THE ANTI-BRIBERY AND ANTI-CORRUPTION REVIEW

Eleventh Edition

Editor
Mark F Mendelsohn

THE LAWREVIEWS

THE ANTI-BRIBERY AND ANTI-CORRUPTION REVIEW

ELEVENTH EDITION

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PREFACE

This 11th edition of *The Anti-Bribery and Anti-Corruption Review* presents the insight and observations of leading anti-corruption practitioners in jurisdictions spanning the globe, including a new chapter covering Thailand. The other contributors to this book have reviewed and updated their chapters from the previous edition to reflect changes in their jurisdictions over the past 18 months.

Following guidance curated by Mark Mendelson of Paul, Wiess, Rifkind, Wharton & Garrison LLP, the authors discuss the legal framework and enforcement record of their respective jurisdictions for both foreign and domestic bribery, as well as associated offences. They also report on legislative developments, give a rundown of membership of international organisations and treaties responding to corruption, and look ahead to possible developments over the next year.

In these chapters, you will find updates on damning reports into recent failings at the Serious Fraud Office in the United Kingdom, Canada's recently established remediation regime claiming its first success, the entering into force of the transposed whistleblower directive in France, acquittals in the long-running *Eni-Shell Nigeria* case in Italy and amended whistleblower legislation in Japan, among other updates.

This Review 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. We are grateful to all our contributors for their help in producing this highly informative volume.

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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. Furthermore, 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 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 a new chapter covering Thailand. The comprehensive scope of this edition of the Review mirrors that dynamism.

Over the past three years, countries across the globe have 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, although 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.

The year 2020 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 continued 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 Najob Razak against his convictions on bribery and money-laundering charges and the resulting 12-year prison term. Furthermore, in Brazil, which has for many years been a hotbed of anti-corruption investigations, President Jair Bolsonaro took 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 still confronting us in the remainder of 2021 and into 2022, 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.

This information was accurate as at November 2021.

Mark F Mendelsohn
Paul, Weiss, Rifkind, Wharton & Garrison LLP
Washington, DC

Chapter 9

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, 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 or

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

2 In German, French, Italian, Romansh and English: https://www.fedlex.admin.ch/eli/cc/54/757_781_799/fr (Federal Law 311.0).

3 Ranked seventh out of 180 countries in 2021 by Transparency International: https://www.transparency.org/en/cpi/2021/index/che.

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 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 servants[5] (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,[8] 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.[9] An advantage can also result from an unbalanced contractual relationship: selling at an undervalued price,

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 Swiss Federal Tribunal, case 6B_433/2020, Paragraph 1.2.3.

9 Ursula Cassani, op. cit., p. 326 and cited reference.

buying at an overrated price[10] and granting a loan at conditions that are too advantageous.[11] 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,[12] or an amelioration of his or her social status, for example, awarding him or her with a distinction or prize.[13]

An advantage is 'undue' when the public official has no legal basis to claim it.[14] 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.[15] If the employee cannot refuse a donation for reasons of politeness, and if the acceptance of the donation serves the general interest of the Swiss Confederation, he or she shall hand it over to the competent authority.[16] 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.[17] 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.[18]

In Geneva, public employees are prohibited from soliciting or accepting for themselves or others gifts or other benefits because of their official position.[19] In particular, soliciting or accepting a cash benefit entails immediate dismissal, without prejudice to the penal consequences.[20] 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.[21] Accepting invitations or trips in the evening or during weekends entails immediate dismissal, unless exceptionally and

10 Swiss Federal Tribunal, case ATF 126 IV 141, pp. 145–146.

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

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

13 Ursula Cassani, op. cit., p. 327 and cited reference.

14 Ursula Cassani, op. cit., p. 327.

15 Article 93 Paragraph 1 of the Ordinance on State Personnel, in German, French and Italian: www.fedlex.admin.ch/eli/cc/2001/319/fr (Federal Ordinance 172.220.111.3).

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

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

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

19 Article 25 of the Regulations under the General Law on the Staff of the Cantonal Administration, the Judiciary and Public Medical Institutions, www.lexfind.ch/fe/fr/tol/30870/versions/169597/fr (Geneva Regulations B 5 05.01).

20 01.07.06 *Avantages octroyés au personnel de l'administration cantonale par des tiers* (18 December 2012): www.ge.ch/document/010706-avantages-octroyes-au-personnel-administration-cantonale-tiers.

