

# ANTI-BRIBERY & CORRUPTION

## Switzerland



# Anti-Bribery & Corruption

Consulting editors

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Quick reference guide enabling side-by-side comparison of local insights, including into relevant domestic and international law, agencies, enforcement and sanctions; recent landmark investigations and decisions; and other recent trends.

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## RELEVANT INTERNATIONAL AND DOMESTIC LAW

### International anti-corruption conventions

To which international anti-corruption conventions is your country a signatory?

Switzerland is a signatory of the following international conventions relating, in whole or in part, to combating corruption:

- the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime of 8 November 1990;
- the Organisation for the Economic Co-operation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions of 17 December 1997;
- the Council of Europe Criminal Law Convention on Corruption of 27 January 1999 as well as its Additional Protocol of 15 May 2003; and
- the United Nations Convention against Corruption of 31 October 2003.

Switzerland has made reservations to most of the above conventions.

In addition to international multilateral conventions, Switzerland has signed bilateral treaties, in particular in matters of mutual legal assistance, that contain provisions facilitating the seizure, confiscation and return of proceeds of corruption.

*Law stated - 11 January 2023*

### Foreign and domestic bribery laws

Identify and describe your national laws and regulations prohibiting bribery of foreign public officials (foreign bribery laws) and domestic public officials (domestic bribery laws).

The active and passive corruption of Swiss public officials is criminalised under articles 322-ter and 322-quater of the Swiss Criminal Code (SCC). The offence is defined as offering, promising or giving an undue advantage (respectively soliciting, receiving a promise of or accepting such an advantage) to a member of a judicial or other authority, a public official, an officially appointed expert, translator or interpreter, an arbitrator or a member of the armed forces for the benefit of that person or for a third party's benefit, in order for the public official to carry out or to fail to carry out an act in connection with his or her official activity, which is contrary to his or her duty or dependent on his or her discretion.

The granting of an advantage (facilitating or 'grease' payments and the like) to a Swiss public official and respectively its acceptance by that official in order to carry out his or her official duties is prohibited under articles 322-quinquies and 322-sexies SCC.

The provisions on active and passive corruption of foreign public officials can be found at article 322-septies SCC.

Articles 322-octies and 322-novies SCC prohibit active and passive bribery in the private sector.

*Law stated - 11 January 2023*

### Successor liability

Can a successor entity be held liable for violations of foreign and domestic bribery laws by the target entity that occurred prior to the merger or acquisition?

There is no court precedent regarding the issue of the liability of the successor entity for violations of criminal law by the target entity that occurred prior to the merger or acquisition. The majority of legal doctrine considers that a liability of the successor entity would breach the general principle that criminal liability is personal and the presumption of innocence.

This rule is, however, not absolute. If a company simply changes its corporate name or form or enters into liquidation, it could be held liable for violations of foreign and domestic bribery laws pursuant to article 102(2) SCC on corporate criminal liability. This was confirmed by the Solothurn High Court in its 2015 decision concerning the Swiss Post: in the course of the criminal proceedings the accused Swiss Post was converted into a stock company under special legislation and the business affected by the main offence was transferred to a subsidiary. The Solothurn High Court found that criminal liability remains with the outsourcing parent company after the restructuring had taken place. Similarly, the Federal Criminal Court held that the opening of bankruptcy proceedings against a company does not hinder the continuation of corporate criminal proceedings.

*Law stated - 11 January 2023*

### **Civil and criminal enforcement**

#### **Is there civil and criminal enforcement of your country's foreign and domestic bribery laws?**

Criminal enforcement of Switzerland's foreign and domestic bribery laws is carried out by criminal law enforcement authorities (ie, public prosecutors and criminal courts). Corruption offences committed in breach of the SCC are prosecuted ex officio or upon the filing of a criminal complaint. The proceeds of corruption may be seized by criminal law enforcement authorities and confiscated by court order.

Civil enforcement of Switzerland's foreign and domestic bribery law applies through the adjudication of civil claims. Indeed, if the offence harmed a person, the victim may bring civil claims based on the offence as a private claimant in the criminal proceedings ('adhesive claim' in accordance with article 122(1) of the Swiss Criminal Procedure Code (SCPC)) or in the context of separate civil proceedings. In accordance with the SCC, the provisions prohibiting bribery do not, in principle, protect private interests. Therefore, there will usually not be any private party who could raise civil claims for damage.

*Law stated - 11 January 2023*

### **Out-of-court disposal and leniency**

#### **Can enforcement matters involving foreign or domestic bribery be resolved through plea agreements, settlement agreements, prosecutorial discretion or similar means without a trial? Is there a mechanism for companies to disclose violations of domestic and foreign bribery laws in exchange for lesser penalties?**

There is no general mechanism of resolution of disputes through plea agreements, settlement agreements, prosecutorial discretion or similar means without a trial. Under certain circumstances, however, bribery cases may be resolved:

- by a decision from the criminal authorities not to prosecute if the level of culpability of the offender and the consequences of the offence are negligible (article 52 SCC);
- by a decision from the criminal authorities not to prosecute if the offender has made reparation for the loss, damage or inquiry or made every reasonable effort to right the wrong that he or she has caused provided that a suspended custodial sentence not exceeding one year or a suspended monetary penalty or a fine are suitable as

- a penalty, the interest in prosecution are negligible and the offender has admitted the offence (article 53 SCC);
- by way of summary penalty order proceedings without a trial if the offender accepts responsibility for the offence or if his or her responsibility has otherwise been satisfactorily established provided that a fine, a monetary penalty or a custodial sentence not exceeding six months are suitable as a penalty (article 352 et seq SCPC); or
- by way of accelerated proceedings on request of the accused if he or she admits the matters essential to the legal appraisal of the case and recognises, in principle (where applicable), the civil claims (articles 358 et seq SCPC), and subject to the condition that the public prosecutor does not request a custodial sentence of more than five years. The main objective of these proceedings is to reach an agreement between prosecution and offender on the sanctions to be subsequently awarded by the court in a summary trial.

