Anti-Corruption: Private Acquisitions (Switzerland)

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

Practice notes | Law stated as at 01-Apr-2024 | Switzerland

This Practice Note provides an overview of Swiss bribery and anti-corruption law issues to consider when acquiring a private company or a business in Switzerland.

This Practice Note explains:

- The bribery and anti-corruption legislation and regulation in Switzerland and how bribery and corruption is investigated.
- The specific bribery and corruption offences and who can be liable.
- Defences, safe harbours, and exemptions that may apply.
- Penalties and sanctions that can be imposed.
- Common bribery and anti-corruption provisions in share and asset purchase agreements.

Legislation and Regulatory Provisions Relating to Bribery and Anti-Corruption

Domestic Legislation

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

- Active and passive bribery of Swiss public officials (*Articles 322 ter and 322 quater, SCC*).
- Granting or accepting an undue advantage to or by Swiss public officials (*Articles 322 quinquies* and *322 sexies, SCC*).
- Active and passive bribery of foreign public officials (*Article 322 septies, SCC*).
- Active and passive bribery of private individuals (*Articles 322 octies* and *322 novies, SCC*).

For more information, see *Specific Bribery and Corruption Offences*.

Bribery and corruption offences can be prosecuted and judged in parallel with offences relating to abuse of and misconduct in public office (*Articles 312 and 314, SCC*) and the breach of official secrecy (*Article 320, SCC*).

Additionally, corporate criminal liability may come into play where the company has failed to take all reasonable organisational measures to prevent the commission of (among an exhaustive list of offences) bribery and corruption offences (*Article 102, paragraph 2, SCC*).

Extraterritorial Jurisdiction

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 (e.g. transferred or paid into 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" according to *Article 7, SCC*).

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

Last, the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions of 17 December 1997 (*OECD Bribery Convention*) provides for universal jurisdiction if the offender is a Swiss national acting in the context of an international business transaction.

International Anti-Corruption Conventions

Switzerland is a signatory to the following three international anti-corruption conventions:

- OECD Bribery Convention.
- Council of Europe Civil Law Convention on Corruption 1999 (Civil Law Convention on Corruption).
- UN Convention Against Corruption 2003 (Corruption Convention).

In addition to these conventions, Switzerland has ratified the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of Proceeds of Crime (Council of Europe Convention).

Moreover, Switzerland is a party to various bilateral treaties in matters of mutual assistance that facilitate the seizure, confiscation, and repatriation of the proceeds originating from crimes, including bribery and corruption.

Specific Bribery and Corruption Offences

Foreign Public Officials

Active and passive bribery of foreign officials is a criminal offence (*Article 322 septies , 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).
- Foreign official to solicit or accept an undue advantage (passive bribery).

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

Under Article 322 novies of the SCC a criminal offence is committed by a private individual if both of the following conditions are 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.
- The act (or omission) must be connected to commercial or professional activities.

Domestic Public Officials

Active (*Article 322 ter , SCC)* and passive (*Article 322 quater , SCC)* bribery of domestic officials are also prohibited. The legal requirements regarding those offences are the same as those for foreign officials, with the sole difference that the public official acts in an official capacity for a Swiss government body or authority.

In addition to bribery of domestic officials, the SCC prohibits the granting *(Article 322 quinquies , SCC)* or accepting (*Article 322 sexies , SCC*)of an undue advantage 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 quinquies and Article 322 sexies of the SCC, serve as catch-all offences for cases that lack the proof of the 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").

Private Commercial Bribery

Since 1 July 2016, bribery in the private sector also constitutes a criminal offence under Article 322 ^{octies} and Article 322 ^{novies} 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).
- 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.
- The act (or omission) must be connected to commercial or professional activities.

Liability of Individuals and Legal Entities

Individuals

Under Swiss law, criminal liability primarily rests with the individual committing the crime.

Associated Persons and Agents

The SCC provides no limitations as to the population of perpetrators of active bribery.

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).