21 01.07.06 *Avantages octroyés au personnel de l'administration cantonale par des tiers* (18 December 2012): www.ge.ch/document/010706-avantages-octroyes-au-personnel-administration-cantonale-tiers.

expressly authorised by the superior.[22] 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.[23]

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 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.[24] If any risk of conflict of interest cannot be ruled out, no authorisation is granted.[25] In the canton of Geneva, the same kinds of rules apply.[26]

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 used to lag behind its European neighbours when it came to political contributions. Except specific laws in some cantons, until October 2022, there was no federal law governing this kind of funding.

On 23 October 2022, new statutes (Articles 76b to 76k) of the Federal Act on Political Rights (PRA) and a new related federal ordinance, the Ordinance on the Transparency of the Financing of Political Life (OTFPL), entered into effect. The new rules on transparency will thus apply for the first time to the National Council elections of 2023.

Essentially, political parties represented in the Federal Assembly have now an obligation to declare their revenues, as well as their donations (monetary and non-monetary) whose value exceeds 15,000 Swiss francs per donor per year (see Article 76b PRA). Furthermore, under certain circumstances, mainly depending on the amounts involved, individuals, groups of individuals and companies that campaign at the federal level can be obliged to declare their financing (see Article 76c PRA). Compliance with these obligations is verified by the Swiss Federal Audit Office (see Articles 76e and 76g PRA with Article 7 OTFPL), which in turn publishes on its website some of the information collected (see Article 76f PRA). Finally, it is now forbidden to accept anonymous donations or donations from abroad, with the exception of donations from Swiss citizens abroad and donations made for the purpose of election to the Council of States (see Article 76h PRA). Failure to comply with their obligations will result in a fine of up to 40,000 Swiss francs for political parties and campaigners (see Article 76j PRA).

22 01.07.06 *Avantages octroyés au personnel de l'administration cantonale par des tiers* (18 December 2012): www.ge.ch/document/010706-avantages-octroyes-au-personnel-administration-cantonale-tiers.

23 01.07.06 *Avantages octroyés au personnel de l'administration cantonale par des tiers* (18 December 2012): www.ge.ch/document/010706-avantages-octroyes-au-personnel-administration-cantonale-tiers.

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

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

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

Notably, the cantons may provide for stricter provisions on the transparency of cantonal political actors in the exercise of political rights at the federal level (see Article 76k PRA).

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.[27]

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.[28]

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 (see Article 34 SCC).

Individuals convicted for granting or accepting an advantage (Swiss public officials) under Articles 322 *quinquies* and 322 *sexies* SCC may be punished by up to three years' imprisonment or a monetary penalty of up to 540,000 Swiss francs (see Article 34 SCC).

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 (see Article 34 SCC).

If any of these sentences is suspended, it may be combined with a fine of up to 10,000 Swiss francs.[29] Moreover, the advantage procured by the receiver is subject to forfeiture,[30] as well as the advantage procured by the payer, for example, payments made according to a contract concluded thanks to the bribe.[31]

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: holidays of Swiss officials abroad, paid for by third parties.

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

28 Ursula Cassani, op. cit., p. 323 and cited reference.

29 Article 42 Paragraph 4 and Article 106 SCC.

30 Article 70 SCC.

31 Swiss Federal Tribunal, case ATF 137 IV 79, p. 80 et seq.

i Conviction of a state councillor

In February 2021, an elected official of the Geneva State Council was convicted for acceptance of an advantage (Article 322 *sexies* SCC) for having accepted a paid trip abroad with his family, on official invitation from a foreign country. He was sentenced to a suspended monetary penalty and to the payment of a compensatory claim of 50,000 Swiss francs (corresponding to the estimated value of the trip). The Tribunal found that the state councillor considered, accepted and accommodated the risk of being influenced in the performance of his duties by accepting such a gift, considered half-official and half-private.

The state councillor's chief of staff was convicted of the same criminal offence, as well as for violating secrecy of function, and sentenced to a suspended monetary penalty. Two individuals were convicted for granting an advantage (Article 322 *quinquies* SCC), and sentenced to a suspended monetary penalty.

However, after the state councillor and most parties appealed the decision, the Geneva Criminal Court of Appeals overturned the state councillor's conviction and acquitted him on all counts in a December 2021 ruling. According to the Court, although the state councillor had undoubtedly accepted an undue advantage, it had not been established that the foreign authorities wished to obtain anything from him.

