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# Switzerland

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**Brief overview of the law and enforcement regime**

Introduction

"*James Bond villains no longer have bank accounts in Switzerland because over the past decades we have built up a robust system for combatting money-laundering and terrorist financing (...) We believe that a healthy financial center is important for the Swiss economy and so is financial integrity. The financial sector accounts for approximately 10% of our GDP*", said Ms. Livia Leu, Swiss Secretary of State, while speaking at a panel on transparency and corruption at the World Economic Forum (WEF), in January 2023.[1]

Switzerland ranks among the top 10 least corrupted countries, according to the 2022 Corruption Perceptions Index from Transparency International.[2] The quality of its institutions and the way the *res publica* is managed compared to other countries could, however, mislead an inattentive observer. Public administrations are inherently exposed to corruption and Switzerland makes no exception.

Furthermore, being one of the most (business-wise) competitive countries in the world, the private sector is well touched by corruption.

Reflecting a constant concern for improvement, the Federal Council fixed the corruption objectives of the Confederation in a 2021–2024 Strategy document which is directly addressed to the federal administration but hopes to create a snowball effect on any other interested sector.[3]

Terminology and applicable law

Within the Swiss legal system, the word "*Corruption*" is used to point both to active corruption and passive corruption. Corruption, in Switzerland, is criminally relevant both in the public and private sectors.

Norms punishing such kind of behaviours are grouped within Title 19 of the Swiss Criminal Code (SCC) at arts 322 *ter*–322 *decies*, as well as at art. 4a(1)(b) on the Unfair Competition Act (UCA).

Switzerland also ratified the OECD Anti-Bribery Convention in 2000 and the UN Convention against corruption in 2009.

The notion of *corruption within the public sector*

Corruption is defined as the offering, promising or giving of an undue advantage to a public official, in exchange of the execution or the omission of an act which relates to the activities of the public official, is contrary to the duties of the latter, or it depends on the exercise of their discretionary powers, at his/her own or a third person's advantage (arts 322 *ter* and *quater* SCC). Offers, promises or gifts of an undue advantage are also criminally relevant if they are

made with the goal of having the public official executing his/her duties, but that are not linked to a specific act (art. 322 *quinquies* and 322 *sexies* SCC).

Art. 322 *septies* SCC extends the criminal responsibility to the act of corruption which relate to foreign officials.

Corruption is punished from both the passive – the act of soliciting, having another promising and receiving – and the active standpoints – the offering, promising or giving.

The notion of *public official*

Members of the Judiciary or of another authority, public officials, officially appointed experts, translators or interpreters, arbitrators, members of the army (art. 322 *ter* SCC), including private individuals who carry out public functions (art. 322 *decies* (2) SCC) are considered public officials, and are thus subjected to corruption. If these kinds of persons act for a foreign state or an international organisation they are considered "foreign public officials" (art. 322 *septies* SCC).

Corruption within the *private sector*

Similarly to the above, corruption is described as the act by which an employer, a company member, an agent or any other auxiliary to a third party is offered, promised or granted undue advantages for themselves or third parties for the commission or omission of an act in relation to their official duties that is contrary to their duties or depend on the exercise of his/her discretionary powers (art. 322 *octies* SCC; art. 4a(1)(a) UCA).

The notion of *undue advantage*

The giving and accepting of "undue advantages" are only punishable when Swiss public officials are concerned (arts 322 *quinquies* and 322 *sexies* SCC).

Payments made with the goal to accelerate the execution of administrative acts to which the corruptor is legally entitled (so-called facilitation payments) are punishable no matter if a Swiss or a foreign official is concerned, but only if the payment influences the discretion of the public official.

Swiss public officials are exempted from criminal sanctions if the advantages are permitted under public employment law or contractually approved by a third party or are common social practices (art. 322 *decies* (1) SCC). This would typically include small Christmas or thank-you gifts, as long as they are not intended to influence the public official concerned.

Sanctions

Active and passive corruption within the public sector is punished with a prison sentence of a maximum of five years or a fine up to CHF 540,000 (arts 322 *ter* and 322 *septies* SCC). Corruption within the private sector may result in imprisonment for up to three years or a fine (arts 322 *octies* (1) and 322 *novies* (1) SCC; art. 23 UCA). The offence is prosecuted only upon denunciation for minor cases, in both active and passive private corruption.

