

# Note for the Board on Anti-Corruption: Switzerland

by Practical Law Corporate Switzerland and Dr Pascal Hachem, Massimo Chiasera, Raphael Annasohn and Dr. Philippe Seiler, Bär & Karrer

Standard documents | [Law stated as of 20-Feb-2023](#) | Switzerland

---

A Standard Document in the form of a legal memorandum for use by in-house or local counsel to provide to the board of directors (or equivalent governing body) of a legal entity highlighting the key points regarding the applicable anti-corruption law and regulations in Switzerland.

---

## Drafting Note: Read This Before Using Document

### Note for the Board

This Standard Document is for use by in-house or local counsel to provide to the board of directors (or equivalent governing body) of a legal entity highlighting the key points regarding the applicable anti-corruption regime in Switzerland. It is presented in the form of a company or legal memorandum and should be modified to fit with company or firm memo letterhead.

For more information on the anti-corruption regime applicable in Switzerland, see [Practice Note, Anti-corruption: Private Acquisitions \(Switzerland\)](#).

END DRAFTING NOTE

---

## OFFENCES UNDER APPLICABLE SWISS LAW

The relevant provisions on bribery and corruption offences are contained in the Swiss Criminal Code SR 311.0 (SCC).

The main anti-corruption offences in Switzerland are:

- **Active or passive bribery** of domestic and foreign public officials (*Articles 322ter and 322quater, SCC*). It is an offence for a:
  - Person to offer, promise, or grant a (foreign) official or a third party an undue advantage (active bribery); or
  - (Foreign) official to solicit or accept an undue advantage (passive bribery).

The criminal act must be committed both:

- In return for an act or omission on behalf of the foreign official which is (i) contrary to their duties towards the state, principal, or employer or (ii) dependent on their discretion; and
- In connection with the foreign official's public (official) duties ("equivalence connection").
- **Commercial bribery.** Since 1 July 2016, bribery in the private sector also constitutes a criminal offence under Articles 322octies and 322novies of the SCC. It is a criminal offence for:
  - A person to offer, promise, or grant an undue advantage to an employee, partner, agent, or any other auxiliary of a third party in the private sector (active bribery); or
  - An employee, partner, agent, or any other auxiliary of a third party in the private sector person to demand, secure the promise of, or accept an undue advantage (passive bribery).

The criminal act must be committed both:

- In exchange for an act (or omission) of the private individual in violation of his/her duties or in the exercise of his/her discretion; and
- In connection with the commercial or professional activities.

The law defines foreign officials as members of a foreign judicial body, or any other authority, who pursue an official activity, be it as a member of a judicial or other authority, a public official, an officially-appointed expert, translator or interpreter, an arbitrator or as a member of the armed forces (*Article 322septies, SCC*).

An "undue advantage" is defined as any identifiable enhancement in the beneficiary's situation, whether in economic, legal, or personal terms. Typically, the undue advantage may consist of precious gifts, bonuses, cash payments, commissions, or benefits in kind. However, an advantage is not considered undue if it is permitted by respective (state of the art) corporate policies and guidelines or if it is of minor or negligible value and in conformity with social customs (*Article 322decies, SCC*).

In addition to bribery of domestic officials, the SCC prohibits the granting or accepting of an advantage related to unlawful favours which are not directly linked to a specific official act (thus do not entail a direct quid pro quo) but are rather focused on obtaining future favourable official behaviour. More specifically, this relates to the so-called "grooming" of the official which is often associated with reoccurring gifts, invitations, and so on. Unlike bribery, the advantage does not have to be linked to an immediate tangible counter-performance, rather, such advantage must aim at influencing future official behaviour (*Articles 322quinquies and 322sexies, SCC*).

The latter two provisions, Articles 322quinquies and 322sexies of the SCC, are catch-all offences for cases in which the proof of the connection between the undue advantage and the quid pro quo cannot be established (which is at times the case for "facilitation payments").