The Public Prosecutor's Office appealed the decision to the Swiss Federal Tribunal in early 2022. The decision has not yet been rendered.

ii Trial of a former federal employee of FEDRO

In April 2021, the OAG filed an indictment with the Federal Criminal Court against a former employee of the Federal Roads Office (FEDRO) and two members of the board of directors of a vehicle import company. According to the indictment, the two board members paid the FEDRO employee to alter data for the calculation of CO_2 penalties so that their company would not pay any penalties for more than three years. This resulted in a loss for the Swiss Confederation of about 9 million Swiss francs. The former FEDRO employee faces multiple charges, including acceptance of bribes (Article 322 *quater* SCC), and the two other individuals face multiple charges, including bribery of a Swiss public official (Article 322 *ter* SCC).

iii Conviction of two former federal employees of the FEDRO

In July 2021, it was confirmed that the OAG had convicted (by summary penalty orders) two former employees of the FEDRO for having received gifts from the director of a construction company on several occasions, such as wine and foodstuffs (Article 322 *quater* SCC).

iv Conviction of a former federal employee of SECO

In 2014, the State Secretariat for Economic Affairs (SECO) reported a corruption case within its ranks to the OAG, which had since been investigating the case. Over a period of 10 years, a former head of department had allegedly favoured certain companies during the contract-award process (by manipulating the evaluations of the bids) and obtained in return benefits totalling more than 1.7 million Swiss francs (VIP tickets, household appliances, meals, sponsorship for events, various other gifts and cash). The OAG put about 10 individuals under investigation and convicted some of them by issuing summary penalty orders.

In August 2021, the head of department at SECO, accused of accepting bribes as a Swiss public official (Article 322 quarter SCC), mismanagement, forgery and money laundering,

along with the heads of three private companies, accused of granting bribes to a Swiss public official (Article 322 *ter* SCC) and other offences, stood trial before the Federal Criminal Court. The OAG asked the Court to sentence the head of department to four years in prison and to a monetary penalty, requesting lower prison sentences and monetary penalties for the three other individuals (between two and three years). The Court rendered its verdict on 17 September 2021 and convicted the former head of department for acceptance of bribes (Article 322 *quater* SCC) and forgery, and sentenced him to 52 months in prison, as well as a suspended monetary penalty.

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.[32] 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,[33] 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 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).[34]

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.[35]

32 Article 322 *septies* Paragraph 2 SCC.

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

34 Ursula Cassani, op. cit., pp. 339–340 and cited references.

35 Ursula Cassani, op. cit., p. 340 and cited references.

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.[36] 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.[37] 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.[38]

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.[39]

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).[40]

vii Agency enforcement

In general, the criminal authorities at the cantonal level prosecute and judge offences under federal law.[41] 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

36 Ursula Cassani, op. cit., p. 327.
37 Ursula Cassani, op. cit., p. 341 and cited reference.
38 Ursula Cassani, op. cit., p. 341.
39 Article 102 Paragraph 2 SCC.
40 https://fedlex.data.admin.ch/eli/cc/2010/267.
41 Article 22 SCPC.

Swiss Confederation or against the Confederation.[42] 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.[43]

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.[44]

viii Leniency

Self-reporting of violations, cooperation with criminal authorities and reparation can lead to reduced sentences,[45] a more favourable settlement[46] or a decision not to prosecute, not to refer the case to the tribunal or not to impose any sentence.[47]

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 few cases have made it to trial.[48] 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).[49] 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 10 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,[50] summary penalty orders[51] and accelerated proceedings.[52]

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.[53]

42 Article 23 Paragraph 1 Letter j SCPC.
43 Article 24 Paragraph 1 SCPC.
44 Article 26 Paragraph 2 SCPC.
45 Article 47 SCC and Article 48 Letter d SCC.
46 See Articles 352 and 358 SCPC.
47 Article 53 SCC.
48 Only two decisions have been rendered by the Swiss Federal Tribunal on appeal: ATF 142 IV 333 (in 2016) and ATF 146 IV 68 (in 2019). That being said, new major cases made it to trial in 2022 (see Section V.vi).
49 Article 352 SCPC.
50 In application of Article 53 SCC.
51 Article 352 SCPC.
52 Article 358 SCPC.
53 Article 53 SCC.