Moreover, 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)*). Assets may be 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 ^{bis} , SCC*) if they accept assets that originate from corruption and they knew or should have known of the illegal origin of these assets.

Legal Entities

Companies may be held criminally liable under certain circumstances set out in *Article 102, 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, SCC* distinguishes between two types of corporate liability:

- Secondary criminal liability (*Article 102, paragraph 1, SCC*).

- Primary criminal liability (*Article 102, paragraph 2, 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.
- 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 therefore 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.

On the other hand, 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 Article 102, paragraph 2, of the SCC. This includes:

- Participation in criminal organisations (*Article 260ter, SCC*).
- Financing of terrorism (*Article 260^{quinquies}, SCC*).
- Money-laundering (*Article 305bis, SCC*).
- Bribery of Swiss and foreign public officials (*Articles 322ter and 322^{septies}, SCC*).
- Granting an advantage to Swiss public officials (*Article 322^{quinquies}, SCC*).
- Bribery of private individuals (*Article 322^{octies}, SCC*).

The law does not define the exact scope of the organisational measures prescribed by legislation. According to legal scholars, the company's internal regulations and international standards should be examined in order to assess whether the appropriate measures have been taken. More specifically, the company will be required to demonstrate that its employees were made aware of, trained in and supervised regarding such rules.

Primary liability is a direct, autonomous, and joint liability. However, the fulfilment of all the conditions of the underlying offence must be demonstrated by the law enforcement authorities, namely prosecutors. 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.

Defences, Safe Harbours, and Exemptions

Individuals

Under Article 322 ^{decies} 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 has a compliance and risk framework, in place to prevent the bribery offence.

Mitigation of Anti-Corruption Risks

In order to mitigate anti-corruption risks, legal entities domiciled in Switzerland or with another Swiss nexus are advised to implement a sound anti-corruption risk framework. This should include a Code of Conduct which, among other things, encourages employees to act with integrity and provides guidance concerning the reporting of potential violations (through their management or a whistleblowing hotline). Furthermore, the entity should implement a specific 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.
- Set out (reasonable) thresholds and guidelines related to gifts, donations and so on.

Last, the company should make sure 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.

Prosecution, Investigation, and Enforcement

Authorities

Switzerland's federal structure means that the cantonal or federal authorities may have jurisdiction to investigate and prosecute bribery and corruption offences, depending on the specific circumstances of the case. The cantonal Public Prosecutor's Office (PPO) has jurisdiction, except for certain cases where the prosecution powers rest with the Office of the Attorney General of Switzerland (OAG). For example, the OAG has jurisdiction if the bribery was:

- Committed by or against federal authorities.
- Substantially committed abroad.
- Committed in two or more cantons with no single canton being the predominant centre of the criminal activity.

The OAG has a right to delegate the investigation to the cantonal PPO in minor cases (*Article 25, paragraph 2, CCP*).

In all other cases, the PPO of the relevant canton in Switzerland is responsible for investigating bribery offences. As a rule, the criminal authorities at a company's seat are in charge of leading investigations against said company and the individuals acting on behalf of it (*Article 36, paragraph 2, CCP*).

The PPO is usually assisted in its investigations by specialised business crime units of the criminal police.

Prosecution Powers

The prosecution powers inherent to the competent PPO include:

- Opening or discontinuing an investigation, thereby bringing or dropping charges against a suspect.
- Ordering coercive measures.
- Hearing the parties and gathering other evidence.
- Gathering evidence by means of international mutual legal assistance proceedings.
- Sentencing the accused by means of a summary penalty order, in certain limited situations.
- Requesting the judgment of the accused by the criminal courts.

The criminal authorities have a certain number of coercive measures at their disposal, which may only be ordered on reasonable grounds of suspicion and in accordance with the principle of proportionality (*Articles 196 et seq., CCP*).

