

# Note for the Board on Anti-Corruption: Switzerland

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Standard documents | [Law stated as of 03-Apr-2024](#) | Switzerland

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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.

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## 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

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## OFFENCES UNDER APPLICABLE SWISS LAW

The relevant provisions on bribery and corruption offences are contained in the Swiss Criminal Code (SCC) of 21 December 1937 (SR 311.0) (SCC).

The main anti-corruption offences in Switzerland are contained in Title Nineteen of the SCC and, in particular, prohibit:

- **Active** (*Article 322<sup>ter</sup>, SCC*) or **passive** (*Article 322<sup>quater</sup>, SCC*) **bribery** of domestic and foreign public officials. 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 offence also requires both of the following conditions to be met:

- In return for an undue advantage, the foreign official carries out an act or omission which is (i) contrary to their duties towards the state, principal, or employer or (ii) dependent on their discretion; and
- The act or omission must be connected to the foreign official's public (official) duties ("equivalence connection").

• **Commercial bribery.** Since 1 July 2016, bribery also constitutes a criminal offence in the private sector according to Articles 322<sup>octies</sup> and 322<sup>novies</sup> 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 offence also requires both of the following conditions to be met:

- In exchange for an undue advantage, the private individual carries out an act (or omission) in violation of his/her duties or in the exercise of his/her discretion; and
- The act (or omission) must be connected to commercial or professional activities.

Pursuant to Article 322<sup>septies</sup> of the SCC, 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.

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 according to Article 322<sup>decies</sup>, paragraph 1 lit. a of the SCC, if it is permitted under public employment law or contractually approved by a third party. Furthermore, pursuant to Article 322<sup>decies</sup>, paragraph 1 lit. b of the SCC, an advantage with minor or negligible value that is common social practice does not amount to an undue advantage.

In addition to bribery of domestic officials, the SCC prohibits the granting (*Article 322<sup>quinquies</sup>, SCC*) or accepting (*Article 322<sup>sexies</sup>, SCC*) of an undue advantage in order to carry out official duties. The unlawful favours are not directly linked to a specific official act and 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.

Article 322<sup>quinquies</sup> and Article 322<sup>sexies</sup> of the SCC, serve as catch-all offences in cases that lack proof of a connection between the undue advantage and the *quid pro quo* (for example, it may be difficult to show such a connection in cases involving "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 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 etc.

The company must ensure that its employees familiarise 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 committing the crime:

- For passive bribery, only public officials can be held liable as main offenders. However, agents and associated persons, such as intermediaries, may face prosecution for aiding and abetting as instigators (*Article 24, SCC*) and accomplices (*Article 25, SCC*) for the committed offences (albeit with a reduced sentence compared to the main offender).
- Agents and associated persons can be subjected to enforcement measures, such as the seizure or freezing of assets (*Articles 263 et seq., Federal Code of Criminal Procedure (SR 312.0) (CCP)*). Furthermore, said assets are subject to subsequent confiscation or forfeiture (*Articles 70 et seq., SCC*), if the criminal proceeds can be traced back to them and the acquisition lacks good faith and appropriate consideration. Such third parties may also be prosecuted for money-laundering (*Article 305<sup>bis</sup>, SCC*) if they accept assets that originate from corruption and they knew or should have known of the illegal origin of these assets.

Companies may be held criminally liable under certain circumstances set out in Article 102 of the SCC. Pursuant to Article 102 paragraph 4, SCC corporate criminal liability applies to all legal entities under private law, certain legal entities under public law, as well as companies and sole proprietorship. Article 102 of the SCC distinguishes with paragraph 1 and 2 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 260<sup>ter</sup>, SCC*);
  - Financing of terrorism (*Article 260<sup>quinqües</sup>, SCC*);
  - Money-laundering (*Article 305<sup>bis</sup>, SCC*);
  - Bribery of Swiss and foreign public officials (*Articles 322<sup>ter</sup> and Article 322<sup>septies</sup>, SCC*);
  - Granting an advantage to Swiss public officials (*Article 322<sup>quinqües</sup>, SCC*); or
  - Bribery of private individuals (*Article 322<sup>octies</sup>, SCC*).

The law does not define the exact scope of the organisational measures required under the law.

Primary liability is a direct, autonomous and joint liability, if the underlying conditions of the offence are fulfilled. Primary liability does not mean strict 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 322<sup>decies</sup>, paragraph 1 lit. a and b 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 the SCC, 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 necessary and reasonable organisational precautions, namely it has a solid compliance and risk framework in place 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 to commit bribery.
- If the proceeds from corruption were deposited in Switzerland (for example, transferred or paid into bank accounts held at 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” according to Article 7 of the 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 SR 170.32*).

Furthermore, the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions 1997 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 recognise that although their anti-bribery program may be compliant with the US Foreign Corrupt Practices Act or the UK Bribery Act, this does not ensure that it is in accordance with 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 reason for using an agent, or the consultancy services are used extensively without any obvious benefit.
- Pressure is exerted for payments to be made urgently or ahead of schedule.
- Payments are processed through a third-party country, for example, goods or services are supplied to country A but payment is 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 as well as an excessive number of rush orders or contract amendments.
- Failure to document key meetings and decisions.

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