There is no special mechanism for companies to disclose violations in exchange for lesser penalties but the company's cooperation with criminal authorities is taken into account in determining the appropriate sanction.

*Law stated - 11 January 2023*

## FOREIGN BRIBERY

### Legal framework

Describe the elements of the law prohibiting bribery of a foreign public official.

Corruption of a foreign public official requires an undue advantage (ie, any tangible or intangible advantage that measurably improves the beneficiary's financial, legal, social or professional situation) for the foreign official himself or a third party for the purpose of determining or inducing that official to act in breach of his or her public duties or to exercise his or her discretion in favour of the corrupting party or a third party. A bribe paid to determine or induce a foreign official to act in accordance with his or her public duties (facilitating or 'grease' payments and the like) is not punishable under article 322-septies Swiss Criminal Code (SCC).

From a subjective point of view, article 322-septies SCC requires the element of intent: the offender must be aware of his or her criminal conduct and be willing to engage in such conduct. *Dolus eventualis* – a legal concept that is akin to 'wilful blindness' (ie, for an individual objectively to foresee the possibility of committing an offence and to accept the risk by persisting regardless of the consequences) – is sufficient.

*Law stated - 11 January 2023*

### Definition of a foreign public official

How does your law define a foreign public official, and does that definition include employees of state-owned or state-controlled companies?

The definition of a foreign public official matches the requirements of the OECD Anti-Bribery Convention and includes persons acting for a foreign state or an international organisation, namely members of judicial or any other authorities, civil servants, officially appointed experts, translators or interpreters, arbitrators or members of the armed forces.

Employees of state-owned or controlled legal entities as well as private individuals fulfilling official duties fall within the definition of foreign public official (see also article 322-decies(2) SCC). Thus, directors, officers, auditors, liquidators and other staff members of companies controlled and supervised by the state are included in this definition. Representatives of international organisations (ie, intergovernmental or supranational organisations) are also considered to be foreign public officials.

Furthermore, pursuant to the Federal Criminal Court individuals without any official public function may fall within the



ambit of article 322-septies SCC if they hold a de facto power to take or influence relevant decisions (eg, children of dictators).

*Law stated - 11 January 2023*

### **Gifts, travel and entertainment**

To what extent do your anti-bribery laws restrict providing foreign officials with gifts, travel expenses, meals or entertainment?

The undue advantage can be of any nature, tangible or intangible. This can, for instance, take the form of a valuable object as a gift or an excessive fee for the performance of a service. This advantage must, though, induce or reward someone to act in a specific manner that is favourable to the corrupting or a third party.

However, advantages are not undue if permitted under public employment law or contractually approved by a third party or if they are of minor value in conformity with common social practice (article 322-decies(1) SCC). For example, for federal public officials the value of socially acceptable gifts is capped at 200 Swiss francs pursuant to article 93 of the Federal Personnel Ordinance.

*Law stated - 11 January 2023*

### **Facilitating payments**

Do the laws and regulations permit facilitating or 'grease' payments to foreign officials?

Switzerland has decided not to criminalise 'grease' payments made to foreign public officials. By contrast, similar payments to Swiss public officials (as well as receipt of such payment by those officials) constitute an offence under Swiss criminal law although the sanctions are less serious than in cases of corruption.

However, facilitating payments to foreign officials are only tolerated if those officials receive the payments to perform official functions that do not depend on their discretionary powers. In other words, the payment will be exempted only if it is designed to secure a lawful function that a foreign public official has a duty to perform.

*Law stated - 11 January 2023*

### **Payments through intermediaries or third parties**

In what circumstances do the laws prohibit payments through intermediaries or third parties to foreign public officials?

The bribe may be made or received indirectly through an intermediary (eg, a local agent or consultant). This follows implicitly from the legal provisions. In addition, article 322-septies SCC explicitly provides that the beneficiary of the undue advantage may be a third party (straw men, domiciliary company, political party or even charitable organisation), as long as this motivates the public official to carry out an act in connection with his or her official activities that is contrary to his or her duties or dependent on his or her discretion. There is no requirement that the official himself or herself directly or indirectly benefits from the undue advantage.

The general provisions of Swiss criminal law pertaining to incitement and assistance (complicity) are also applicable to other participants in cases of corruption.

*Law stated - 11 January 2023*

## Individual and corporate liability

### Can both individuals and companies be held liable for bribery of a foreign official?

With regard to active bribery of foreign officials, article 102(2) SCC on corporate criminal liability enables – irrespective of the criminal liability of any individual acting within the company – the attribution of the offence to the company, provided that the latter can be held to have failed to take all reasonable and necessary organisational measures to prevent such an offence. Thus, both the company and the individuals acting on its behalf may be held liable for having bribed a foreign public official.