Not all criminal authorities are equal with respect to the scope and powers at their disposal, as, for example, certain coercive measures cannot be ordered without judicial review and therefore require validation by the Coercive Measures Court. Moreover, the powers and autonomy of the police will generally be limited, insofar as it acts under the supervision of the PPO in the framework of an investigation.

Powers of Interview

According to *Articles 142 et seq., CCP* the criminal authorities can:

- Interview the accused, witnesses or experts as well as persons providing information.
- Confront parties during hearings or, on the contrary, avoid confrontation through the implementation of protective measures in the interest of the victim or their family.
- Summon parties to a hearing and compel their attendance with the help of the police.
- Impose a fine in case of non-appearance or a refusal to testify without due cause.

Powers of Search or to Compel Disclosure

The accused has an absolute right to remain silent and to refuse to co-operate with the criminal authorities (*Articles 113* and *158, CCP*). Other parties may invoke their right of refusal to testify or to provide evidence in certain situations (*Articles 168 et seq.; Article 265, CCP*) for example, in order to avoid breaching a professional secrecy (such as legal privilege or medical secrecy) or self-incriminating from a criminal or civil standpoint.

However, such right does not completely neutralise the rather extensive coercive powers of the prosecution authorities, who are entitled to:

- Punish those who refuse to answer or to produce documents without due cause with a fine.
- Order a search or raid or the seizure of evidence if the parties do not comply voluntarily with a production order.

A seizure or freezing order may be issued in order to:

- Safeguard means of evidence.
- Guarantee the payment of fines, monetary penalties or various procedural costs and indemnities.
- Ensure subsequent restitution of the assets to the harmed parties.
- Ensure subsequent confiscation, forfeiture or guarantee an equivalent compensatory claim.

Under Articles 248 and 264 of the CCP, certain documents may, on the motion of the concerned parties, be sealed or excluded from the seizure. Such documents include:

- Strictly personal records.
- Correspondence with legal counsel or with other persons who are bound by professional privilege.

Powers to Obtain Evidence

The criminal authorities have a wide range of measures available for gathering evidence. For example, they can:

- Interview individuals.
- Request the production of documents.
- Seize documents or electronic data.
- Undertake inspections.
- Conduct secret surveillance.
- Intercept mail or telecommunications.
- Monitor banking relations.

- Order the production of reports or medical files.
- Conduct DNA analyses.
- Take writing and voice samples.

In certain cases, coercive measures will need to be directly ordered or validated by the competent Coercive Measures Court.

The prosecution authorities can further request access to files and information from other Swiss-based authorities (*Articles 43 et seq., CCP*), and foreign authorities via international mutual legal assistance (*Articles 54* and *55, CCP*).

Power of Arrest and Detain Individuals

The criminal authorities have the powers to search for suspects, arrest them with or without a prior warrant and detain them in pre-trial custody and for the duration of the trial (*Articles 212 et seq., CCP*). The suspect has a right to be heard before the prosecution authorities on the suspicions against them and before the Coercive Measures Court regarding their detention. The detention must be validated by the Coercive Measures Court within 96 hours following the arrest.

Detention in custody can be ordered if the suspect presents risk of:

- Evasion.
- Tampering with evidence or collusion or conspiracy.
- Reiteration or danger to the safety of others.

The decision to detain and the duration of the detention must be proportionate to the circumstances, and may, where possible, be substituted with alternative measures (*Articles 237 et seq., CCP*), such as:

- Bail.
- Handover of identity papers.
- Confinement to a specific location.
- Obligation to check in regularly with the authorities.
- Requirement of a steady employment or monitored medical treatment.
- Ban on contact with certain individuals.

Therefore, an accused can be released on bail from pre-trial custody. The security deposited may thereafter be confiscated to cover any monetary penalty, fine, procedural costs or damages allocated to a harmed party.

Court Orders or Injunctions

The PPO and, once the matter is handed over for trial, the competent courts, can issue interim mandatory orders (*Articles 196 et seq., CCP*). The police can do so only when authorised under the law, particularly if the matter is urgent. Such orders include:

- Summons to appear.

