. In 2017, Swiss citizens had collected enough signatures to support a federal people's initiative 'For more transparency in the financing of political life (Transparency Initiative)', whose purpose was the amendment of the Swiss Constitution and to oblige the federal government to legislate on political contributions. That said, the Swiss Federal Council (i.e., the Swiss federal executive power) rejected the initiative and recommended to the Parliament that it should be put to the popular vote. The process is still ongoing.

vii Private commercial bribery

Bribery of private individuals is forbidden under the SCC.

Article 322 *octies* Paragraph 1 SCC prohibits any person from offering, promising or giving an employee, partner, agent or any other auxiliary of a third party in the private sector an undue advantage for that person or a third party, so that the person carries out or fails to carry out an act in connection with his or her professional or commercial activity. The act in question must be contrary to the person's duties or dependent on the person's discretion. The passive behaviour is prohibited under Article 322 *novies* Paragraph 1 SCC (demanding, securing the promise of or accepting an undue advantage for himself or herself or for a third party). In minor cases, these offences are only prosecuted if a criminal complaint has been filed by the victim.²³

Unlike in the public sector, private bribery requires an 'exchange'. Hence, the mere granting or accepting of an undue advantage in the sense of Articles 322 *quinquies* and 322 *sexies* SCC (see Section II.i.) is not criminalised.

The notion of 'private individual' is defined broadly and basically includes any individual bound by a general obligation of loyalty toward the victim.²⁴

viii Penalties

Individuals convicted for bribery (Swiss public officials) under Articles 322 *ter* and 322 *quater* SCC may be punished by up to five years' imprisonment or a monetary penalty of up to 540,000 Swiss francs.

20 Article 91 Paragraph 2 of the Ordinance on State Personnel.

21 Article 91 Paragraph 3 of the Ordinance on State Personnel.

22 Article 9 of the Regulations under the General Law on the Staff of the Cantonal Administration, the Judiciary and Public Medical Institutions.

23 Articles 322 *octies* Paragraph 2 and 322 *novies* Paragraph 2 SCC.

24 Ursula Cassani, *op. cit.*, p. 323 and cited reference.

Individuals convicted for granting/accepting an advantage (Swiss public officials) under Articles 322 *quinquis* and 322 *sexies* SCC may be punished by up to three years' imprisonment or a monetary penalty of up to 540,000 Swiss francs.

Individuals convicted for bribery of private individuals under Articles 322 *octies* and 322 *novies* SCC may be punished by up to three years' imprisonment or a monetary penalty of up to 540,000 Swiss francs.

If any of these sentences is suspended, it may be combined with a fine of up to 10,000 Swiss francs.²⁵

Moreover, the advantage procured to the receiver is subject to forfeiture,²⁶ as well as the advantage procured to the payer, for example the payments made according to a contract concluded thanks to the bribe.²⁷

III ENFORCEMENT: DOMESTIC BRIBERY

In Switzerland, a few proceedings for domestic bribery have been conducted these past years, and convictions remain very rare. In these domestic cases, one issue seems to come up more regularly: vacations of Swiss officials abroad, paid for by third parties.

IV FOREIGN BRIBERY: LEGAL FRAMEWORK

i Elements

Bribery of foreign public officials falls under the SCC. Article 322 *septies* Paragraph 1 SCC forbids any person from offering, promising or giving to a foreign public official an undue advantage for himself or herself or for a third party in order to carry out or fail to carry out an act in connection with his/her official activity. The act must be contrary to the official's duty or dependent on his or her discretion. The passive behaviour is prohibited under Article 322 *septies* Paragraph 2 SCC (demanding, securing the promise of or accepting an undue advantage for himself or herself or for a third party).