The general sentencing guidelines concerning, for example, the culpability of the offender, and/or his/her personal and financial circumstances at the time of conviction will guide the judge in deciding the amount of the sentence (art. 34(1) and (2) SCC).

The Swiss criminal code also provides for additional administrative sanctions such as the prohibition of practising certain professions (art. 67 SCC) and the seizing of assets linked to corruption that is received or intended to be used for corruption (art. 70 SCC).

In addition, Swiss criminal procedure provides for the possibility that the person suffering harm from corruption brings civil claims as a private claimant, in the criminal proceedings.

## Overview of enforcement activity and policy during the last year

Enforcement activity

The Money Laundering Reporting Office Switzerland ("MROS") reports that 7.3% of the possible predicate offences underlying money laundering cases referred to them in 2022 were instances of public and private corruption.[4] This means that, in 2022, among the 7,639 Suspicious Activity Reports ("SARs") received by the MROS,[5] more than 500 denunciations reported cases of corruption as the basis of suspicious money laundering activity.

Official statistics show that, in 2022, within the whole Switzerland, only 15 cases of corruption passed the thresholds of the indictment and led to criminal convictions.[6]

Since 2003, the Swiss Criminal Code provides for a specific criminal responsibility of legal entities which, when concerning corruption, is independent from the criminal responsibility of the person who is responsible for the infraction, if the organisation did not put in place all the reasonable and necessary measures to avoid the commission of these offences (art. 102 (2) SCC). An analysis of the practices of the federal and cantonal law enforcement authorities is difficult as convictions are often rendered without trial, through "sentence orders" which are not, generally, made public.

At the federal level, between 2011–2021, the Office of the Attorney General of Switzerland (OAG) concluded a total of eight criminal proceedings against legal entities by means of a sentence order, which correspond to the 36% of the cases submitted to its authority.[7]

As far as it was made public, in November 2021, the OAG convicted three Swiss subsidiaries of the oil service group SBM Offshore, imposing sanctions of over CHF 7 million, including a fine of CHF 4.2 million. The three companies were found guilty of various deficiencies in their internal organisation which, if put in place, could have prevented the bribery of foreign public officials in Angola, Equatorial Guinea and Nigeria, between 2006 and 2012. This case, which was opened in 2020, was linked to the OAG 2020 conviction of a former executive employee of the SBM Offshore Group for the bribery of foreign public officials. In addition, as part of the proceedings being conducted by a task force in connection with the semi-state-owned company Petrobras, the OAG has prosecuted bank employees and banking institutions in Switzerland (PKB Privatbank SA).[8]

Policy/legislation

On 1 January 2023, the Swiss legislator took another step toward the strengthening of transparency and avoiding corruption by introducing the "Transparency in non-financial matters", "Transparency in row material businesses" and the "Duty of care and transparency with regard to minerals and metals from conflict zones and child labor" chapters (arts 964 a – 964 l) within the Swiss Code of Obligation (CO).

While environmental and social issues coupled with respect for human rights and the fight against corruption are hot topics, not much has been done to make these new provisions known to the public. As per what concerns corruption, in fact, every year, concerned enterprises must prepare a report on payments made to state bodies. Concerned companies are companies listed on the stock exchange, companies required to draw up consolidated accounts, and companies which, as an annual average over two successive financial years, exceed two of the following thresholds: (1) 250 full-time employees; (2) a balance sheet of CHF 20,000,000; (3) sales of CHF 40,000,000; and/or companies that are (directly or through a controlled entity) involved in mineral production.

This duty to report concerns companies that have made, during a given financial year, payments of at least CHF 100,000 to public bodies in connection with commercial transactions related to extractive activities (art. 964f (2) CO).

Concerned entities will now have to present their reports in 2024; this makes Swiss legislation one of the most advanced in Europe in terms of Corporate Social Responsibility.

On 1 January 2023, the new amendments to the Anti-Money Laundering (AML) Act also entered into force. Notably, new measures targeting financial intermediaries in the areas of beneficial ownership were introduced (arts 2 (a *bis*), 4, 7 AML Act) and the supervision and controls of the precious metals sectors was heightened.

From a more general policy point of view, in 2020 the Federal Council (the Swiss government) published its Anti-corruption Strategy 2021–2024 which presents several goals and measures to achieve them. Though focusing primarily on the public sector, but also recognising that corruption "*occurs at the boundary between public and private interests and cannot be prevented or tackled by the State alone*", the Federal Council therefore calls on the private sector and civil society to join with it in the fight against corruption.[9] It also outlines a lack of protection of whistleblowers, which makes the detection of domestic cases of corruption difficult.