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)[54] 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.[55] 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.[56] In corruption matters, since the offenses under the SCC never entail custodial sentences of more than five years,[57] 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.[58] 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.[59] 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.[60]

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.[61] If the sentence is suspended, it may be combined with a fine of up to 10,000 Swiss francs.[62]

54 See Article 34 SCC.
55 Article 358 Paragraph 1 and Article 360 SCPC.
56 Article 358 Paragraph 2 SCPC.
57 See Article 322 *ter* to Article 322 *novies* SCC.
58 Articles 3 and 8 Paragraph 1 SCC.
59 Article 8 Paragraph 2 SCC.
60 Ursula Cassani, op. cit., p. 349 and cited references.
61 Article 322 *septies* SCC with Article 34 SCC.
62 Article 42 Paragraph 4 and Article 106 SCC.

Companies can be sentenced to a fine of up to 5 million Swiss francs.[63] 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.[64]

Moreover, and most importantly, the advantage given to the receiver is subject to forfeiture,[65] as well as the advantage given to the payer, for example the payments made according to a contract concluded thanks to the bribe.[66] In a June 2021 ruling, the Swiss Federal Tribunal further developed its case law on the extent of the forfeiture, providing criteria for determining whether and to what extent the profits from a contract obtained through corruption should be forfeited.[67] 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.[68] 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).[69]

On 1 January 2021, a new federal Act on Public Procurements entered 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.[70]

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),[71] 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 to 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 that 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.

63 Article 102 Paragraphs 1 and 2 SCC.

64 Article 102 Paragraph 3 SCC.

65 Article 70 SCC.

66 Swiss Federal Tribunal case ATF 137 IV 79, p. 80 et seq.

67 Swiss Federal Tribunal case ATF 147 IV 479, p. 493 et seq. See the same case (p. 500 et seq.) regarding the question of whether the assets of the sole shareholder can be forfeited (according to the transparency principle) when the profits were made by his or her company.

68 Article 71 Paragraph 1 SCC.

69 OAG's press release dated 17 October 2019: www.bundesanwaltschaft.ch/mpc/fr/home/medien/archiv-medienmitteilungen/news-seite.msg-id-76725.html.

70 Article 45 Paragraph 1 of the federal Act on Public Procurements.

71 In German, French, Italian, Romansh and English: https://www.fedlex.admin.ch/eli/cc/27/317_321_377/fr (Federal Law 220).

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.[72]

Under the federal Act on Combating Money Laundering and Terrorist Financing (AMLA), special auditing rules apply to financial intermediaries.[73]

ii Disclosure of violations or irregularities

Strictly speaking, companies do not 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).[74]

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 (see Article 34 SCC).

v Tax deductibility of domestic or foreign bribes

Since 1 January 2022, under the federal Act on Direct Federal Taxation (ADFT) (see Articles 27 and 59)[75] and the federal Act on the Harmonisation of Direct Federal Taxation at Cantonal and Communal Levels (AHDFT) (see Articles 10 and 25),[76] any bribe that falls under the SCC is not deductible.

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 ADFT and Article 59 Paragraph 1 Clause 1 AHDFT, if the tax evaded in any tax period exceeds 300,000

72 Article 727 and Article 727a SCO.

73 See Articles 15 and 19a AMLA, in German, French, Italian and English: www.fedlex.admin.ch/eli/cc/1998/892_892_892/fr (Federal Law 955.0).

74 Ursula Cassani, op. cit., p. 354.

75 Articles 27, al. 3 and 59, al. 2, in German, French and Italian: www.fedlex.admin.ch/eli/cc/1991/1184_1184_1184/fr (Federal Law 642.11).

76 Articles 10, al. 1 *bis* and 25, al. 1 *bis*, in German, French and Italian: www.fedlex.admin.ch/eli/cc/1991/1256_1256_1256/fr (Federal Law 642.14).

Swiss francs.[77] 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.[78]

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*.[79]

Money laundering can result in corporate criminal liability under Article 102 SCC. In December 2021, the Federal Criminal Court convicted a financial institution based on its corporate criminal liability for the first time. The bank concerned was found guilty of failure to guarantee an appropriate separation of duties, to provide effective independent supervision of high-risk business relationships and to avoid conflicts of interest.[80] Another Swiss bank was convicted in June 2022.[81]

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 both qualify as predicate offences,[82] and second, because financial intermediaries have a duty to report where there is suspicion of money laundering.[83]

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.[84] 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.[85] A serious case is constituted, in particular, where the offender acts

77 Article 305 *bis* Paragraph 1 *bis* SCC.
78 Article 305 *bis* Paragraph 3 SCC.
79 Article 305 *ter* Paragraph 2 SCC.
80 https://www.bstger.ch/fr/media/comunicati-stampa/2021/2021-12-15/1224.html.
81 https://www.bstger.ch/fr/media/comunicati-stampa/2022/2022-06-27/1275.html.
82 Article 305 *bis* SCC.
83 Article 9 Paragraph 1 AMLA.
84 Article 305 *bis* Paragraph 1 SCC with Article 34 SCC.
85 Article 305 *bis* Paragraph 2 SCC.