Unlike the system applying to Swiss public officials, bribery of foreign public officials requires an 'exchange'. Hence, the mere granting or accepting of an undue advantage in the sense of Articles 322 *quinquies* and 322 *sexies* SCC (see Section II.i.) is not criminalised.

ii Definition of foreign public official

Foreign public officials are defined broadly under Title Nineteen SCC as officials of a foreign state or international organisation.²⁸ Hence, they can be public servants (appointed or employees of any public administration), members of the judicial, executive or legislative branches, officially appointed experts, translators or interpreters, as well as arbitrators, members of the armed forces. In this context, the Swiss judge will apply the Swiss notion of foreign public official,²⁹ which basically concurs with the notion of Swiss public official (see Section II.iii). In short, a foreign public official is any person who carries out a task that is by

25 Article 42 Paragraph 4 and Article 106 SCC.

26 Article 70 SCC.

27 Swiss Federal Tribunal, case ATF 137 IV 79, pages 80 and following.

28 Article 322 *septies* Paragraph 2 SCC.

29 Ursula Cassani, op. cit., p. 339 and cited references.

nature public, either because the task is a matter of state sovereignty, or because the person or legal entity benefits from special treatment or protection in comparison with the competition (for example a monopoly has been granted by the state).³⁰

Officials of international organisations are considered foreign public officials when said organisations are intergovernmental or constituted by public law authorities, not when they are non-governmental organisations.³¹

iii Undue advantage (gifts and gratuities, travel, meals and entertainment restrictions)

The same definition of an undue advantage applies to bribery of Swiss and foreign officials (see Section II.iv): an advantage is ‘undue’ when the public official has no legal basis to claim it.³² Under Article 322 *decies* SCC, 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.

Three aspects are specific to bribery of foreign officials. First, knowing if an advantage is authorised by service regulations or the applicable law is a question that must be decided in the light of the law governing the official’s activity. Second, most authors consider that bribes are not justifiable by the fact that they are in accordance with the local customs.³³ Third, the local context must be taken into account when considering a ‘negligible’ advantage. Where a gift for 20 Swiss francs (about the price of a daily special at lunch) will be considered as negligible in Switzerland, the same value could represent a weekly salary in other parts of the world.³⁴

iv Payments through third parties or intermediaries

Payments through third parties or intermediaries also fall under Article 322 *septies* SCC. In fact, using third parties or intermediaries for conducting business abroad is deemed ‘risky’, when it comes to corruption.

v Individual and corporate liability

Both individuals and companies can be criminally liable for bribing a foreign public official. In fact, when violating Article 322 *septies* Paragraph 1 SCC by bribing a foreign public official, companies can be punished irrespective of the criminal liability of any natural persons, provided that said entities have failed to take all the reasonable organisational measures that are required in order to prevent such an offence.³⁵

vi Civil and criminal enforcement

Companies and individuals only face criminal enforcement under the SCC. That said, civil claims can be brought in the criminal proceedings by the victim under Article 122 Paragraph 1 of the Swiss Criminal Procedure Code (SCPC).

30 Ursula Cassani, *op. cit.*, p. 339–340 and cited references.

31 Ursula Cassani, *op. cit.*, p. 340 and cited references.

32 Ursula Cassani, *op. cit.*, p. 327.

33 Ursula Cassani, *op. cit.*, p. 341 and cited reference.

34 Ursula Cassani, *op. cit.*, p. 341.

35 Article 102 Paragraph 2 SCC.

vii Agency enforcement

In general, the criminal authorities at the cantonal level prosecute and judge offences under federal law.³⁶ When there is cantonal jurisdiction, local prosecutors conduct the investigations and bring cases to trial. That said, in many instances there is federal jurisdiction, and the OAG conducts the proceedings. In the context of bribery, the OAG is competent when the offences in Title Nineteen SCC are committed by a member of an authority or an employee of the Confederation or against the Confederation.³⁷ Moreover, in cases of bribery of a Swiss or foreign official, or granting or accepting an undue advantage, federal jurisdiction applies and the OAG is competent, if the offences have to substantial extent been committed abroad or in two or more states with no single state being the clear focus of the criminal activity.³⁸