## Law and policy relating to issues such as facilitation payments and hospitality

Art. 322 *decies* SCC lists what do not constitute as "*undue advantages*" leading to corruption: (1) advantages that are permitted under public employment law and that are contractually approved; or (2) advantages whose value is negligible and are accepted as common social practices (such as the Christmas gifts to the Postman, which is a very common social practice in Switzerland).

The Swiss criminal code does not provide for a definition of "facilitation payments" or "negligible advantages", nor it gives indications concerning the "hospitality" matters. For the personnel of the Swiss Confederation, on the contrary, the Law on the Personnel and the related decree[10] though reaffirming the general rule that employees must not accept, solicit or be promised gifts or other benefits for themselves or others in the performance of activities arising from the employment contract, exempts gifts in kind with a market value not exceeding CHF 200 (arts 21 para. 3 LPers and 93 para. 1 OPers).

In addition, employees are required to decline all invitations likely to restrict their independence or freedom of action and to refuse invitations to foreign countries, unless authorised in writing by their superior (art. 93a al. 1 OPers). For employees involved in a purchasing or decision-making process, even the acceptance of modest customary gifts or invitations is prohibited, as long as a link with this process cannot be ruled out (arts 93 al. 2 and 93a al. 2 OPers).

Gifts that cannot be refused for reasons of politeness must be handed over to the hierarchic superior of the employee concerned, as their acceptance is intended to serve the general interests of the Confederation (art. 93 al. 3 OPers).

Additional and/or different regulations and restrictions implementing the federal legislation may also apply at the cantonal level. For example, in the Canton of Geneva, the solicitation or acceptance of a cash benefit leads to immediate dismissal, without prejudice to criminal sanctions. The same sanction applies to employees who accept an invitation to an evening, weekend or travel event or who receives a non-standard gift, unless expressly authorised by the hierarchical superior, on an exceptional basis. Lunches, aperitifs, etc. during working hours and days require the authorisation of the hierarchical superior. Finally, customary gifts such as chocolate and wine are permitted but they must be shared with the entire department. In exceptional cases, and with the authorisation of the immediate superior, the employee may keep them for himself or herself.[11]

A recent decision of the Federal Tribunal,[12] which is the highest Swiss criminal court, has contributed to the definition of all these concepts. The decision concerns a cantonal politician who, charged of having accepted undue advantages for himself and his family after having travelled to Abu Dhabi with his family as a public official, was first sentenced to a suspended fine for accepting undue advantages by the first instance judge, then acquitted by the Court of appeal and finally, following the appeal of the Public prosecutor, was found guilty of art. 322 *sexies* SCC by the Federal Tribunal.

The latter, also following highly respected doctrine on this matter, affirmed that the specificity of art. 322 *quinquies* SCC and 322 *sexies* SCC, compared to art. 322 *ter* SCC (active corruption) and 322 *quater* (passive corruption), lies in the fact that no exchange relationship between the advantage and an act or omission of the public official is required.

The public official receives the advantage "in order for him to perform the duties of his office", which therefore excludes gifts given or received in a private context. Art. 322 *sexies* SCC thus applies to the gifts received by a public official who takes advantage of his or her position to obtain undue benefits, without allowing himself or herself to be corrupted within the meaning of art. 322 *quater* SCC.

In practical terms, art. 322 *quinquies* and 322 *sexies* of the Criminal Code, the Federal Tribunal said, are likely to come into play in two different situations. The first relates to cases of "facilitation/grease payments", where a public official receives an advantage for performing an act that he/she is obliged to perform or would perform anyway, in the absence of discretionary power, and where the advantage is ultimately intended only to guarantee or accelerate the obtaining of a service to which the briber is entitled after all. The difference with art. 322 *ter* and 322 *quater* SCC is that the public official here will not violate the duties of his office, nor abuse a power of appreciation which he does not have.[13]

The second situation concerns manoeuvres involving "progressive feeding" or "payment of goodwill", that is the delivery of undue advantages with a view to winning the goodwill of a public official and influencing him or her favourably in a general way, without aiming at any definite or even determinable counter-performance, but solely in the hope that the opportunity for a "return of the favor" will one day present itself. Hence, the act is not criminally relevant if the advantage is granted without any connection with the official activity, in a purely private context, such as family or friendship.[14]

The lower limit of unlawfulness must be determined in the light of a set of qualitative criteria, such as the nature of the relationship between the protagonists and the circumstances in which the contacts take place, as well as quantitative criteria taking into account the scale and quantum of the advantage in question.

