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Anti-bribery & corruption: the fight goes global

Commercial Fraud Commission

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National Report of Switzerland

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1. THE LEGAL FRAMEWORK

1.1 What criminal and/or civil/administrative law(s) exist in your jurisdiction which are specifically targeted at bribery & corruption? Please provide:

a. a brief summary of the offences;

Active and passive bribery of Swiss public officials

Swiss criminal law prohibits in the first place the active bribery of Swiss public officials, which is the act by which a person offers, promises or gives a public official an undue advantage, for his own benefit or for the benefit of any third party, in order to cause that public official to carry out or to fail to carry out an act in connection with his official activity which is contrary to his duty or dependent on his discretion (Article 322ter Swiss Criminal Code (the "**SCC**")).

Passive bribery - the act by which the public official demands, secures the promise of or accepts such an undue advantage within the same circumstances - is similarly punishable (Article 322^{quater} SCC).

"*Public official*" is broadly defined as "*a member of a judicial or other authority, a public employee, an expert, translator or interpreter employed by any authority, an arbitrator or a member of the armed forces*" but the notion also includes a private person who carries out a public function. An independent engineer mandated by an authority to award public procurement contracts could thus also be included in the definition.

Active and passive bribery of foreign public officials

Switzerland recently extended the prohibition of bribery to foreign public officials by introducing the offence of active bribery of foreign public officials in 2000, and passive bribery of public foreign officials, six years later, in 2006 (Article 322^{septies} SCC).

The definition of "*foreign public official*" includes any person acting for a foreign independent state recognised as such by international public law. Persons acting for an international organisation such as the European Union would also be covered.

Granting or accepting an undue advantage

Swiss law makes a distinction between "*Bribery*" in the narrow sense, and "*Granting of an advantage*".

Like bribery, both the offer, promise or giving of an undue advantage as well as the acceptance of such an advantage is prosecuted (Article 322^{quinquies} and 322^{sexies} SCC).

Unlike bribery however, the undue advantage is not connected to a specific act or omission of the bribed public official, but is rather given or accepted in order that the public official *carries out his official duties*. While bribery is in a relationship of exchange with the undue advantage, the granting of an advantage refers to unjustified favours given or accepted without any concrete consideration in return. It includes, for example, payments which are intended to speed execution or ensure performance of administrative acts to which the payer is legally entitled (facilitation payments). It also includes undue advantage given or accepted with a general view to establish a positive climate for the future execution of official duties, even though it is not possible to connect the undue advantage with any concrete violation of the official's duty.

It is worth noting that unlike the offence of bribery, the offence of granting an undue advantage is not prohibited with regard to foreign officials. This apparent loophole has an impact on the treatment of facilitation payment outside Switzerland.

Bribery of private persons

Unlike the other corruption offences regulated in the Criminal Code, bribery in the private sector is regulated by the Unfair Competition Act (the "**UCA**"). Bribery of private persons, as opposed to bribery of public officials, presupposes a tripartite relationship in which one person connected to another by a relationship of trust and loyalty, such as an employee, an agent or a partner, receives an undue advantage from a third party in order to act or fail to act, within the context of his professional or commercial activities, in breach of his trust and loyalty duties to his employer, principal or partner (Article 4a UCA). The prohibition of private bribery aims at protecting trust and loyalty in business relationships by sanctioning the breach of private-law duties.

Since 2006, the bribed person is also punishable to the same extent as the briber.

Unlike public bribery, the mere "*granting of an advantage*" is not punishable between private parties, which means that only undue advantages which are connected to an actual breach of the recipient's trust and loyalty duties may be punishable. As a result, undue advantages given or accepted with a general view to create, maintain or improve business relations between two private parties are not punishable under Swiss law.

b. any affirmative defences that are available;

In the above-mentioned cases of public bribery, advantages are not regarded as undue when they are permitted under the regulations on the conduct of official duties or when they are negligible advantages that are common social practice (Article 322octies § 2 SCC). Small gifts may thus be regarded as lawful, as long as such a social practice may be proven in the context.

These gifts must still be considered with care. Indeed, the reference to "*social practice*" must not permit legalization of highly questionable practices but simply shows that innocent looking practices that do not tarnish the public services reputation should not be forbidden. Swiss law does not provide for a specific monetary limit that would clearly draw a line between forbidden "*undue advantage*" and allowed "*common social gift of negligible value*". While Austrian practice had set the limit at 1,000 shillings (CHF 115), a Swiss federal work group suggested in 1994 the setting up of the limit for common social gift to CHF 100. Some Swiss authors agree with this limit, while some others would fix it at CHF 300. Doctrine stresses however that this limit is relative and cannot be the only criteria taken into account. It is obvious that objective aspects (value of the good) as well as subjective aspects (perception of the good's value) must be cumulatively examined.

The situation is completely different in the private sector. As already mentioned, the granting of an advantage, as opposed to bribery in the narrow sense, is not punishable between private parties. As a result, as long as they are not intended to provoke the recipient's breach of his trust and loyalty duties, gifts, hospitality and any kind of other advantages, even undue, are not punishable under Swiss law.

c. the penalties that may be imposed upon offenders

With regards to active and passive bribery of Swiss or foreign public officials, offenders face a custodial sentence up to five years or a monetary penalty up to CHF 1,080,000.

For granting or accepting an undue advantage, the maximum custodial sentence is reduced to up to three years, while the maximum monetary penalty remains the same, *i.e.* CHF 1,080,000.

The sanction for bribery of private persons is the same: a custodial sentence up to three years or a monetary penalty up to CHF 1,080,000. Unlike the bribery of public officials, private bribery is pursued under criminal law only on a complaint.