## IMPLICATIONS FOR COMPANIES, BOARDS AND MANAGEMENT

Companies should implement the following risk mitigation tools:

- **Code of Conduct** encouraging employees to act with integrity and provides guidance concerning the reporting of potential violations (through their management or a whistleblowing hotline).
- **Anti-Bribery Compliance Policy** which holistically addresses bribery related conduct risks, and which sets out a zero-tolerance approach regarding bribery of any kind. The policy framework and other internal regulations should also:
  - Address the approval process concerning expenses and gifts; and
  - Set out (reasonable) thresholds and guidelines related to gifts, donations and so on.

The company should make sure that its employees familiarize themselves with the respective policies on a regular basis, carry out respective trainings and reassess the effectiveness of its anti-bribery framework on a regular basis.

Under Swiss law, criminal liability primarily rests with the individual perpetrating the crime:

- For passive bribery, only public officials can be held liable for committing the offence as main offenders. However, agents and associated persons, such as intermediaries, may face prosecution for aiding and abetting as instigators and accomplices for the committed offences (albeit with a reduced sentence compared to the main offender (*Article 25, SCC*)).
- Agents and associated persons can be the target with regard to enforcement measures, such as the seizure or freezing of assets (*Articles 263 et seq., Federal Code of Criminal Procedure 312.0 (CCP)*) and subsequent confiscation or forfeiture (*Articles 70 et seq., SCC*), if and to the extent that the criminal proceeds can be traced back to them and if they cannot prove good faith and appropriate consideration when acquiring said assets. Such third parties may also be prosecuted for money-laundering (*Article 305bis, SCC*) if they accept assets stemming from corruption and they knew or should have known the illegal origin of these assets.

Corporate criminal liability applies to all legal entities under private law, certain legal entities under public law, as well as companies and sole proprietorships. Companies may be held criminally liable under certain circumstances set out in Article 102 of the SCC. This provision distinguishes between two types of corporate liability:

- **Secondary criminal liability** (*Article 102, paragraph 1, SCC*). Secondary corporate criminal liability may be triggered in connection with any offence set out in the SCC if:
  - The offence was committed within the company;
  - The offence was committed in the conduct of the company's business activities;

- The company has a deficient internal organisation; or
- As a result of the company's deficient organisation, the criminal authorities were unable to identify the perpetrator(s) of the committed offence.

Secondary corporate liability is only applicable if the underlying offence cannot be attributed to a specific individual due to the company's deficient organisation. However, according to case law, such underlying offence must be fulfilled in all its objective and subjective components.

- **Primary criminal liability** (*Article 102, paragraph, 2 SCC*). A company may incur primary corporate criminal liability if it has failed to take all reasonable organisational measures to prevent the commission of any of the offences exhaustively listed in paragraph 2 of Article 102 of the SCC. This includes:
  - Participation in criminal organisations (*Article 260ter, SCC*);
  - Financing of terrorism (*Article 260quinquies, SCC*);
  - Money-laundering (*Article 305bis, SCC*);
  - Bribery of Swiss and foreign public officials (*Articles 322ter and 322septies, SCC*);
  - Granting an advantage to Swiss public officials (*Article 322quinquies, SCC*); or
  - Bribery of private individuals (*Article 322octies, SCC*).

The law does not define the exact scope of the organisational measures required under the law. For more information on the interpretation of what company internal regulations and international standards may be required, see [Practice Note, Anti-Corruption: Private Acquisitions \(Switzerland\): Legal Entities](#).

Primary liability is a direct, autonomous and joint liability, if the underlying conditions of the offence are shown to be fulfilled. Primary liability does not mean causal liability, as, according to case law, the proceedings must be dropped or the company must be acquitted if the law enforcement authorities fail to provide actual proof of the fulfilment of an underlying offence.

### Defenses and Safe Harbors

- **Individuals.** Under Article 322decies of the SCC, an individual perpetrator's liability may be excluded if it can be shown that the advantage:
  - Is in conformity with public employment law or has been contractually approved.

- Is of minor value and in line with social customs, such as gifts. This exception is subject to a case-by-case analysis.