Besides, with regard to passive bribery of foreign public officials, corporate criminal liability arises if the criminal conduct occurred in a corporate context, but the offender cannot be identified due to the company's lack of organisation (article 102(1) SCC).

Moreover, it is conceivable for members of corporate bodies or officers within corporations to be held liable for having failed to supervise or prevent corrupt acts committed by employees under their supervision.

*Law stated - 11 January 2023*

## Private commercial bribery

### To what extent do your foreign anti-bribery laws also prohibit private commercial bribery?

Articles 322-octies and 322-novies SCC prohibit and punish active and passive bribery in the private sector. Active or passive bribery of foreign private individuals may fall within the ambit of articles 322-octies and 322-novies SCC if, pursuant to the general provisions regarding Swiss jurisdiction, the criminal act took place or had effect on Swiss territory.

*Law stated - 11 January 2023*

## Defences

### What defences and exemptions are available to those accused of foreign bribery violations?

The defences available are those related to the fact whether the objective and subjective requirements of article 322-septies SCC are met. It is, for instance, possible to dispute the fact that a gift is to be deemed an undue advantage or to challenge the status as foreign public official.

As to corporate criminal liability, a corporation can exonerate itself if it is able to show that it has taken all reasonable and necessary organisational measures required to prevent the offence from being committed even though the offence was ultimately committed.

Furthermore, articles 52 and 322-decies(1) SCC set out certain de minimis exceptions: article 52 SCC provides that the competent authority may decide to refrain from prosecuting an offender, bringing him or her to court or punishing him or her if the level of culpability and consequences of the offence are negligible (minor cases). In addition, pursuant to article 322-decies(1) SCC, an advantage shall not be deemed to be undue if the advantage is permitted under public employment law or contractually approved by a third party or if an advantage of minor value is of common social practice. It is, nevertheless, noteworthy that even small gifts can amount to bribery if they are given in view of influencing a public official.

Finally, article 53 SCC provides that if an offender has made reparation for the loss, damage or injury, or made every reasonable effort to right the wrong that he or she has caused, the competent authority shall refrain from prosecuting

him or her, bringing him or her to court or punishing him or her if the requirements for a suspended sentence are fulfilled and the interests of the general public and of the persons harmed in prosecution are negligible. However, it should be noted that in 2017, the Office of the Attorney General of Switzerland (OAG), responsible for domestic criminal investigations at the federal level, announced that it would, in principle, no longer apply article 53 SCC in cases of criminal liability of transnational corporations. The OAG has never publicly abandoned or further clarified its rigid practice regarding the application of article 53 SCC, despite a change of leadership in 2021 (ie, the appointment of a new attorney general).

*Law stated - 11 January 2023*

## Agency enforcement

### What government agencies enforce the foreign bribery laws and regulations?

In matters of international cooperation, the central authority appointed in Switzerland (in particular for the purposes of article 29 of the Council of Europe Criminal Law Convention on Corruption) is the Swiss Federal Office of Justice, a government agency that is part of the Federal Department of Justice and Police.

As regards domestic criminal investigations, the prosecutor's offices at the cantonal level as well as the OAG at the federal level are competent to enforce offences under article 322-septies SCC. The OAG will lead the investigation exclusively if:

- the offences under investigation were, to a large extent, committed abroad, or if the criminal conduct took place in various cantons without a clear emphasis on one canton; or
- the offences under investigation were committed by a member of a federal authority or an employee of the Confederation or against the Confederation.

The cantonal prosecutor's offices and the OAG may also agree that the investigation is conducted by the OAG, or the OAG may delegate an investigation to a cantonal prosecutor's office. Conflicts of competence are decided by the Federal Criminal Court.

If acts of bribery or similar allegations concern a financial intermediary supervised by the Swiss Financial Market Supervisory Authority (FINMA), FINMA is authorised to enforce its supervisory powers independently from any criminal investigation led by the prosecution authorities.

*Law stated - 11 January 2023*

## Patterns in enforcement

### Describe any recent shifts in the patterns of enforcement of the foreign bribery rules.

Pursuant to a report dated November 2020 by the OECD Working Group on Bribery in Switzerland, Switzerland remains one of the most active countries in enforcing the foreign bribery offence, although the number of newly investigated and ongoing cases has decreased in recent years.

An overall analysis of the judicial decisions and sentences so far shows that, at least on a federal level, foreign bribery cases are often dealt with by way of special procedures, such as the summary penalty order procedure or accelerated proceedings, where the sanctions may be of a lesser severity.

The OECD Working Group on Bribery in Switzerland repeatedly expressed reservations about the effective, proportionate and dissuasive nature of the sanctions imposed on companies convicted of transnational corruption. Its

reports dated March 2018 and November 2020 demonstrate that the fines imposed by the Swiss authorities have never reached the maximum amount provided for by law (5 million Swiss francs), which can itself be considered relatively low compared to the considerable amounts often involved in those cases and to other countries' fine amounts. In a recent communication, the OECD stated that it will commence preparations for a high-level mission to Switzerland in December 2022 unless the Swiss authorities take concrete steps to increase the statutory maximum fine for companies, among other things, by that time.

