

BRIEFING MAY 2023

COMPANY CONVICTED FOR INSUFFICIENT COMPLIANCE MEASURES AGAINST BRIBERY

In its press release of 27 April 2023, the Office of the Attorney General (OAG) of Switzerland announced the conviction of a company of corporate criminal liability in connection with acts of corruption by way of penalty order. The fine and compensation payable totalled CHF 81 million

This conviction once again demonstrates that corporate criminal liability under Article 102 of the Swiss Criminal Code (SCC) and the bribery of foreign officials under Article 322^{septies} SCC involves substantial risks for companies and that the Swiss law enforcement authorities do indeed initiate criminal proceedings against legal entities related to organisational shortcomings or compliance violations that enable or facilitate acts of bribery.

INTRODUCTORY REMARKS

A company can be held criminally liable under Article 102 para. 2 SCC if it has failed to take all reasonable organisational measures required to prevent, amongst others, bribery of foreign officials under Article 322^{septies} SCC.

In addition to imposing a fine of up to CHF 5 million (Article 102 para. 1 SCC), the law provides for the forfeiture of assets that have been acquired through the commission of the underlying offence (Article 70 para. 1 SCC). If the assets subject to forfeiture are no longer available, the court may enforce a claim for compensation by the state equating to a sum of equivalent value (Article 71 para. 1 SCC). In view of the potentially unlimited amount of forfeiture and the discretionary powers of the authorities in determining the amount that can

be recovered, confiscation in general represents the greater risk for affected companies compared to fines. In the case referred to here, the compensation claim amounted to CHF 80 million, while the fine was set comparatively low at CHF 1 million.

The required human and financial resources as well as the organisational compliance measures that need to be taken within the company depend, among other things, on the size, structure, business environment and markets/countries in which the company operates. Companies must establish a risk management and compliance framework based on foreseeable risks and proactively address such criminal, compliance and/or bribery risks. The implementation of a compliance culture is a key component. So-called “paper compliance” is not sufficient.

KEY MESSAGES OF THE OAG’S PENALTY ORDER

SICPA SA offers security inks and solutions for the production of banknotes and other documents of value.

In the case here, SICPA SA had acknowledged its failure to take all necessary and reasonable organisational precautions to prevent bribery of foreign officials. The OAG accordingly convicted the company pursuant to Article 102 para. 1 SCC in conjunction with Article 322^{septies} SCC and ordered the company to pay a fine of CHF 1 million.

In addition, the OAG imposed a claim for compensation under Article 71 para. 1 SCC amounting to CHF 80 million. A former

sales manager of SICPA SA was found guilty of bribery of foreign public officials under Article 322^{septies} SCC and was sentenced to a conditional prison sentence of 170 days.

The criminal proceedings identified organisational deficiencies, particularly in the areas of corporate governance, risk management and compliance. These organisational deficiencies made it possible for employees of the company to bribe public officials while conducting business in Brazil, Colombia and Venezuela.

SELECTED PAST CONVICTIONS RELATED TO OTHER COMPANIES

The OAG had already convicted Alstom Network Schweiz AG in 2011 for breaching Article 102 para. 2 SCC in conjunction with Article 322^{septies} SCC and ordered the company to pay a fine of CHF 2.5 million. In addition, it imposed a compensatory claim of CHF 36.4 million. During the investigation, the OAG established that although the group had implemented a compliance policy that was suitable in principle, it had failed to enforce it with the necessary persistence and as a result, acts of bribery in Latvia, Tunisia and Malaysia were not prevented. Consequently, even if companies have internal policies in place, they expose themselves to the risk of criminal prosecution if they do not adequately implement and enforce them.

A more recent example of the lack of any precautionary measures to mitigate corruption risks concerns the case against Gunvor (Gunvor International BV, represented by its Geneva branch, and Gunvor Ltd in Geneva). In 2019, the OAG convicted Gunvor for its breach of Article 102 para. 2 SCC in conjunction with Article 322^{septies} SCC and ordered the payment of nearly CHF 94 million, including a fine of CHF 4 million. As a result of serious deficiencies in its organisation, Gunvor failed to prevent the bribery of public officials in the Republic of Congo and also in Ivory Coast between 2008 and 2011.

Finally, in December 2022, the OAG concluded a criminal investigation against ABB Management Services AG and sentenced the company to a fine of CHF 4 million for violations of Article 102 para. 2 SCC in conjunction with Article 322^{septies} SCC. No additional replacement claim was requested due to the company's compensation payment already made in South Africa for the amount of USD104 million. In these criminal proceedings, the company was accused of not having taken all necessary and reasonable organisational precautions to

prevent bribery payments to foreign public officials in South Africa.

RECOMMENDATIONS FOR COMPANIES

The aforementioned orders make it clear that Article 102 SCC is being taken seriously by Swiss prosecution authorities, and that companies are more than ever well advised to identify their criminal law, compliance, corruption and bribery risks.

In particular, the use of agents operating on a contingency basis in countries with high levels of corruption poses a significant prosecution risk for companies operating internationally, and this risk can only be reduced through adequate and proactive compliance efforts and the implementation of an adequate compliance culture.

Companies which are exposed to heightened corruption risks should consider establishing, implementing and monitoring organisational arrangements and measures to reduce such corruption risks. They should protect themselves by taking the following action:

1. Implement a Code of Conduct as well as specific compliance, anti-corruption and bribery policies, including risk-based third-party due diligence and management (including specific employee training);
2. Embed these policies in a robust and compliance framework which allows for monitoring and is subject to periodic review;
3. Establish a reliable whistleblowing framework;
4. Facilitate a cultural transformation within the company: awareness and acceptance of employees related to compliance topics as well as the required „tone from the top“ (the relevance of this aspect is often underestimated in companies);
5. Consistently and thoroughly investigate allegations, in particular of potentially criminally relevant events, with corresponding lessons learned and respective adjustments/remediations to the existing compliance framework; and
6. Consistently sanction violations within the company, regardless of hierarchical level. regardless of hierarchical level.



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