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.[86]

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 (see Article 34 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,[87] or 150,000 Swiss francs in the event of negligence.[88]

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),[89] as well as individuals and legal entities that deal in goods commercially and, in doing so, accept cash (i.e., 'dealers').[90] 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),[91] 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.

In the ninth edition, it was reported that on 22 October 2019, the OAG announced the filing of 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 and handed down a suspended custodial sentence of 16 months (five years' probation) and the payment of a compensatory claim of 1.6 million Swiss francs. The judges agreed with the conclusions of the OAG: while acknowledging that the proposed sentence of 16 months was close

86 Article 305 *bis* Paragraph 2 SCC.
87 Article 37 Paragraph 1 AMLA.
88 Article 37 Paragraph 2 AMLA.
89 See Article 2 Paragraph 2 AMLA.
90 Article 2 AMLA.
91 Articles 3–8a AMLA.

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.[92]

More recently, on 23 May 2022, the OAG convicted a former Swiss bank executive for money laundering in relation to the *Petrobras* case. The accused was found guilty of allowing the laundering of US$17.5 million linked to the corruption scheme. In its summary penalty order, the OAG convicted the former banker to a monetary penalty of 270,000 Swiss francs (the execution of the sentence was suspended and the banker subjected to a two-year probation period).[93]

ii FIFA

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

In the ninth edition, it was reported that the trial of three individuals was held between 14 and 23 September 2020 at the Swiss Federal Criminal Tribunal in Bellinzona, and that two individuals were accused of having paid bribes in order to secure media rights to various championships.

On 30 October 2020, the Tribunal acquitted the two individuals on all counts of bribery.

On 23 June 2022, after the OAG had filed an appeal, the Appeal Court confirmed the acquittal of one individual but convicted FIFA's former secretary-general for receiving bribes (and committing forgery).

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.

In the ninth edition, the verdicts were reported.[94] 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

92 www.tdg.ch/suisse/affaire-petrobras-condamnation-suisse/story/28084049.

93 https://www.swissinfo.ch/fre/petrobras--premi%C3%A8re-condamnation-d-un-banquier-suisse-par-le-mpc/47698436.

94 OAG's press release dated 17 October 2019: www.admin.ch/gov/fr/accueil/documentation/communiques.msg-id-76725.html.

(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 had announced on 12 August 2019 that a trial for bribery of foreign officials (Article 322 *septies* SCC) and forgery would take place before the Geneva Court. Three individuals were 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 was to be the first trial involving bribery of foreign officials in Geneva.

In the ninth edition of this Review, we indicated that the first instance trial took place in January 2021 and lasted two weeks. The Court found that the three defendants did work together to pay US$8.5 million in bribes between 2006 and 2012 to Mamadie Touré, the fourth wife of Guinean President Lansana Conté, in order for BSGR to obtain rights to mines in Simandou. The head of the group was convicted and sentenced to five years' imprisonment (his effective management position within the group having been established) and the payment of a compensatory claim of 50 million Swiss francs. An administrative director of companies linked to the group was convicted and sentenced to two years' imprisonment (suspended) and the payment of a compensatory claim of 50,000 Swiss francs. The man in charge of the field in Africa was sentenced to three-and-a-half years' imprisonment and the payment of a compensatory claim of 5 million Swiss francs. Finally, we indicated that the appeal process was ongoing.

We can now report that the trial on appeal took place in early September 2022 and that the verdict is still pending at the time of writing.

v Oil trading in Ecuador

In June 2021, the OAG opened criminal proceedings against unknown persons on suspicion of bribery of foreign public officials (Article 322 *septies* SCC). The OAG was acting on the basis, in particular, of court documents from criminal proceedings conducted by the US authorities in connection with alleged acts of bribery of Ecuadorian public officials and money laundering by a former employee of a group of companies active in commodities trading based in Geneva, among other places. The aim is to clarify whether, in this complex of facts, offences could have been committed on Swiss territory.

vi Conviction of the son of a former minister from Libya

In the ninth edition of this Review, it was mentioned that, in July 2021, the Federal Criminal Court found the son of a former Libyan minister (under Muammar Qaddafi) guilty of complicity of passive bribery of foreign public officials (Article 322 *septies* Paragraph 2 SCC) for having received US$1.5 million from a Norwegian multinational, in order to allow it to set up in Libya. The money transited through the Geneva subsidiary of the Norwegian company and then ended up in an account in Geneva belonging to the minister's son. The convicted individual was sentenced to a fine of 360,000 Swiss francs and to the payment

of a compensatory claim of 1.5 million Swiss francs. This is a rare case in Switzerland of conviction for passive bribery of a foreign official. In 2016, the OAG had already convicted the Geneva subsidiary and its managers by issuing summary penalty orders.