## Key issues relating to investigation, decision-making and enforcement procedures

When corruption is committed by a member of an authority or an employee of the Swiss Confederation or against the Swiss Confederation (art. 23(1)(j) of the Swiss Code of Criminal Procedure – SCCP), or if the offence has been substantially committed abroad, or in two or more cantons with no single canton being the focus of the criminal activity (art. 24(1) SCCP), the investigations are run by the OAG. In all other cases, investigations are run by the competent cantonal law enforcement authorities. The Federal Office of Justice ("FOJ") is the authority competent to handle international cooperation requests and matters, such as mutual legal assistance and extradition requests.

Switzerland lacks mechanisms to resolve corruption cases through plea agreements, settlement agreements or similar without-trial means. However, this might refrain from

prosecuting or punishing an offender if the latter "has made reparation for the loss, damage or injury or made every reasonable effort to right the wrong that he has caused" and the public and private interests harmed are negligible (art. 53 SCC). Recent changes into the regime of criminal records made this solution less interesting, in the sense that dismissals based on art. 53 SCC, since January 2023, registered into one's criminal records.[15]

As per what concerns the responsibility of corporate entities for corruption and, in general, business crimes, the OAG strongly affirms the need to have, especially within the domain of the criminal responsibility of undertakings, a piece of legislation offering adequate incentives to corporations to cooperate with the authorities, as it happens in the USA, UK, France and soon Germany.

Specifically, the OAG believes that it is necessary, at the Swiss level, to create the possibility – based on the Anglo-Saxon Deferred Prosecution Agreement – to suspend an indictment. In this way, companies will be encouraged to report suspected cases falling within the scope of the criminal provisions applicable to companies (art. 102 SCC) or to promptly agree to undergo an investigation and cooperate openly and fully with the prosecuting authorities.

Though Swiss criminal law and procedure provides for certain incentives for companies to cooperate, this is limited to a cooperative behaviour that might be taken into account by the authorities only at the sentencing phase.[16]

## Overview of cross-border issues

In April 2023, the Geneva Court of Appeal upheld the conviction of Beny Steinmetz for corruption of foreign public officials, as per art. 322 *septies* SCC. The French Israeli mining magnate was sentenced to three years in prison (of which 18 months were suspended) and a compensation claim of CHF 50 million for having bribed the fourth wife of the late President of Guinea, Lansana Condé, with USD 8.5 million. This pact enabled Beny Steinmetz Group Resources (BSGR) to obtain the exploitation rights in one of the world's largest iron mines.[17]

In September 2023, the OAG filed two indictments before the Federal Criminal Court with, for both, charges of corruption with an international dimension. The first case was filed against a former employee of Gunvor accused to have participated, actively in the payment of bribes to enable the Geneva commodities trading company to gain access to the petroleum market in the Republic of the Congo.[18]

The second one was filed against Gulnara Karimova, the daughter of former Uzbek President Islam Karimov, and the former CEO of the Uzbek subsidiary of a Russian telecommunications company. The two defendants are accused of participating in a criminal organisation operating in various countries, including Switzerland. The charges cover the period from 2005 to 2013, and include, among others, participation in a criminal organisation (art. 260 *ter* SCC), money laundering (art. 305 *bis* SCC) and passive corruption of foreign public officials (art. 322 *septies* para. 2 SCC). In connection with the indictment, the OAG has requested the confiscation of assets for more than CHF 440 million.[19]

## Corporate liability for bribery and corruption offences

As mentioned before, since 2003, the Swiss Criminal Code provides for a specific criminal responsibility of legal entities which, when concerning financial crimes such as corruption (arts 322 *ter*, *quinquies*, *septies* (1), *octies*), is independent from the criminal responsibility of any physical person, if the organisation did not put in place all the reasonable and necessary measures to avoid the commission of one of the offences listed in the norm (art. 102 (2) SCC).

In one of its more recent sentence orders – of which the content has been made indirectly published and commented[20] – the OAG examines the organisational deficiencies that enabled the underlying offence (corruption of public foreign agents, as per art. 322 *septies* (1) SCC, in this case) to be committed.