Finally, if a criminal case is subject to both federal and state jurisdiction, the OAG may instruct the proceedings to be combined and dealt with by the federal authorities or the state authorities.³⁹

viii Leniency

Self-reporting of violations, cooperation with criminal authorities and reparation can lead to reduced sentences,⁴⁰ a more favourable settlement or a decision not to prosecute.⁴¹

While self-reporting is rare, cooperation does lead to many plea agreements, in particular when companies are involved. In fact, in Switzerland's short history of corporate criminal liability, only a very few cases have made it to trial.⁴² In most instances, charges have been dropped after reparation or convictions have been negotiated and decided by prosecutors, who have the ability to issue summary penalty orders when the accused has accepted responsibility for the offence (or if his or her responsibility has otherwise been satisfactorily established).⁴³ In the context of transnational corruption cases involving companies (Articles 102 and 322 *septies* SCC: bribery of a foreign official by a company), the OAG has convicted several companies in the past ten years by means of summary penalty orders.

ix Plea-bargaining

Plea-bargaining and negotiated settlements are key when it comes to bribery of foreign public officials by companies. The SCPC does not provide for deferred prosecution agreements (although a modification of the SCPC has recently been discussed), but three other mechanisms exist: non-prosecution agreements,⁴⁴ summary penalty orders⁴⁵ and accelerated proceedings.⁴⁶

36 Article 22 SCPC.

37 Article 23 Paragraph 1 Letter j SCPC.

38 Article 24 Paragraph 1 SCPC.

39 Article 26 Paragraph 2 SCPC.

40 Article 47 SCC and Article 48 Letter d SCC.

41 Article 53 SCC.

42 Only two decisions have been rendered by the Swiss Federal Tribunal: ATF 142 IV 333 (in 2016) and 6B_31/2019 (in 2019).

43 Article 352 SCPC.

44 In application of Article 53 SCC.

45 Article 352 SCPC.

46 Article 358 SCPC.

Non-prosecution agreements negotiated with the prosecution allow the offender to avoid criminal conviction, if he or she has admitted the offence, if a suspended custodial sentence not exceeding one year, a suspended monetary penalty or a fine are suitable as a penalty, and if the interest in prosecution of the general public and of the persons harmed are negligible.⁴⁷

Summary penalty orders negotiated with the prosecution allow the offender to be convicted directly by decision of the prosecutor, without having to go to trial or submitting said decision to the review of the criminal judge. This is possible when the accused has accepted responsibility for the offence in the preliminary proceedings (or if his or her responsibility has otherwise been satisfactorily established), and if a fine, a monetary penalty of no more than 180 daily penalty units (i.e., a maximum of 540,000 Swiss francs) or a custodial sentence of no more than six months are deemed appropriate.

Accelerated proceedings negotiated with the prosecutor allow the offender who has admitted the charges and the civil claims to conclude an agreement on the content of the indictment.⁴⁸ Hence, contrary to summary penalty orders, the civil claims must necessarily be part of the agreement. Accelerated proceedings can occur when the appropriate sentence exceeds the limit set under the rules of summary penalty orders described above. In fact, accelerated proceedings can occur as long as the prosecutor does not request a custodial sentence of more than five years.⁴⁹ In corruption matters, since the offenses under the SCC never entail custodial sentences of more than five years,⁵⁰ accelerated proceedings are always an option.

x Prosecution of foreign companies and individuals

Foreign companies and individuals can be prosecuted in Switzerland according to the principle of territoriality. In short, the offence must be committed ‘in Switzerland’, which means that the offender must commit the act or unlawfully omit to act in Switzerland, or that the place where the offence has taken effect is Switzerland.⁵¹ An attempted offence is considered committed at the place where the person concerned attempted it and at the place where he or she intended the offence to take effect.⁵² Hence, foreign companies and individuals can obviously be prosecuted when bribing foreign officials from their base in Switzerland, but also, according to authors, when the bribe is paid (paid using a bank account in Switzerland or paid abroad from a Swiss bank account) or laundered in Switzerland.⁵³