- Search warrants.
- Seizure or freezing orders.
- Orders for the production of documents or the disclosure of information.

To limit the risk of collusion or conspiracy, the authorities may also issue injunctions banning parties, under the threat of criminal sanctions, from entering into contact with or informing specific individuals of certain facts, for example:

- A witness banned from disclosing the subject of their hearing.
- A bank banned from informing an account holder of a freezing over their assets.

Seizure and freezing orders may be challenged before the court of appeals within ten days of their service. The lifting of such measures can also be requested at any given time thereafter.

Penalties

Individuals

Individuals found guilty of bribing public officials may be sentenced to a:

- Custodial sentence of up to five years.
- Monetary penalty of up to CHF 540,000 (that is, 180 daily penalty units not exceeding CHF 3,000 each).

Further, depending on the circumstances, the sanction may include:

- A prohibition from practising a profession or a comparable activity for a period of between six months to five years (*Article 67, SCC*).
- The publication of the judgment (*Article 68, SCC*).
- Expulsion from Switzerland for foreign nationals (*Articles 66a et seq., SCC; Federal Act on Foreign Nationals and Integration (SR 142.20)*).

By contrast, bribery of private individuals as well as the giving and accepting of undue advantages are considered misdemeanours under Swiss law, punishable by a:

- Custodial sentence of up to three years.
- Monetary penalty of up to CHF 540,000 (that is, 180 daily penalty units not exceeding CHF 3,000 each).

In minor cases of private bribery, the offence may only be prosecuted if a complaint is filed (as opposed to *ex officio* prosecution).

Legal Entities

When prosecuted in connection with bribery, companies may be sanctioned with a fine of up to CHF 5 million.

Administrative Sanctions

The authority can order:

- The confiscation or forfeiture of assets belonging to the accused individual perpetrator, company, or to third parties.
- The confiscation or forfeiture of an equivalent compensatory claim, if the proceeds of the crime are no longer available (for example, they have been spent or otherwise dissimulated).
- The allocation or restitution of assets to the injured party, where appropriate.

The above tools target as much the direct proceeds of corruption (that is, the bribe) as the indirect benefits accrued as a result of corruptive behaviour (for example, the proceeds and profits from deals and contracts obtained through corruption).

Various international treaties and the applicable rules on international mutual legal assistance apply, in addition to the *Federal Act on the Freezing and the Restitution of Illicit Assets held by Foreign Politically Exposed Persons (SR 196.1)*, which is applicable in Switzerland as of 1 July 2016. This law entitles the Swiss Federal Council to order the seizure or freezing of assets in relation to Politically Exposed Persons (PEPs) in view of potential mutual legal assistance proceedings or their subsequent forfeiture.

The persons, entities or states whose interests are harmed by a corruption offence may, where appropriate, file a civil claim before the criminal authorities and request the restitution of the criminal proceeds.

Deferred Prosecution Agreements

Swiss law does not contain a legal basis for entering into deferred prosecution agreements which would end the prosecution in exchange for a respective agreement entered into with the prosecution.

However, Article 53 of the SCC provides the possibility for so called reparation payments. More specifically, law enforcement authorities, that is, the prosecutor, can discontinue the criminal proceedings (which is equivalent of an acquittal) if the offender has made reparation for the loss, damage or injury, or has made every reasonable effort to right the wrong that they have caused. The requirements for this type of resolution include:

- The suspended custodial sentence does not exceed one year.
- The interest in the prosecution by the general public and the persons harmed are negligible.
- The offender has admitted the offence.

The route through a reparation payment under Article 53 of the SCC has to be considered on a case-by-case basis and also depends on which authority (cantonal or state level) is involved. For example, in recent years, the OAG refrained from accepting reparation payments which limits the possibilities of entities faced with bribery related charges to seek resolution under Article 53 of the SCC and to evade a conviction by making a respective reparation payment.

