

Reforms in the Criminal Law on Bribery

To date, bribery in the private sector has only been punishable pursuant to the Act against Unfair Practices ("UWG"), if it was held to distort competition. Absent any of the elements typical to competition law cases, however, there was no sanction for the bribery of persons in the private sector (as opposed to public officials). Further, private sector bribery was only prosecuted upon the complaint of an injured party.

Following recent reforms, private sector bribery will now also be regulated by the Criminal Code ("StGB"). Criminal liability for bribery will thus no longer depend on the existence of anti-competitive conduct. The newly introduced penal provisions are generally categorized as public offences; only in minor cases will the complaint of an injured party continue to be a requirement for prosecution. In addition to the enactment of new offences in the private sector, broader provisions have been introduced in respect of the bribery of public officials. Going forward, bribery will also be a criminal offence in those cases where the bribe has not been paid directly to a public official but to a third party, for example, a sports association.

The revision of the rules on corruption adopted on 25 September 2015 will come into force on 1 July 2016.

Background

The Swiss economy is extensively globalized and is strongly orientated towards international markets. Numerous international sports associations, which are often pivotal to large business and financial deals, also have their headquarters in Switzerland. Moreover, the high economic value of sports makes it a breeding ground to corrupt practices. Particular weaknesses in the prosecution of private sector bribery have become apparent in the past few years in connection with the alleged bribery of sporting officials in order to obtain rights to major sporting events. The reasons for these inadequacies were mainly that, until now, private sector bribery was only regulated in the Act against Unfair Practices (Art. 4a UWG) and it was only prosecuted upon the application of an injured party and if the conduct

lead to a distortion of competition pursuant to the UWG. Since entering into force on 1 July 2006, there have been no convictions for private sector bribery under the UWG, despite the fact that the act entitles a relatively large category of persons to file the complaints needed for prosecution. The lack of convictions is hardly indicative of the non-existence of corrupt practices in the Swiss private sector. It is due to the UWG provisions never have been applied by reason of prosecution being conditional on a prior complaint being filed.

The most recent legislative revision of the rules on corruption was adopted by the Federal Assembly on 25 September 2015 and the revised (Art. 102(2), 322^{quinquies}, 322^{sexies} StGB) and new (Art. 322^{octies}, 322^{novies}, 322^{decies} StGB) provisions are expected to enter into force on 1 July 2016. This revision is just

another example of the efforts being made to tackle corruption, particularly because the new provisions penalize the bribery of private persons.

Main Features of the Revised Laws on Corruption

Bribery in the Private Sector (Art. 322^{octies} and Art. 322^{novies} StGB)

To date, private sector bribery was only liable to prosecution if it fell under the jurisdiction of the UWG. Since 1 July 2006, the offence of private sector bribery was thus codified in Art. 4a in conjunction with Art. 23 UWG. To qualify as private sector bribery under the UWG, the conduct must have the effect of distorting the market or competition in a prohibited manner. According to the explanatory memorandum on the corruption legislation dated 30 April 2014, this would be the case if, for example, a manufacturer of car brake components were to bribe the employee of a car manufacturer responsible for purchasing orders in order to be awarded the contract for supply of the brake components purchasing contracts, even though his products do not offer the best value for money. Based on the UWG, such conduct would be liable to prosecution.

Private sector bribery now constitutes a criminal offense contrary to the Swiss Criminal Code. The offense of bribing private persons has thus been disassociated from the notion of unfair competition and no longer requires the corrupt conduct to distort competition; for example, because it qualifies as a monopoly (e.g. the award of sporting events such as the Olympic Games or the Football World Championship) or if the bribery does not occur at the time of entering a contract but after the contract has been concluded (e.g. if the supplier of brake components bribes an employee in the quality control section of an automobile manufacturer). Codifying private sector bribery as an offense in the Criminal Code, has clarified the position of various non-profit organizations (e.g. international sports federations).

The grounds that usually justify the prosecution being dependent on a prior complaint being filed

(e.g. the relatively insignificant breach of legal rights, close personal relationship between perpetrator and victim, etc.) do not apply to private sector bribery. In future, therefore, the bribery of private individuals will be prosecuted in the same matter as its related offenses (e.g. embezzlement or unauthorized business operations) *ex officio* (regardless of whether a victim complaint has been filed). This, it is now considered to be a public offense. During the course of the parliamentary debate, however, it was decided to add a second subparagraph to Arts. 322^{octies} (bribery) and 322^{novies} (taking bribes) StGB, which explicitly excludes "minor cases" from *ex officio* prosecution. Such cases will consequently only be prosecuted, if a prior complaint has been filed. The new rules do not define what constitutes minor cases, which will initially lead to significant uncertainty for those applying the law once the legislation becomes effective. The following criteria, discussed during the parliamentary debate, could offer some guidance:

- The amount in issue is not significant; i.e. the undue advantage amounts to a few thousand Swiss Francs at most, comparable to the monetary limit for particularly minor cases of counterfeiting (Art. 240(2) StGB).
- The offense has no impact on the health and safety of others.
- The offense does not involve multiple, sustained or organized conduct.
- The bribery did not involve any offenses of document forgery.