47 Article 53 SCC.

48 Article 358 Paragraph 1 and Article 360 SCPC.

49 Article 358 Paragraph 2 SCPC.

50 See Article 322 *ter* to Article 322 *novies* SCC.

51 Articles 3 and 8 Paragraph 1 SCC.

52 Article 8 Paragraph 2 SCC.

53 Ursula Cassani, *op. cit.*, p. 349 and cited references.

xi Penalties

Individuals convicted for bribery of foreign public officials under Articles 322 *septies* SCC may be punished by up to five years' imprisonment, or a monetary penalty of up to 540,000 Swiss francs.⁵⁴ If the sentence is suspended, it may be combined with a fine of up to 10,000 Swiss francs.⁵⁵

Companies can be sentenced to a fine of up to 5 million Swiss francs.⁵⁶ The court assesses the fine in particular in accordance with the seriousness of the offence, the seriousness of the organisational inadequacies and of the loss or damage caused, and based on the economic ability of the company to pay the fine.⁵⁷

Moreover, and most importantly, the advantage given to the receiver is subject to forfeiture,⁵⁸ as well as the advantage given to the payer, for example the payments made according to a contract concluded thanks to the bribe.⁵⁹ If the assets subject to forfeiture are no longer available, the authorities may uphold a claim for compensation by the state in respect of a sum of equivalent value.⁶⁰ In a 2019 corruption case (bribes paid in Africa), a Geneva-based company was sentenced by the OAG to pay a fine exceeding US\$4 million and to pay a sum equivalent to the proceeds of the deals made thanks to the bribe for an amount exceeding US\$95 million (summary penalty order dated 14 October 2019).⁶¹

On 1 January 2021, a new federal Act on Public Procurements will enter into effect. Under Article 44 of this Act, an individual or a company can be excluded from an award procedure, deleted from a list or lose a contract already awarded, if said tenderer (an organ of the tenderer, a third party to which the tenderer appeals or an organ of the third party) has violated provisions on combating corruption. For exclusion based on corruption, the exclusion can last for up to five years and relates to every public procurement of the Swiss Confederation.⁶²

V ASSOCIATED OFFENCES: FINANCIAL RECORD-KEEPING AND MONEY LAUNDERING

i Financial record-keeping

Under Article 957 Paragraph 1 of the Swiss Code of Obligations (SCO), sole proprietorships and partnerships that have achieved sales revenue of at least 500,000 Swiss francs in the last financial year, as well as legal entities have the duty keep accounts and file financial reports.

Under Article 957 Paragraph 1 SCO, sole proprietorships and partnerships with less than 500,000 Swiss francs sales revenue in the last financial year, associations and foundations which are not required to be entered in the commercial register, and some foundations need only to keep accounts on income and expenditure and on their asset position.

54 Article 322 *septies* SCC.

55 Article 42 Paragraph 4 and Article 106 SCC.

56 Article 102 Paragraphs 1 and 2 SCC.

57 Article 102 Paragraph 3 SCC.

58 Article 70 SCC.

59 Swiss Federal Tribunal case ATF 137 IV 79, page 80 and following.

60 Article 71 Paragraph 1 SCC.

61 OAG's press release dated 17 October 2019; <https://www.bundesanwaltschaft.ch/mpc/ft/home/medien/archiv-medienmitteilungen/news-seite.msg-id-76725.html>.