Bribes or Other Payments as Tax-Deductible Business Expenses

Swiss federal and cantonal tax laws explicitly prohibit tax deductibility with respect to bribes or “hidden commissions” paid to domestic or foreign public officials.

Bribery of private individuals became a punishable offence under the SCC in 2016 (rather than only a breach of the Unfair Competition Act). Since then, bribes or hidden commissions paid to private individuals are deemed non-deductible. This has been explicitly provided in the relevant Swiss tax laws following an amendment which entered into force on 1 January 2022, as confirmed by the Federal Council on 11 November 2020.

Share or Asset Purchase Agreements: Bribery and Corruption

Anti-Corruption Warranties

In Switzerland, anti-corruption representations and warranties are typically included in share purchase agreements (SPAs) or asset purchase agreements. Reasonably buyer friendly clauses are often drafted along the following lines:

Compliance with Laws and Permits

> The Group Companies, the products offered, sold or distributed by them and the Persons for whose acts a Group Company is responsible, are and have in the past [5] years always been, in compliance with all applicable laws, regulations (in Switzerland or elsewhere; including environmental, employment, antitrust and data protection laws and regulations), de facto binding trade association requirements and the like. [At the date hereof,] there are no administrative, criminal or other investigations or proceedings pending or threatened against the Group Companies or any Person for whose acts a Group Company is responsible, and there are no circumstances likely to give rise to such investigation or proceeding.

> The Group Companies and the products offered, sold or distributed by them have, and have in the past [5] years always had, all authorisations, permits, licenses and certificates granted or issued by a governmental authority or private institution ("Permits") necessary or customary to conduct their businesses as currently, conducted (including environmental permits). The Group Companies and their products are and have in the past [5] years always been, in compliance with all such Permits and the requirements set out therein. All such Permits are in full force and effect. [At the date hereof,] there are no circumstances likely to result in, any partial or full suspension, revocation, adverse modification or non-renewal of any such Permit.

> Neither the Group Companies nor any of the Persons for whose acts they are responsible have (i) knowingly used any corporate funds for any unlawful contribution, gift or other unlawful expense relating to political activity, (ii) unlawfully offered or provided, directly or indirectly, anything of value to (or received anything of value from) any foreign or domestic government employee or official or any other Person, (iii) violated any provision of the United States Foreign Corrupt Practices Act of 1977, as amended, and any rules or regulations promulgated thereunder (FCPA) or other similar laws of other jurisdictions or (iv) violated any provision of the UK Bribery Act or other similar laws of other jurisdictions. The Group Companies have neither directly or indirectly taken any action in violation of any applicable export control laws, anti-boycott regulations, embargo country regulations, prohibited or blocked party regulations or other similar applicable US or other laws.

Other Provisions Relating to Anti-Corruption

There are no general provisions which are commonly set out in SPAs in relation to anti-corruption. However, depending on the particularities of the specific transaction, and on a case-by-case basis, an indemnity for certain identified risks in relation to anti-corruption may be required.

Remedies

Standard remedies for a "material breach" of anti-corruption representations and warranties are damage claims and, therefore, the same as for breach of other representations and warranties.

Other Significant Bribery or Anti-Corruption Issues in Switzerland

Duty to Report Bribery or Corruption

There is no overarching and formal duty to report suspicions of bribery or corruption to the authorities. Article 22a of the Federal Personnel Act requires federal personnel to report crimes or misdemeanours that they have discovered or that have been reported to them in the course of their official activities to the law enforcement authorities, their superiors or the Swiss Federal Audit Office. Some similar provisions have been enacted on cantonal level. Further, Swiss financial institutes have an obligation to report to the Money Laundering Reporting Office Switzerland (MROS) transactions known or assumed to originate from a crime, including suspicions related to bribery or corruption *(Article 305 ^{bis} SCC* and *Article 9 paragraph 1 of the Federal Act on Combating Money Laundering and Terrorist Financing (SR 955.0)*).