However, it should be pointed out that in practice companies are often affected by the imposition of large forfeiture orders or compensation claims, which usually exceed the maximum fine amount by a multiple.

*Law stated - 11 January 2023*

## Prosecution of foreign companies

### In what circumstances can foreign companies be prosecuted for foreign bribery?

Swiss jurisdiction requires a sufficient link of the criminal conduct to Switzerland. In general, the link requires that criminal acts took place on Swiss territory or had 'effects' on Swiss territory (articles 3 and 8 SCC). Under Swiss law, the deficient organisation of the company is a necessary requirement for establishing corporate criminal liability.

Regarding jurisdiction over a foreign corporation, there is no court precedent as to whether jurisdiction will be based on the place where the lack of organisation materialised, the place where the acts of bribery took place, or both. In recent summary penalty orders (eg, summary penalty order issued in 2019 against the commodity trading company Gunvor), the OAG ruled that foreign companies are subject to Swiss law on corporate criminal liability if the offence was committed in Switzerland or the lack of organisation existed (at least in part) in Switzerland. Furthermore, the Federal Criminal Court held, in its first-time conviction of a (domestic) company in December 2021, that in cases where companies can be held liable irrespective of the criminal liability of any individual acting within the company (article 102(2) SCC), jurisdiction is based on the place where the underlying offence (eg, the acts of bribery) took place.

*Law stated - 11 January 2023*

## Sanctions

### What are the sanctions for individuals and companies violating the foreign bribery rules?

Active and passive bribery of foreign public officials carry sentences of up to five years of imprisonment or a monetary penalty of up to 540,000 Swiss francs for individuals. Penalties may further include a ban on exercising professional activities, a publication of the judgment or the revocation of a residence permit for foreigners under criminal or administrative law. Corporations can be sanctioned with a fine of up to 5 million Swiss francs.

In addition to the sentence, illegal profits obtained through corrupt acts or assets intended to induce or to reward the offender are subject to forfeiture (article 70 SCC) (ie, 'disgorgement'). If these assets are no longer available, the offender will be ordered to pay an equal amount in the form of a compensation claim that is raised by the state (article 71 SCC). Neither forfeiture nor compensation claims are capped at a certain amount and can thus result in a very serious sanction.

*Law stated - 11 January 2023*

## Recent decisions and investigations

## Identify and summarise recent landmark decisions or investigations involving foreign bribery.

In recent years, the following companies and individuals have been convicted in connection with bribes paid to foreign public officials:

- In August 2018, the Federal Criminal Court sentenced a former employee of the Swiss-based commodity trading company Gunvor to a suspended 18-month custodial sentence, by way of accelerated proceedings, after he admitted the active bribery of foreign government officials in the Republic of the Congo and the Ivory Coast in order to secure oil deliveries. Subsequently, in a summary penalty order of October 2019, the OAG convicted Gunvor for failing to take all the necessary and reasonable organisational measures to prevent its employees and intermediaries from bribing the Ivorian and Congolese public officials. Gunvor was sentenced to pay a fine of 4 million Swiss francs along with a disgorgement of approximately 90 million Swiss francs.
- In February 2020, the Federal Criminal Court found a Swiss-Brazilian individual guilty of complicity in bribing foreign public officials and money laundering in the context of the international corruption affair around the state-owned Brazilian corporation Petrobras, by way of accelerated proceedings. The accused was sentenced to a 16-month custodial sentence, as well as a disgorgement amounting to US\$1.6 million.
- In January 2021, a French-Israeli commodities trader was found guilty by a cantonal first instance court of, among others, bribing the wife of Guinea's former president to secure access to an iron-ore mine in Guinea. He was sentenced to a five-year custodial sentence and ordered to pay 50 million Swiss francs in disgorgement. In 2022, appeal proceedings before the cantonal appeal court took place; the verdict has not yet been pronounced.
- By summary penalty order of 18 November 2021, the OAG sentenced three Swiss subsidiaries of the group SBM Offshore for corporate criminal liability in connection with acts of bribery of foreign public officials. The three companies, SBM Holding Inc SA, Single Buoy Moorings Inc and SBM Production Contractors Inc SA were sentenced to the payment of 7 million Swiss francs, including a fine of 4.2 million Swiss francs for failing to take all reasonable and necessary measures to prevent the bribery of public officials in Angola, Equatorial Guinea and Nigeria.
- In December 2022, the OAG issued a summary penalty order against ABB Management Services Ltd for failing to take all necessary and reasonable organisational measures to prevent its employees from bribing officials in South Africa in connection with the construction of a coal-fired power plant. ABB Management Services Ltd was sentenced to a fine of 4 million Swiss francs. The OAG refrained from ordering the disgorgement of illicit profits since a compensation payment in the amount of US\$104 million had already been made in South Africa.

*Law stated - 11 January 2023*

## FINANCIAL RECORD-KEEPING AND REPORTING

### Laws and regulations

What legal rules require accurate corporate books and records, effective internal company controls, periodic financial statements or external auditing?

While, in principle, a general duty to use external auditors exists, the required auditing standards vary depending on the scale of the company (articles 727 et seq of the Swiss Code of Obligations (SCO) ). Special rules apply for regulated industries, such as banking and insurance.