62 Article 45 Paragraph 1 of the Federal Act on Public Procurements.

Depending on the volume of their business and their legal structure, companies (for example a publicly traded limited liability company) must have their annual accounts and if applicable their consolidated accounts reviewed by an external auditor.⁶³

Under the federal Act on Combating Money Laundering and Terrorist Financing (AMLA), special auditing rules apply to financial intermediaries.⁶⁴

ii Disclosure of violations or irregularities

Strictly speaking, companies don't have a specific duty to disclose violations of anti-bribery laws. That said, as explained in Section V.ix, companies that qualify as financial intermediaries have specific obligations of disclosure under the anti-money laundering laws.

iii Prosecution under financial record-keeping legislation

Financial record-keeping legislation is not specifically used to prosecute bribery-related conduct. That said, falsifying accounting records can constitute forgery, which is a criminal offense under Article 251 SCC. Hence, as in most white-collar crime cases, forgery charges are often brought in corruption proceedings in relation to falsification of financial records. This approach targets in particular illicit payments made by companies or funds allocated to future such payments (slush funds).⁶⁵

iv Sanctions for record-keeping violations

Individuals convicted for falsifying financial records under Article 251 SCC may be punished by up to five years' imprisonment, or a monetary penalty of up to 540,000 Swiss francs.

v Tax deductibility of domestic or foreign bribes

As of today, bribes paid to Swiss and foreign officials are not deductible,⁶⁶ but bribes paid to private individuals are according to many authors. In this context, a new federal Act, which was voted on by the Swiss Parliament on 19 June 2020, will prohibit the deductibility of any bribe that falls under the SCC.⁶⁷ This Act will enter into effect on 1 January 2021.

vi Money laundering laws and regulations

The anti-money laundering system is based on the SCC and the AMLA.

Article 305 *bis* Paragraph 1 SCC forbids any person from carrying out an act that is aimed at frustrating the identification of the origin, the tracing or the forfeiture of assets that he or she knows or must assume originate from a felony or aggravated tax misdemeanour. An aggravated tax misdemeanour is any of the offences set out in Article 186 of the federal Act on Direct Federal Taxation (ADFT) and Article 59 Paragraph 1 Clause 1 of the federal Act on the Harmonisation of Direct Federal Taxation at Cantonal and Communal Levels

63 Article 727 and Article 727a SCO.

64 See Articles 15 and 19a AMLA.

65 Ursula Cassani, *op. cit.*, p. 354.

66 Articles 27, al. 3 and 59, al. 2, ADFT; Articles 10, al. 1 *bis* and 25, al. 1 *bis*, AHDF.

67 Federal Act on the Fiscal Treatment of Financial Sanctions.

(AHDFT), if the tax evaded in any tax period exceeds 300,000 Swiss francs.⁶⁸ The offender is also liable to the foregoing penalties where the main offence was committed abroad, provided such an offence is also liable to prosecution at the place of commission.⁶⁹

Foreign and domestic bribery (Articles 322 *ter*, 322 *quater* and 322 *septies* SCC) are predicate offences under Article 305 *bis* Paragraph 1 SCC, since they qualify as felonies (which are offences that carry custodial sentences of more than three years). By contrast, the mere granting or accepting of an undue advantage (Articles 322 *quinquies* and 322 *sexies* SCC) or the bribery of private individuals (Articles 322 *octies* and 322 *novies* SCC) are not predicate offences as they are misdemeanours (which are offences that carry custodial sentences not exceeding three years or a monetary penalty).

Moreover, aside from money laundering, the SCC penalises the conduct of financial intermediaries who lack diligence in their financial transactions. Under Article 305 *ter* Paragraph 1 SCC, any person who as part of his or her profession accepts, holds on deposit or assists in investing or transferring outside assets and fails to ascertain the identity of the beneficial owner of the assets with the care that is required in the circumstances is criminally liable. The financial intermediaries mentioned above are entitled to report to the Money Laundering Reporting Office in the Federal Office of Police any observations that indicate that assets originate from a felony or an aggravated tax misdemeanour in terms of Article 305 *bis* Number 1 *bis*.⁷⁰