Protections for Whistleblowers

As the law stands, there is no specific statutory protection for whistleblowers. Under Swiss labour law, employees must observe a duty of loyalty and a duty of confidentiality towards their employer, including a duty of business secrecy *(Article 321a paragraphs 1 and 4 of the Federal Act on the Amendment of the Swiss Civil Code, Part Five: The Code of Obligations (CO) (SR 220)*). As a result of these duties, employees report irregularities or grievances pursuant to the following three-step procedure:

- Step 1. The employee must first report the misconduct internally to their employer (internal whistleblowing).
- Step 2. Failing appropriate remedial measures from the employer, the employee is entitled to report the case to the authorities (external whistleblowing).
- Step 3. Failing a response from the authorities, the employee is entitled to report the case to the public or third parties as a means of last resort (external whistleblowing).

A breach of theses escalation principles may result in a breach of the employees' contractual duties and, therefore, lead to the termination of the employment contract.

Employees who report irregularities or grievances within a company to the authorities or public face significant legal uncertainties. Under Swiss law, termination in response to lawful whistleblowing may be deemed wrongful (*Articles 336 et seq., CO)*, in which case the employee will at most be entitled to financial compensation of up to six months' salary.

Further, Swiss criminal authorities may treat disclosing confidential information to the public as a criminal offence, for example breaching:

- Manufacturing or business secrecy (*Article 162, SCC*).
- Official secrecy (*Article 320, SCC*).
- Banking secrecy (*Article 47, Banking Act (SR 952.0)*).
- Professional confidentiality (*Article 35, Federal Act on Data Protection (SR 235.1)*).

However, since mid-2015, the Swiss Federal Police (Fedpol) has implemented an external web-based reporting platform which enables the general public to directly report information on any criminal acts of bribery anonymously.

Recovery of Losses

Under Swiss corporate law, a company's directors are liable for damages inflicted on the company to the shareholders and the company's creditors. However, as long as the company is not in bankruptcy, such claims can only be brought by the company itself and the shareholders. Where shareholders raise such claims for damages against the company's directors, shareholders can only claim that the directors pay damages to the company, but not directly to the shareholders. If the company is in bankruptcy, creditors may also bring such damages claims against the directors, however, it is first for the estate administrator to commence such legal action. If the estate administrator decides not to do so, the creditors may request that the claims be assigned to them. Should they be able to recover any amounts under such claims from the directors, the creditors may first use them to satisfy their own claim and must then disgorge any funds left to the estate for distribution to the other creditors.

In addition, if the company is in bankruptcy, the estate administrator may bring clawback claims against the recipients of illicit payments. If the administrator decides not to pursue such claims, upon request by the creditors they can be assigned to them.

ESG Due Diligence and Reporting Obligations

As of 1 January 2022, the Indirect Counter-proposal to the Responsible Business Initiative entered into force in Switzerland. Although the counterproposal does not introduce a new liability regime, it does set out new due diligence and reporting obligations for certain companies in relation to environmental, social, labour, human rights and anti-corruption matters ("ESG Matters") (see *Non-Financial Reporting Obligation*). Companies whose activities carry risks in the areas of child labour and minerals from potential conflict-affected areas must comply with special and more extensive due diligence obligations (see *Transparency Requirements in the Commodities Sector*).

The counterproposal also introduces a criminal liability offence for violations of the reporting and record-keeping obligations.

The counterproposal was implemented by six new Articles 964 ^{bis} to 964 ^{septies} of the CO and by the new Article 325 ^{ter} of the SCC.

Non-Financial Reporting Obligation

The non-financial reporting obligation applies to companies of public interest domiciled in Switzerland such as listed companies and prudentially supervised large companies in the financial sector with subsidiaries in Switzerland and abroad, that fulfil the following criteria:

- An annual average of at least 500 full-time employees.
- Exceed either the threshold of CHF 20 million in assets, or CHF 40 million in turnover.

A company will not be subject to the reporting obligation if it is either:

- Controlled by another company within the scope of the new regulation.
- Required to produce an equivalent report under foreign law.