By contrast, a general duty of internal auditing does not exist, except for regulated sectors. Depending on the circumstances, a duty to perform internal audits may derive from the overarching duty to organise the book-keeping of a company in such a way that the required accounting principles can be met (see the duty of corporations to maintain

an internal control system, part of which can be an internal auditing function; article 728a(1)(3) SCO).

Pursuant to articles 957 et seq SCO, the applicable requirements on the level of statutory accounting depend on the company's economic significance (eg, turnover, balance sheet total, full-time positions). Listed companies particularly are obliged to report in addition to the statutory report in one of the following accounting standards: IFRS, IFRS for SMEs, US GAAP, Swiss GAAP FER or IPSAS. It should be noted, however, that special rules may apply, again, to companies in regulated sectors, in particular, banking and insurance.

Pursuant to article 958f SCO, accounting records and the corresponding accounting vouchers together with the annual report and the audit report must be retained for 10 years.

As of 1 January 2022, companies that are either themselves or through a company that they control involved in the raw materials sector (ie, the extraction of minerals, oil or natural gas or the harvesting of timber in primary forests) must under certain circumstances produce an annual report on the payments (in cash or kind) they have made to national, regional or local authorities in a third country or departments and businesses controlled by such authorities (articles 964d et seq SCO).

In addition, under Switzerland's new non-financial ESG transparency and disclosure requirements, publicly traded and other large Swiss companies will be required to file an annual report as of 1 January 2023, which contains a description of policies adopted about non-financial topics such as combating corruption (articles 964a et seq SCO).

*Law stated - 11 January 2023*

### **Disclosure of violations or irregularities**

**To what extent must companies disclose violations of anti-bribery laws or associated accounting irregularities?**

Companies are not under any general obligation to voluntarily disclose bribery or irregularities in accounting. Reporting duties may exist in certain regulated sectors, such as banking and insurance, in respect of the supervisory authorities. These supervisory bodies (eg, the Swiss Financial Market Supervisory Authority (FINMA)) may then notify the criminal investigation authorities. Special reporting duties apply to publicly listed companies, provided that the violations at issue are of such nature and dimensions that they are potentially price sensitive (ad hoc publicity).

Furthermore, if the external auditors detect violations of laws (including criminal law and thus bribery), they must report it to the board of directors and, under certain circumstances, also to the general assembly of shareholders, quotaholders and members (article 728c(2) SCO).

*Law stated - 11 January 2023*

### **Prosecution under financial record-keeping legislation**

**Are such laws used to prosecute domestic or foreign bribery?**

Often, bribery will go hand-in-hand with falsification of accounts and accounting documents. The latter regularly falls within the ambit of article 251 Swiss Criminal Code (SCC), which punishes the making or using of forged documents that are intended to have a legal effect, or other penal provisions specifically aimed at ensuring proper record keeping and accountancy (articles 166 and 325 SCC).

Moreover, violations of accounting or bookkeeping obligations may lead to harsh administrative sanctions in certain regulated sectors and may be an indication of shortcomings in a company's internal organisation standards (which in turn may result in corporate criminal liability for bribery within the meaning of article 102(2) SCC). In addition, civil liability may arise from duties under the provisions of the SCO.

Finally, Swiss tax laws prohibit the deductibility of bribes paid to domestic and foreign public officials. Thus, companies are under an obligation to formally disclose such bribes in their annual tax returns. Whereas a failure to disclose may result in criminal prosecution for tax evasion or tax fraud, the disclosure may prompt tax authorities to file a criminal complaint for bribery offences.

*Law stated - 11 January 2023*

### **Sanctions for accounting violations**

What are the sanctions for violations of the accounting rules associated with the payment of bribes?

Accounting violations (eg, document forgery in the meaning of article 251 SCC) may trigger the same sanctions as bribery (eg, imprisonment for up to five years or a monetary penalty of up to 540,000 Swiss francs). Lower penalties apply for tax offences.

*Law stated - 11 January 2023*

### **Tax-deductibility of domestic or foreign bribes**

Do your country's tax laws prohibit the deductibility of domestic or foreign bribes?

Switzerland's tax laws, on the cantonal as well as the federal level, expressly prohibit the deduction of bribes paid to domestic or foreign public officials. The prohibition applies to legal entities as well as self-employed natural persons. In addition, as of 1 January 2022, the Federal Act on the Tax Treatment of Financial Sanctions has entered into effect and private bribery payments are no longer tax-deductible.

*Law stated - 11 January 2023*

## **DOMESTIC BRIBERY**

### **Legal framework**

Describe the individual elements of the law prohibiting bribery of a domestic public official.

Articles 322-ter to 322-sexies Swiss Criminal Code (SCC) set out the regulations against bribery of Swiss public officials.

From an objective point of view, the following four conditions are required:

- a corrupting party;
- a corrupted party: a Swiss public official;
- a typical behaviour: the offering, promising or granting of an undue advantage (active corruption and granting of a facilitation payment), or the soliciting, eliciting of a promise of or accepting of an undue advantage (passive corruption and accepting of a facilitation payment); and
- the 'consideration' of the corrupted party: the commission or omission of an act in relation to a public official's duties that is contrary to his or her duties or dependent on the exercise of his or her discretionary powers (corruption), or the commission of an act in accordance with a Swiss public official's duties (facilitation payment).