The trial on appeal is supposed to have taken place in May 2022, but we are waiting for confirmation.

vii SBM Offshore

In a summary penalty order dated 18 November 2021, the OAG sentenced three Swiss subsidiaries of the multinational group SBM Offshore and ordered them to pay an amount of over 7 million Swiss francs, including a fine of 4.2 million Swiss francs, for having failed to take all the reasonable organisational measures required to prevent the bribery of foreign public officials in Angola, Equatorial Guinea and Nigeria. Their criminal practices were part of a system specifically set up to pay substantial bribes to foreign public officials with the aim of securing contracts for the SBM Offshore group. According to the OAG, the extent and the duration of the acts of corruption show that, during the period under investigation, the assessment of the risk of corruption and the related measures and procedures to prevent it were either non-existent or wholly inadequate.[95]

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 following:

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

VIII LEGISLATIVE DEVELOPMENTS

As mentioned in Section IV.xi, on 1 January 2021, a new federal Act on Public Procurements entered into effect,[96] making it possible, in particular, 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 was voted on by the Swiss Parliament on 19 June 2020, entered into effect on 1 January 2022. As a consequence, two federal tax laws were amended: the federal Act on Federal Direct Taxation (see Articles 27 and 59) and the federal Act on the Harmonisation of Direct Federal Taxation at Cantonal and Communal Levels (see Articles 10, 25 and 72). As a result, the deductibility of any bribe that falls under the SCC is now prohibited.

95 https://www.bundesanwaltschaft.ch/mpc/fr/home/medien/archiv-medienmitteilungen/news-seite.msg-id-86009.html.

96 www.fedlex.admin.ch/eli/cc/2020/126/fr.

As mentioned in Section II.vi, on 23 October 2022, new statutes (Articles 76b to 76k) of the federal Act on Political Rights (PRA) and a new related federal ordinance entered into effect, creating at the federal level new obligations for certain political parties, elected officials and campaigners regarding financing of the political life.

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).[97] For these practitioners, breach of attorney–client privilege constitutes a criminal offence that carries a custodial sentence of up to three years' imprisonment.[98] 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 entered into effect, making it possible, in particular, to exclude individuals who have violated provisions on combating corruption from an award procedure.

In Switzerland, in general, whistleblowing mechanisms are not mandatory for private companies.[99] 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)[100] or commercial secrecy,[101] 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 whistleblower 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 general public.[102] In the public sector, whistleblowers are better protected. Under Article 22a Paragraph 5 of the federal Act on Employees of the Swiss Confederation,[103] 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

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

98 Article 321 SCC.

99 Concerning financial intermediaries, see Section V.ix.

100 Article 47 of the Act on Banks.

101 Article 162 SCC.

102 Swiss Federal Tribunal, case ATF 127 III 310, p. 316.

103 In German, French, Italian and Romansh: www.fedlex.admin.ch/eli/cc/2001/123/fr (Federal Law 172.220.1).

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.[104] Moreover, local authorities and private associations provide their own brochures.

XI OUTLOOK AND CONCLUSIONS

Although Switzerland is still considered as one of the least corrupt countries in the World, it has recently been criticised for 'stagnating' in its fight against corruption.[105] Lack of whistleblower protection and transparency in political party funding still need improving, according to commentators. The new provisions of the federal Act on Political Rights should eventually improve the situation regarding this second issue.

That said, bribery, especially of foreign public officials, is being prosecuted, and companies as well as individuals are being convicted. As noted above, Swiss criminal authorities have prosecuted and tried significant cases related to bribery this past year, involving both Swiss and foreign officials. 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. We expect that increasingly more cases will be brought to justice and that companies will need to up their game in terms of organisational pre-emptive measures.

104 www.seco.admin.ch/seco/en/home/Publikationen_Dienstleistungen/Publikationen_und_Formulare/Aussenwirtschafts/broschueren/korruption_vermeiden.html.

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

Appendix 1

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