Money laundering can result in corporate criminal liability under Article 102 SCC.

vii Prosecution under money laundering laws

Money laundering laws are key in the fight against corruption. First, this is because bribery of foreign and Swiss officials qualify as predicate offences,⁷¹ and second, because financial intermediaries have a duty to report where there is suspicion of money laundering.⁷²

viii Sanctions for money laundering violations

A person convicted for money laundering under Article 305 *bis* SCC is liable to a custodial sentence not exceeding three years, or to a monetary penalty not exceeding 540,000 Swiss francs.⁷³ In serious cases, the penalty is a custodial sentence not exceeding five years, or a monetary penalty. A custodial sentence is combined with a monetary penalty not exceeding 1.5 million Swiss francs.⁷⁴ A serious case is constituted, in particular, where the offender acts as a member of a criminal organisation, of a group that has been formed for the purpose of the continued conduct of money laundering activities or achieves a large turnover or substantial profit through commercial money laundering.⁷⁵

A person convicted for lack of diligence under Article 305 *ter* SCC is liable to a custodial sentence not exceeding one year or to a monetary penalty not exceeding 540,000 Swiss francs.

68 Article 305 *bis* Paragraph 1 *bis* SCC.

69 Article 305 *bis* Paragraph 3 SCC.

70 Article 305 *ter* Paragraph 2 SCC.

71 Article 305 *bis* SCC.

72 Article 9 Paragraph 1 AMLA.

73 Article 305 *bis* Paragraph 1 SCC.

74 Article 305 *bis* Paragraph 2 SCC.

75 Article 305 *bis* Paragraph 2 SCC.

A person who fails to comply with the duty to report under Article 9 AMLA is liable to a fine not exceeding 500,000 Swiss francs,⁷⁶ or 150,000 Swiss francs in the event of negligence.⁷⁷

ix Disclosure of suspicious transactions

On top of the repressive statutes of the SCC, the AMLA provides preventive and regulatory statutes that apply to financial intermediaries (banks, fund managers, investments companies, insurance institutions, securities dealers),⁷⁸ as well as individuals and legal entities that deal in goods commercially and, in doing so, accept cash (i.e., ‘dealers’).⁷⁹ The main duties under the AMLA are the duty of due diligence (verification of the identity of the customer, establishing the identity of the beneficial owner, ascertaining the nature and purpose of the business relationship wanted by the customer, keeping records, taking organisational measures to prevent money laundering),⁸⁰ and the duty to report. Under Article 9 AMLA, financial intermediaries and dealers must immediately file a report with the Money Laundering Reporting Office Switzerland if it knows or has reasonable grounds to suspect that assets involved in the business relationship are connected to money laundering (and a few other offences).

VI ENFORCEMENT: FOREIGN BRIBERY AND ASSOCIATED OFFENCES

i Petrobras

In the eighth edition of this Review, it was mentioned that since 2014 the OAG had initiated over 60 criminal investigations into bribes paid to managers of Petrobras and politicians in Brazil.

This needs to be updated as follows: on 22 October 2019, the OAG announced having filed its first indictment with the Federal Criminal Court under accelerated proceedings (which means that the accused has admitted his or her guilt) against an individual – financial intermediary – on the charge of complicity in the bribery of foreign public officials and of money laundering. In February 2020, the Federal Criminal Court convicted the individual for complicity in bribery of foreign public officials and money laundering to a suspended custodial sentence of 16 months (five year probation) and the payment of a compensatory claim of 1.6 million Swiss francs. The judges agreed with the conclusions of the AOG: while acknowledging that the proposed sentence of 16 months is close to the minimum acceptable limit, the judges approved it, the defendant benefiting from mitigating circumstances for his sincere repentance, exceptional cooperation, availability for the authorities for future trials and awareness of the seriousness of his actions.⁸¹

76 Article 37 Paragraph 1 AMLA.

77 Article 37 Paragraph 2 AMLA.

78 See Article 2 Paragraph 2 AMLA.

79 Article 2 AMLA.

80 Articles 3–8a AMLA.

81 <https://www.tdg.ch/suisse/affaire-petrobras-condamnation-suisse/story/28084049>.

ii FIFA

In the eighth edition of this Review, it was mentioned that the OAG initiated various proceedings related to FIFA, in particular an investigation concerning allegations of private bribery.