The element of undue advantage encompasses any measurable improvement in the beneficiary's situation, whether

financially, legally or personally. The classical bribe is a material advantage (ie, the granting of any benefit that has an economic value) such as the payment of money. This advantage must induce or reward someone to act in a specific manner that is favourable to the corrupting party or a third party. Pursuant to article 322-decies(1) SCC, an advantage shall not be deemed to be undue if the advantage is permitted under public employment law or contractually approved by a third party or if an advantage of minor value is of common social practice. It is, nevertheless, noteworthy that even small gifts can amount to bribery if they are given in view of influencing a public official.

For all corruption offences under the SCC, intent is required: the offender must be aware of his or her criminal conduct and be willing to engage in such conduct. Dolus eventualis (wilful blindness) (ie, for an individual objectively to foresee the possibility of committing an offence and to accept the risk by persisting regardless of the consequences) is sufficient.

The offering, promising or granting of an undue advantage must be the motive for the commission or omission of the act that is contrary to the person's duties or dependent on his or her discretion, respectively, in cases of facilitation payments, the carrying out of an act in accordance with public duties.

*Law stated - 11 January 2023*

### **Scope of prohibitions**

Does the law prohibit both the paying and receiving of a bribe?

The constitutive elements of the offence of bribery or facilitating payments include not only the active payment of such bribes but also the passive action of receiving them. The active and passive forms of the offence are subject to the same penalties.

*Law stated - 11 January 2023*

### **Definition of a domestic public official**

How does your law define a domestic public official, and does that definition include employees of state-owned or state-controlled companies?

A Swiss public official is a member of a judicial or other authority, a public official, an officially appointed expert, translator or interpreter, an arbitrator or a member of the armed forces.

Private individuals who fulfil official duties are subject to the same provisions as public officials (article 322-decies(2) SCC).

Employees of state-owned or state-controlled companies may qualify as public officials if, and to the extent that, they pursue an official activity.

*Law stated - 11 January 2023*

### **Gifts, travel and entertainment**

Describe any restrictions on providing domestic officials with gifts, travel expenses, meals or entertainment. Do the restrictions apply to both the providing and the receiving of such benefits?

Pursuant to the SCC, an 'undue advantage' can take any form and include gifts, travel expenses, meals or entertainment. The restrictions apply to both the providing and the receiving of such benefits. Articles 52 and 322-decies(1) SCC set out certain de minimis exceptions.



In accordance with article 322-decies(1) SCC, advantages are not undue if permitted under public employment law, contractually approved by a third party or if they are negligible advantages that are common social practice. For instance, giving a chocolate box worth 50 Swiss francs to a public official for his or her speech at a public seminar would be a commonly accepted social practice. However, meals at expensive restaurants are not considered commonly accepted practice by Swiss courts.

*Law stated - 11 January 2023*

## Facilitating payments

Have the domestic bribery laws been enforced with respect to facilitating or 'grease' payments?

The number of convictions with respect to facilitating or 'grease' payments are relatively low. Between 2014 and 2019, the Federal Office of Statistics has solely identified 13 sentences for such charges.

Recent decisions can be summarised as follows:

- In January 2018, the Federal Supreme Court sentenced a former employee of the Swiss company SIG providing local services in the Canton of Geneva to a suspended two years custodial sentence for charges of acceptance of an undue advantage (a sum of 100,000 Swiss francs). The Federal Supreme Court referred the case back to the Geneva court for further investigation with respect to a second accusation of acceptance of undue advantage by the SIG employee, whose wife received an excessive payment of 180,000 Swiss francs from a Ticino businessman active in the energy fields to acquire the copyright of a book on wind energy that she had written.
- In June 2020, the Federal Criminal Court found a former member of the Federal Criminal Police guilty of acceptance of an undue advantage in connection with a hunting trip to Kamtschatka organised by the former Deputy Attorney General of the Russian Federation. However, the Federal Criminal Court refrained from punishing him, as it considered him to be so severely affected by the immediate consequences of his acts that a penalty would be inappropriate. This decision was confirmed by the Federal Supreme Court on 17 November 2021.
- On 22 February 2021, a Geneva Court sentenced a member of the Council of State of Geneva to a suspended monetary penalty of 300 daily penalty units for charges of acceptance of an undue advantage with regard to a family trip to Abu Dhabi estimated at 50,000 Swiss francs, organised by a friend of his active in the real estate field in Geneva and exclusively paid by an Emirati friend of this Geneva friend. The conviction was, however, overturned by the Geneva Appeal Court, which acquitted the politician in January 2022. On 31 October 2022, upon appeal by the Geneva prosecutor's office, the Federal Supreme Court overturned the Geneva Appeal Court's decision by confirming the charges of acceptance of an undue advantage, and referred the case back to the Geneva Court.

*Law stated - 11 January 2023*

## Public official participation in commercial activities

What are the restrictions on a domestic public official participating in commercial activities while in office?

All public officials in Switzerland are allowed to own shares in private enterprises. There is no specific rule that prohibits Swiss public officials from participating in commercial activities while in the office. The employees of the federal administration as well as those of the cantonal administrations are only allowed to exercise an activity outside of their public function in specific circumstances and upon authorisation by the appropriate authorities. If that activity presents a risk of conflict of interest, no authorisation will be granted.

### **Payments through intermediaries or third parties**

In what circumstances do the laws prohibit payments through intermediaries or third parties to domestic public officials?