As constitutive elements of the underlying offence of corruption of foreign public officials were met, the OAG also analysed the question of whether the three companies under investigation could be accused of a lack of organisation that enabled the corrupt acts to be committed. To determine the measures that a company should put in place to prevent corruption, the OAG referred to the rules of conduct, standards and best practices in this area, notably, the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, SECO's Guidelines on Preventing Bribery – Advice for Swiss Companies Operating Abroad and the Rules of the International Chamber of Commerce.

In light of the scale and duration of the acts of corruption, the OAG noted that, in that specific case, the analysis of the risk of corruption, the measures and processes for combatting corruption, and the controls were non-existent or inadequate. Until 2008, there was not a compliance department, the intermediaries and agents were not supervised in any way, nor had any internal directives been issued to monitor their activities. The OAG, therefore, concluded that, at the time of the events, there was not only disorganisation within the accused companies regarding the fight against corruption, but also a systematic corrupt scheme aimed at making bribe payments. These serious and multiple organisational shortcomings made it possible for the companies to commit the offences, and were common to all three companies, since they shared the same premises and, in part, the same employees and directors.

## Proposed reforms / The year ahead

At the national level, as pointed out by the Federal Council in its 2021–2024 Strategy against corruption, Switzerland shows an important lack of protection of whistleblowers, which makes the detection of corruption difficult. The employees of the Federal administration benefit from a programme of protection through the implementation of a reporting programme that guarantees their anonymity. The Canton of Geneva also implemented a similar programme. In the private sector, the duty of banks and financial intermediaries to report suspicious activities of money laundering to the MROS has undoubtfully enhanced the detection, prosecution and punishment of corruption committed in or through Switzerland. However, the private sector at large will remain the weak link in the fight against corruption as long as there is no legal protection of whistleblowing for their employees.

At the European level, the creation of the European Public Prosecutor's Office (EPPO), the EU criminal prosecution body responsible for prosecuting offences against the EU's financial interests, such as fraud, corruption and transnational VAT offences took office in 2021 and, since then, the Swiss authorities have already received several requests for mutual assistance, which have been refused for lack of a legal basis. As a consequence, Switzerland has first intensified "reflections" on how to cooperate with this new body and, finally, in December 2022, published a new piece of legislation allowing the collaboration between Switzerland and the EPPO[21] on the basis of the international mutual assistance in criminal matters legislation. This new decree entered into force in February 2023 and, if correctly used, would avoid the risk Switzerland be used for criminal purposes which is contrary to the declared Switzerland's objectives in the fight against transnational crime and its willingness in ensuring a clean financial centre.

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She represents creditors, foreign insolvency office holders and persons affected by economic crime before Swiss courts and authorities. She focuses on civil and criminal litigation, especially in the area of business crime, international judicial assistance and enforcement of foreign arbitral awards and judgments. Over the past years, she has handled a great number of international asset recovery cases which included the laying of civil and criminal attachments and the enforcement of foreign judgements. She also assisted clients in preparing and coordinating multi-jurisdictional disputes, in particular with common law jurisdictions. She has developed a strong experience in cross-border insolvency cases involving foreign bankrupt banks and fraud schemes.
She is recognised among Global Elite Thought Leaders by *Who's Who Legal* GIR's Asset Recovery Guide and by *Who's Who Legal Switzerland*. She is described as "an impressive lawyer", "a renowned specialist in the area", and "widely respected as a top-tier lawyer" who "navigates perfectly across jurisdictions and is a go-to for plaintiffs and liquidators seeking information and assets in Switzerland".

**Silvia Palomba**
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Silvia Palomba specialises in national and international criminal litigation.
Her areas of practice range from business criminal law to environmental criminal law, passing through fundamental rights. With many years of experience gained both in courts and in the field, she intervenes in high-impact international cases before national and international courts. She works alongside anyone requiring defence or representation before these bodies and is driven exclusively by the conviction that the right to defence is one of the pillars of the rule of law.
Silvia Palomba also works on projects with a high social impact and advises companies on ESG (Environment, Social and Governance) issues helping them with the development of strategies that anticipate changes in legal obligations and case law rather than reacting to them.
Before joining Ardentĕr Law, Silvia Palomba practised for five years in Geneva, worked for several non-profit and international organisations specifically dealing with civil and political rights, arbitrary detention, fair trial and UN human rights protection mechanisms.

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