This needs to be updated as follows: the trial of three individuals was held between 14 and 23 September 2020 at the Swiss Federal Criminal Tribunal in Bellinzona. Two individuals are accused of having paid bribes in order to secure media rights on various championships. The verdict will be rendered by the Tribunal on 30 October 2020.

iii Gunvor SA

In the eighth edition of this Review, it was mentioned that after the conviction for bribery of a foreign official of a former oil trader with Gunvor Group in 2018, the Geneva branch of Gunvor International BV and Gunvor's Swiss entity, Gunvor SA, were facing charges for the same offence.

This needs to be updated as follows:⁸² Gunvor SA was convicted of bribery of foreign officials on 14 October 2019 and sentenced to pay a fine of 4 million Swiss francs and pay 90 million Swiss francs (proceeds of the crime) in compensation. In substance, Gunvor SA was blamed for its organisational shortcomings, not having taken any measures to prevent corruption: the trader had no code of conduct to give a clear signal and guide employees in their activities, no compliance programme, no internal audit, no staff member responsible for identifying, analysing or reducing the risk of corruption and no internal guidelines or training in place to raise employee awareness and reduce the risk of corruption. Moreover, Gunvor SA failed to address the risk of corruption associated with the use of agents to obtain oil cargoes and to whom commissions of several tens of millions of US dollars were paid between 2009 and 2012. In particular, Gunvor SA did not select the agents used and did not monitor their activity. However, Swiss and international anti-corruption standards (OECD, ICC, SECO) specifically highlight the increased risk of corruption in the activities of agents. They recommend, among other things, that due diligence should be carried out and adequately documented, that the selection process should be regulated, that warning signals should be defined to detect potentially illegal activities, and that regular checks should be carried out, in particular when paying their bills.

iv BSGR

In the eighth edition of this Review, it was mentioned that the Office of the Attorney General of Geneva announced on 12 August 2019 that a trial for bribery of foreign officials and forgery would take place before the Geneva Court. Three individuals are accused of having bribed officials of the Republic of Guinea in order to secure mining rights worth US\$5 billion to the benefit of Beny Steinmetz Group Ressources (BSGR). Although the canton of Geneva is familiar with white-collar cases and proceedings involving corruption offences, this will be the first trial involving bribery of foreign officials in Geneva. The trial could not take place in 2020 as scheduled, but is expected in 2021.

82 AOG's press release dated 17 October 2019: <https://www.admin.ch/gov/fr/accueil/documentation/communiqués.msg-id-76725.html>.

VII INTERNATIONAL ORGANISATIONS AND AGREEMENTS

Although not a member of the European Union, Switzerland is a member of the United Nations, the OECD and the Council of Europe. Switzerland is party to the:

- a OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions;
- b Council of Europe Criminal Law Convention on Corruption;
- c Council of Europe Additional Protocol to the Criminal Law Convention on Corruption;
- d United Nations Convention Against Corruption; and
- e United Nations Convention against Transnational Organized Crime.

VIII LEGISLATIVE DEVELOPMENTS

As mentioned above in Section IV.xi, on 1 January 2021, a new federal Act on Public Procurements will enter into effect, rendering in particular possible to exclude individuals who have violated provisions on combating corruption from an award procedure.

The federal Act on the Fiscal Treatment of Financial Sanctions, which has been voted on by the Swiss Parliament on 19 June 2020, will prohibit the deductibility of any bribe that falls under the SCC.⁸³ This Act will enter into effect on 1 January 2021.