The bribe may be made or received indirectly through an intermediary. This follows implicitly from the legal provisions. In addition, articles 322-ter to 322-novies SCC explicitly provide that the beneficiary of the undue advantage may be a third party, as long as this motivates an individual to carry out an act in connection with his or her official activities that is contrary to his or her duties or dependent on his or her discretion, respectively, in cases of facilitation payments, to act in accordance with his or her public duties.

The general provisions of Swiss criminal law pertaining to incitement and assistance (complicity) are also applicable to other participants in cases of corruption.

### **Individual and corporate liability**

Can both individuals and companies be held liable for violating the domestic bribery rules?

In accordance with article 102(2) SCC, if an act of active domestic bribery is committed in an undertaking, the undertaking is penalised irrespective of the criminal liability of any natural persons, provided the undertaking has failed to take all the reasonable and necessary organisational measures required to prevent such an offence. In that context, both individuals and companies can be held liable for having bribed a Swiss public official.

There must thus be a causal link between the lack of organisation and the offence, such that the undertaking is not liable if the offence was committed despite the adoption of all reasonable and necessary organisational measures.

'Irrespective of the criminal liability of any natural persons' means that even if the person who committed the offence escapes prosecution, the undertaking's punishability is maintained.

With regard to passive bribery and acceptance of an undue advantage, in accordance with article 102(1) SCC, a corporate criminal liability arises if a criminal conduct occurred in a corporate context, but the offender cannot be identified due to the corporation's lack of organisation. The act is therefore attributed to the undertaking.

### **Private commercial bribery**

To what extent does your country's domestic anti-bribery law also prohibit private commercial bribery?

Articles 322-octies and 322-novies SCC prohibit active and passive bribery in the private sector. Those provisions prohibit the act of offering, promising or giving (respectively soliciting, securing the promise of or accepting) to an employee, partner, agent or any other auxiliary of a third party in the private sector an undue advantage for that person's or a third party's benefit in order for that person to carry out or fail to carry out an act in connection with his or her official activities, which is contrary to the person's duties or dependent on his or her discretion.

## Defences

### What defences and exemptions are available to those accused of domestic bribery violations?

The defences available are those related to the fact whether the objective and subjective requirements of the relevant provision are met. It is, for instance, possible to challenge the fact that a gift is to be deemed an undue advantage.

As to corporate criminal liability, a corporation can exonerate itself if it is able to prove that it has taken all reasonable and necessary organisational measures required to prevent the offence from being committed even though the offence was ultimately committed.

*Law stated - 11 January 2023*

## Agency enforcement

### What government agencies enforce the domestic bribery laws and regulations?

In principle, the prosecutor's offices at the cantonal level as well as the Office of the Attorney General of Switzerland (OAG) at the federal level are competent to enforce the Swiss bribery laws and regulations. The OAG will lead the investigation exclusively if the offences under investigation were, to a large extent, committed abroad, or if the criminal conduct took place in various cantons without a clear emphasis on one canton. The cantonal prosecutor's offices and the OAG may also agree that the investigation is conducted by the OAG, or the OAG may delegate an investigation to a cantonal prosecutor's office.

If acts of bribery or similar allegations concern a financial intermediary supervised by the Swiss Financial Market Supervisory Authority (FINMA), the latter is authorised to enforce its supervisory powers independently from any criminal investigation led by the prosecution authorities.

*Law stated - 11 January 2023*

## Patterns in enforcement

### Describe any recent shifts in the patterns of enforcement of the domestic bribery rules.

Switzerland has been ranked seventh among 180 listed countries in Transparency International's Corruption Perceptions Index 2021.

Switzerland is also implementing anti-bribery provisions into existing legislation. A revised Federal Act on Public Procurement (PPA) came into force on 1 January 2021, which includes measures against corruption. Pursuant to article 44(1)(e) PPA, a tenderer may be excluded from an award procedure, removed from a list, or have an award revoked if it is found that the tenderer, one of its governing bodies, a third party called upon or one of such a third party's governing bodies has violated anti-corruption provisions. The exclusion on grounds of corruption lasts for a maximum of five years and applies to every public procurement of the Swiss Confederation.

*Law stated - 11 January 2023*

## Prosecution of foreign companies

### In what circumstances can foreign companies be prosecuted for domestic bribery?

Swiss jurisdiction requires a sufficient link of the criminal conduct to Switzerland. In general, the link requires that

criminal acts took place on Swiss territory or had 'effects' on Swiss territory (articles 3 and 8 SCC). Under Swiss law, the deficient organisation of the company is a necessary requirement for establishing corporate criminal liability.

Regarding jurisdiction over a foreign corporation, there is no court precedent whether jurisdiction will be based on the place where the lack of organisation materialised, the place where the acts of bribery took place, or both. In a summary penalty order issued in December 2016 in the Petrobras matter, the OAG ruled that foreign companies are subject to Swiss law on corporate criminal liability if the offence was committed in Switzerland or the lack of organisation existed (at least in part) in Switzerland. Furthermore, the Federal Criminal Court held, in its first-time conviction of a (domestic) company in December 2021, that in cases where companies can be held liable irrespective of the criminal liability of any individual acting within the company (article 102(2) SCC), jurisdiction is based on the place where the underlying offence (eg, the acts of bribery) took place.