The non-financial reporting obligations are analogous to the Non-Financial Reporting Directive of the European Union (*Directive 2014/95/EU*). Companies that fall under the scope of the new Swiss regulation will be required to report annually on environmental, social, employee, human rights and anti-corruption matters.

The report may be based on national, European or international reporting standards, in particular on the *OECD guidelines for Multinational Enterprises*, but companies must also ensure that their ESG report covers all requirements of the new Swiss regulation.

The report on ESG Matters can be drafted in either a Swiss national language (German, French, Italian, Romansh) or in English. It must be approved by the board of directors and the shareholders' meeting like the annual financial statements, but the report must not be audited.

It must be published electronically and remain available for at least ten years.

Liability for Violation of Reporting Obligations

According to Article 325 ^{ter} of the SCC, a fine of up to CHF 100,000 may be imposed on anyone who either:

- Makes false statements in the report on ESG matters or on the mandatory human rights due diligence.
- Fails to publish a report.
- Does not comply with the documentation obligations.

The fine for negligent behavior is up to CHF 50,000.

The liability of the board of directors and the executive management remains unaffected by these changes. The existing liability provisions, namely the liability of board members and management under Article 754 of the CO, continue to apply where the respective requirements are fulfilled.

Transparency Requirements in the Commodities Sector

Since January 2021, Swiss companies that operate in the extraction of natural resources are required to disclose payments to government entities of CHF 100,000 or more per financial year. These new transparency provisions, namely Articles 964a to 964f of the CO are intended to contribute to responsible corporate conduct by increasing transparency and additionally combating mismanagement as well as corruption.

The new disclosure requirement concerns only Swiss companies that fulfil the following two cumulative conditions:

- The company concerned is subject to ordinary audit pursuant to Article 727, paragraph 1 of the CO, that is, it is either:
    - listed on a stock exchange; or
    - has exceeded two of the thresholds pursuant to Article 727, paragraph 1, no. 2 of the CO (balance sheet total of CHF 20 million, sales revenue of CHF 40 million, 250 full-time positions on annual average) in two successive financial years.

- The company concerned operates in the extraction of natural resources, which according to Article 964a, paragraph 4 of the CO, includes all corporate activities in the fields of exploration, prospecting, discovery, development and extraction of minerals, oil and gas deposits as well as the felling of timber in primary forests.

The activity of extracting natural resources does not need to be mentioned in the statutory purpose of the company. A one-time activity in the field of natural resource extraction is sufficient and thus, it is irrelevant whether the company concerned carries out the activity itself or through a subsidiary controlled by the company.

A company that is subject to the new provisions is required to prepare a public and electronically accessible report within six months after the end of each financial year.

Automatic Conversion of Bearer Shares into Registered Shares

In recent years the Swiss parliament has taken various measures in response to international criticism of bearer shares due to tax evasion, money laundering and corruption links, eventually abolishing bearer shares in Switzerland.

Since July 2015, all acquisitions of existing bearer shares must be reported to the issuing company. The company must in turn, keep a list of all its shareholders holding bearer shares. This reporting obligation does not apply if the company is listed or if the bearer shares have the form of intermediated securities.

As of 1 May 2021, bearer shares are only allowed to be held if one of the following exceptions applies:

- The company is listed on a stock exchange. It is sufficient that a specific category of shares, participation certificates or dividend right certificates is listed. The bearer shares themselves do not have to be listed.
- The bearer shares are structured as intermediated securities (for example, they are held via the banking system) and are deposited with a custodian in Switzerland or are registered in the main register.

In addition, companies had to record the fact that they relied on one of these exceptions in the Swiss commercial register by 1 May 2021. If none of the exceptions apply, or if a company has failed to register the exception, the bearer shares of the company in question were converted into registered shares automatically, by operation of law, after 1 May 2021. The same applies to bearer participation certificates.

END OF DOCUMENT