According to Federal Councilor Sommaruga, the size of a company or the financial circumstances of the parties involved are not relevant when considering the severity of a case. It remains to be seen whether and how quickly the cantons will be able to develop a uniform practice on the issue. It would be helpful for the Swiss Prosecutors Conference to make recommendations on the issue. Ultimately, however, it will be up to the courts to specify the relevant criteria.

Further, as was the case under Art. 4a UWG, the application of the new criminal offences will be limited to business and professional activity.

The bribery of individuals outside a business and professional context will thus remain decriminalized (e.g. if a private individual, in exchange for receiving gifts, gives a personal acquaintance an alibi to cover up his extramarital affair). In practice, the differentiation between professional activity, which is also exercised in secondary employment (e.g. members of the executive committee of major sporting organizations), and non-business activity (e.g. the president of a local chess club) will increasingly turn on the criteria of remuneration.

Private sector bribery will also continue to require the involvement of three parties. The criminal provisions will not cover a person who accepts bribes without breaching a legally enforceable fiduciary obligation towards a third party.

Geographically, even the partial commission of a private sector bribery offence on Swiss territory will be sufficient to invoke Swiss jurisdiction (e.g. if the promise, offer or acceptance of a financial advantage is made in Switzerland). Hence, an offence will have been committed in Switzerland if the bribing party gives the instruction for a bribe to be transferred whilst he is temporarily in Switzerland. Depending on the circumstances, the use of a Swiss bank account for bribery purposes may also lead to prosecution.

Bribery of Public Officials (Art. 322^{quinquies} and 322^{sexies} StGB)

Arts. 322^{quinquies} (granting financial advantage) and 322^{sexies} (accepting financial advantage) StGB, which are formulated in terms of the standard wording of Arts. 322^{ter} and 322^{quater} StGB, now also cover cases in which an undue advantage is granted "in favor of a third party" in order to induce a public official to perform an act, which he was in any event required to perform. As was the case under the previous legislation, the undue advantage must be conferred in respect of the official's public functions and the perpetrator must act intentionally and with knowledge of this fact.

Range of Sentences and General Provisions (Art. 322^{decies} StGB)

The maximum sentence for the two new offences (Art. 322^{octies} and Art. 322^{novies} StGB) and the revised offences in articles Art. 322^{quinquies} und 322^{sexies} StGB is three years imprisonment or a fine. This precludes private sector bribery from qualifying as a predicate offense for money laundering.

Art. 322^{decies}(1) StGB incorporates elements of two provisions (Art. 322^{octies}(2) StGB and Art. 4a(2) UWG) to exclude the aspects from the ambit of an undue advantage:

- Accepting or conferring advantages which conform with public service regulations or which have been contractually approved;
- Socially accepted advantages of negligible value.

We recommend providing clear guidance on what qualifies as the acceptable conferral and acceptance of financial advantage in binding regulations (such as in an employment contract, codes of conduct, etc.).

Note also that the acceptance or conferral of advantages to which an employee is entitled (e.g. discounts, loyalty rewards, etc.) do not fall within the new the criminal provisions.

Finally, Art. 322^{decies}(2) StGB (general provisions) adopt the former wording in Art. 322^{octies}(3) StGB. As a result, private individuals are treated as public officials if they provide public services.

Need for Businesses to take Action?

The newly introduced legislative amendments list active private sector bribery (Art. 322^{octies} StGB) in the catalogue of offences for which a corporate entity can be held liable pursuant to Art. 102(2) StGB. The concurrent liability for corporate entities provided for in Art. 102(2) StGB has the effect that, in addition to the actual offender, the employing company may also be punished for the offence if it "can be held

responsible for failing to take all the organizational measures that were reasonably required in order to prevent such an offence".

This exposes companies to a significant risk of prosecution if they fail to take sufficient measures to counter the risk of bribery. This is particularly relevant to companies that have not done business with state owned or state controlled companies in the past and have thus not been exposed to the bribery related risks. Such companies are well-advised to review their internal policies and regulations to ensure they meet the requirements for an adequate internal organization within the meaning of Art. 102(2) StGB. In addition to introducing employee training, implementing specific control processes, establishing internal avenues for reporting improper conduct (whistleblower hotlines), making amendments to contracts for the provision of goods and services, it may also be necessary to make adjustments to internal codes of conduct.

Note in relation to whistleblowing, that a currently proposed legislative amendment anticipates giving whistleblowers the protection to report incidents without fearing any repercussion from their employers. Moreover, since summer 2015, Fedpol has implemented a web-based (external) reporting platform which allows the general public to directly report information on any criminal acts of corruption and, if so desired, on an anonymous basis. The anonymity of the person reporting the information is guaranteed. The reported information is reviewed for criminal relevance and then forwarded for processing to the relevant department within the Federal Criminal Police or, if necessary, to the competent external authority (e.g. the cantonal police). This is another reason why companies and international sports federations are advised to establish internal platforms to enable the effective reporting of allegations of corruption.

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