*Law stated - 11 January 2023*

## Sanctions

What are the sanctions for individuals and companies that violate the domestic bribery rules?

Active and passive corruption carry sentences not exceeding three to five years of imprisonment depending on the type of bribery committed, or a monetary penalty of up to 540,000 Swiss francs for individuals. Penalties may further include a ban on exercising professional activities or the revocation of a residence permit for foreigners as an administrative sanction. Corporations can be sanctioned with a fine of up to 5 million Swiss francs.

In addition to the sentence, illegal profits obtained through corrupt acts or assets intended to induce or to reward the offender are subject to forfeiture (article 70 SCC). If these assets are no longer available, the offender will be ordered to pay an equal amount in the form of a compensation claim that is raised by the state (article 71 SCC). Neither forfeiture nor compensation claims are capped at a certain amount and can thus result in a very serious sanction.

*Law stated - 11 January 2023*

## Recent decisions and investigations

Identify and summarise recent landmark decisions and investigations involving domestic bribery laws, including any investigations or decisions involving foreign companies.

In June 2018, the Federal Criminal Court sentenced an employee of the Swiss Federal Railways (SBB) for charges of passive bribery and acceptance of an undue advantage to a 36-month custodial sentence, partially suspended, and a monetary penalty of 150 daily penalty units. Two directors of an electrical company were sentenced for charges of active bribery of a Swiss public official and granting of an undue advantage to suspended monetary penalties amounting to 360 and 240 daily penalty units respectively.

In 2019, the OAG opened an investigation against a former head of section at the State Secretariat for Economic Affairs (SECO) for charges of passive bribery and six directors of an IT company for charges of active bribery of a Swiss public official. In the spring of 2019, the OAG issued three summary penalty orders against three of the IT company directors (partially suspended monetary penalty from 100 to 180 daily penalty units, together with a fine from 1,000 to 1,500 Swiss francs). In September 2019, the OAG filed indictments against the former head of section at SECO and the three other directors of the IT company before the Federal Criminal Court. In September 2021, the Federal Criminal Court sentenced the former head of section at SECO to a 52-month custodial sentence and a monetary penalty of 130 daily penalty units. The three directors of the IT company were imposed suspended custodial sentences and monetary penalties.

Two former Tissot executives and a former Calvin Klein Watch & Jewelry executive were suspected of accepting bribes

between 2006 and 2015 from a French businessman based in Hong Kong as well as committing acts of mismanagement and money laundering. The three former executives allegedly received more than 15 million Swiss francs from the businessman in Hong Kong in order to enable him to obtain privileged contracts with the two brands formerly owned by Swatch Group. On 2 September 2022, after more than eight years of proceedings, a Neuchâtel court acquitted the defendants on all charges and considered that the acts of active and passive corruption were time-barred. Swatch Group has filed an appeal.

*Law stated - 11 January 2023*

## UPDATE AND TRENDS

### Key developments of the past year

Please highlight any recent significant events or trends related to your national anti-corruption laws.

On 25 November 2020, the Federal Council (the Swiss government) approved its anti-corruption strategy for the 2021–2024 period . This strategy defines numerous objectives ranging from prevention and law enforcement to international cooperation. It addresses direct measures at the Federal Administration, which will be responsible for their implementation. The Interdepartmental Working Group on Combating Corruption is responsible for monitoring and promotes implementation of the measures by organising exchanges of information on the progress made and encouraging interaction between the relevant federal offices.

As of 1 January 2021, the revised Federal Act on Public Procurement (PPA) makes it possible, in particular, to exclude a tenderer from an award procedure for public contracts if it is found that the latter, one of its governing bodies, a third party called upon or one of such a party's governing bodies has violated anti-corruption provisions.

On 1 January 2022, the Federal Act on the Tax Treatment of Financial Sanctions entered into effect and, as a consequence, private bribery payments are no longer tax-deductible.

On 1 January 2022, new provisions of the Swiss Code of Obligations entered into force and impose new obligations on Swiss companies aiming at better protecting individuals and the environment. As a result, Swiss companies will need to comply with a duty to report on the risks generated by their activities in terms of, inter alia, combating corruption as well as the measures they have adopted to counter this risk.

*Law stated - 11 January 2023*

## Jurisdictions

	<b>Australia</b>	Holding Redlich
	<b>China</b>	Herbert Smith Freehills LLP
	<b>France</b>	Bougartchev Moyne Associés AARPI
	<b>Greece</b>	ANAGNOSTOPOULOS
	<b>Hong Kong</b>	Herbert Smith Freehills LLP
	<b>Israel</b>	Herzog Fox & Neeman
	<b>Italy</b>	Studio Legale Pisano
	<b>Japan</b>	Anderson Mōri & Tomotsune
	<b>Netherlands</b>	Sjöcrona Van Stigt
	<b>Russia</b>	Noerr PartGmbH
	<b>Singapore</b>	Eugene Thuraisingam LLP
	<b>Sweden</b>	NORDIA LAW
	<b>Switzerland</b>	Schellenberg Wittmer
	<b>Ukraine</b>	GOLAW
	<b>United Arab Emirates</b>	Charles Russell Speechlys
	<b>United Kingdom</b>	White & Case
	<b>USA</b>	Miller & Chevalier Chartered