IX OTHER LAWS AFFECTING THE RESPONSE TO CORRUPTION

In Switzerland, attorney–client privilege is guaranteed for attorneys who have passed the bar exam and who actually practice law as independent attorneys (in a law firm).⁸⁴ For these practitioners, breach of attorney–client privilege constitutes a criminal offence that carries a custodial sentence of up to three years' imprisonment.⁸⁵ By contrast, the professional activity of lawyers who have passed the bar, but who work in the legal departments of companies, is not covered by attorney–client privilege.

Bribery of a Swiss military official falls under the Swiss Military Criminal Code. All forms of bribery or granting of an undue advantage are criminalised under Articles 141, 141a, 142, 143, 143a of this Code.

As mentioned in Sections IV.xi and VIII, on 1 January 2021, a new federal Act on Public Procurements will enter into effect, in particular rendering it possible to exclude individuals who have violated provisions on combating corruption from an award procedure.

In Switzerland, in general, whistle-blowing mechanisms are not mandatory for private companies.⁸⁶ Moreover, employees of the private sector who wish to blow the whistle must be careful not to violate banking secrecy (if an employee of a Swiss bank)⁸⁷ or commercial secrecy,⁸⁸ if they want to avoid criminal prosecution themselves. In general, an employee must keep secret any wrongdoing of his or her employer, unless a superior interest commands the whistle-blower to act on the information. In this situation, the employee must first talk to the employer, then to the competent authority, and only if this authority does not act, to the

83 Federal Act on the Fiscal Treatment of Financial Sanctions.

84 Articles 2 and 13 of the Federal Law on the Free circulation of Attorneys.

85 Article 321 SCC.

86 Concerning financial intermediaries, see Section V.ix.

87 Article 47 of the Act on Banks.

88 Article 162 SCC.

general public.⁸⁹ In the public sector, whistle-blowers are better protected. Under Article 22a Paragraph 5 of the federal Act on Employees of the Swiss Confederation, employees of the federal administration must not suffer any professional disadvantage for having denounced an offence or an irregularity or for having testified as a witness.

X COMPLIANCE

Compliance programmes have been essential in Swiss banks for quite some time and have become more and more important for other companies. In fact, under Article 102 SCC, companies are convicted where they have not taken the appropriate measures to prevent the commission of an offence. In recent cases, the lack of compliance systems was a major aspect of the decision taken by the criminal authorities. Compliance can be a mitigating factor in sentencing. The Swiss authorities do provide guidance. For example, the Swiss State Secretariat for Economic Affairs (SECO) and other actors have authored a brochure providing Swiss companies operating abroad advice on active prevention of corruption. This brochure, called 'Preventing corruption – Information for Swiss business operating abroad', is available online in different languages.⁹⁰ Moreover, local authorities and private associations provide their own brochures.

XI OUTLOOK AND CONCLUSIONS

If Switzerland remains considered as one of the least corrupt countries in the World, it has recently been criticised for 'stagnating' in its fight against corruption.⁹¹ Lack of whistle-blower protection and transparency in political party funding still need improving, according to commentators.

That said, bribery, especially of foreign public officials, is being prosecuted, and companies are being convicted. If sentences can be viewed as lenient in comparison with other jurisdictions, restitution claims (equivalent to proceeds of the crime) are not limited under the SCC. It seems expectable that more and more cases will be brought to justice and that companies will need to up their game in terms of organisational pre-emptive measures.

89 Swiss Federal Tribunal, case ATF 127 III 310, page 316.

90 https://www.seco.admin.ch/seco/en/home/Publikationen_Dienstleistungen/Publikationen_und_Formulare/Aussenwirtschafts/broschueren/korruption_vermeiden.html.

91 <https://transparency.ch/fr/la-lutte-contre-la-corruption-stagne-y-compris-en-suisse-selon-une-etude/>.

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