Further, other standard defences under general criminal law, such as the state of necessity (*Articles 17 and 18 SCC*), are available to the accused. However, considering the offence of bribery, they are of limited, if any, practical relevance.

- **Legal entities.** In the context of corporate liability for bribery offences (*Article 102, paragraph 2, SCC*), the accused company can argue that the:
  - Underlying bribery offence was not committed by an individual "within the company".
  - Underlying offence did not fulfil all its objective and subjective components.
  - Company undertook all requisite and reasonable organisational precautions, namely disposed of a sound compliance and risk framework, to prevent the bribery offence.

### JURISDICTIONAL REACH OF SWISS ANTI-CORRUPTION LAW

The anti-corruption laws of Switzerland can have extraterritorial reach.

For cases with transnational components and fact patterns, the competence of Swiss law enforcement authorities and courts may be given under the following circumstances:

- If the accused individual was in Switzerland at the time of receiving (i) the promise or offer of an undue advantage or (ii) the actual bribe payment.
- If the act in exchange for the undue advantage or bribe was, or should have been, carried out (or not carried out) in Switzerland.
- If the offender used intermediaries or agents in Switzerland in view of committing bribery.
- If the proceeds from corruption were deposited in Switzerland (that is, transferred to, or deposited on, bank accounts held by a Swiss financial institute or bank).
- If the person under a duty of care was supposed to act in Switzerland to prevent bribery.
- In cases of corporate criminal liability, if the organisational deficiency originates in Switzerland.
- If the individual accused of bribery related offences is a Swiss national (principle of "active personality") (*Article 7, SCC*).

In addition, offences committed by Swiss public officials abroad are also subject to Swiss jurisdiction (Article 16 of the *Federal Act on the Liability of the Federal Government, the Members of Authorities and its Public Officials 170.32* (GLA)).

The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions 1997 (*OECD Bribery Convention*) provides for universal jurisdiction if the offender is a Swiss national acting in the context of an international business transaction.

## **THE US FOREIGN CORRUPT PRACTICES ACT**

Companies must recognize that although their anti-bribery program may be compliant with the US Foreign Corrupt Practices Act (FCPA) or the UK Bribery Act, this does not ensure that it constitutes adequate procedures under Swiss law.

## **COMMON RED FLAGS FOR BRIBERY**

Red flags can include the following.

### **AGENTS AND CONSULTANTS**

- Agent's fees are paid in cash.
- The fee payments are made in a different country to where the activity takes place, in particular any offshore financial centre known to be used to launder money.
- There is no apparent business case for use of an agent, or there is extensive use of consultancy services without apparent value received.
- Pressure is exerted for payments to be made urgently or ahead of schedule.
- Payments are made through a third-party country, for example, goods or services supplied to country A but payment being made to a shell company in country B.
- Fees are split into multiple accounts for the same agent, often in different jurisdictions.

### **MARKETING**

- Exceptional sales achievements in a market in which competitors are known to bribe.
- Tender documents using specifications favourable to the company's products.
- Frequent hospitality and travel for public procurement officials.
- Luxurious lifestyle of public procurement officials.

- Requests for special favours, such as donations or sponsorship related to the favourite causes of the procurement officer or of their family members.

## **PURCHASING AND CONTRACTING**

- Private meetings with public contractors or companies hoping to tender for contracts.
- Lavish hospitality and gifts being received.
- Proximity of employee to suppliers, such as:
  - taking holidays with suppliers or their families;
  - individual never takes time off, even if ill, or holidays;
  - individual insists on dealing with specific contractors themselves; and
  - unexpected or illogical decisions when accepting projects or contracts.
- Breaching the decision-making process, controls or delegated powers in awarding a contract.
- Awarding contracts that are unfavourable to the organisation due to the terms or time period.
- Unexplained preferences for certain contractors and avoidance of independent checks on tendering or contracting processes.
- Raising barriers around specific roles or departments that are key in the tendering or contracting process and an excessive number of rush orders or contract variations.
- Failure to document key meetings and decisions.

---

END OF DOCUMENT