1.2 Does your jurisdiction outlaw "private" bribery/corruption (i.e. transactions between two or more private entities or persons) as well as "public" bribery/corruption? If so, please explain how the distinction is drawn between private and public bribery/corruption.

Yes, Swiss law outlaws both public and private bribery as two distinct offences, the former regulated in the Swiss Criminal Code and the latter in the Unfair Competition Act. Please see question 1.1 above for a description of the two offences and their distinction.

It is worth mentioning in this regard that the Swiss legislator is about to modify its legislation on private bribery, in order to address, notably, the two following criticisms:

First, the fact that private bribery is until now regulated by the UCA rather than by the SCC. Indeed, its presence in the UCA implies a link between the offence and the notion of unfair competition which would not exist if the offence was in the SCC. As a result, only an act of unfair competition, which means an act likely to favor or to disadvantage a company in its struggle to acquire clients or to increase or decrease its market share, is punishable.

The second major criticism concerned the fact that the offence is only pursued on a complaint. Indeed, even though the new provision on private bribery has been in force for more that eight years, studies suggest that not one condemnation has been pronounced so far, and only a small number of cases are currently pending, which seems to indicate that the condition of a complaint is an excessive obstacle to prosecution.

In order to address those criticisms and to strengthen its legislation on private bribery, the Swiss government prepared a draft amendment to the SCC which transfers the offence of private bribery into the SCC and removes the condition of a complaint: the offence of private bribery is now proposed to be automatically pursued.

This draft was accepted by the Swiss Government in April 2014 and is currently under consultation at the Swiss Parliament.

1.3 Is your law extra-territorial? If so, in what circumstances can it be enforced if the relevant acts/omissions of bribery/corruption occur outside your jurisdiction?

Swiss law does not have, in principle, any extra-territorial effect. Indeed, Swiss criminal authorities are primarily competent to prosecute an offence when the offence has been committed in Switzerland, the place of commission being both the place where the person concerned commits the act and the place where the offence has taken effect. It is sufficient to trigger Swiss jurisdiction that the act is only partially committed in Switzerland.

Now we will see below that Swiss legal writers, confirmed by recent case law, have adopted a rather large interpretation of the "*place of commission*" notion, which results in a **relatively broad interpretation of the Swiss jurisdiction**.

If the bribe is offered or promised from one country to another (by post, e-mail, telephone or any other means of communication), Swiss legal writers consider that the act is committed at both the place where the bribing person is physically located when it offers or promises the bribe, as well as at the place where the bribed person is when he receives the offer or promise. Swiss authorities would thus have jurisdiction for every possible scenario, as long as one of the protagonist (the briber or the bribed one) is physically in Switzerland at the time when he offers or promises the bribe / receives the offer or the promise.

If the bribe is given from one country to another, the act will be first considered as having been committed at the place where the briber is physically located when it gives the payment order to his bank, irrespective of where the debited account is and even if the briber is only transiting through Switzerland and does not have otherwise any specific link with the country, as well as the place where the briber is when he receives the payment. Furthermore, Swiss legal writers also consider that the act is committed in Switzerland when a Swiss bank account has been used either to pay the bribe, or to receive it. **Switzerland may thus consider that it has jurisdiction to prosecute a briber or a bribed person when the only link with Switzerland is the existence of a Swiss bank account from which - or to which - the bribe was paid**, even though all protagonists are abroad and all negotiations took place outside Switzerland.

Finally, the offence is also considered to have been committed at the place where the briber hopes that the bribed person will act in his favour. If a person meets a Swiss public official abroad and offers him, at this occasion, a bribe to help him get a building permit back in Switzerland, Swiss criminal authorities would have

jurisdiction to prosecute the briber, even if the Swiss public official refuses the offer.

1.4 Are there any "safe harbours" or exemptions in relation to transactions that might otherwise be regarded as bribes, such as "facilitation payments", which are expressly excluded from being illegal? If so, is this determined by statute/codified law, by case law or otherwise?

The notion of facilitation payments does not exist as such in Swiss law. Therefore, **there is no exception for these payments** which must best be examined in light of the regulatory provisions described under question 1.1 above.

Since facilitation payments are made in order that the public official carries out his official duties, they would be regarded as the "*granting of an advantage*", and not as "*bribery*". If the link between the payment and the public official's activity is proven, both the payer and the official are punishable.

As already discussed above, while "*bribery*" is prohibited in relation to Swiss public officials as well as foreign public officials, the "*granting of an advantage*" is only prohibited when it relates to Swiss public officials. As a result, and unlike bribery, facilitation payments are not punishable when they occur outside Switzerland. The amount of the advantage is not important: an advantage paid to induce the agent to fulfil his duties is not covered by Swiss law, regardless of the amount of the payment.

Companies should be careful though, because such facilitation payments may be forbidden according to local laws. Moreover, since the distinction between bribery and facilitation payment is not always easy, it seems to be in the interest of enterprises to prohibit all kind of facilitation payments in their company's policy, in order to avoid any risk.

1.5 Does the financial regulatory system (i.e. the law and regulations governing the operation and conduct of banks and other financial institutions) in your jurisdiction address the topic of bribery & corruption? If so, please provide a brief summary of the obligations (including systems/controls and reporting obligations) that are imposed on banks and other financial institutions in this regard.

The Swiss financial regulatory system does not specifically adress the issues of bribery and corruption, but they are to some extent adressed by the law and regulations on money laundering.

The Federal Act on Combating Money Laundering and Terrorist Financing in the Financial Sector (the "**CMLA**") imposes on banks and other financial institutions certain control as well as reporting obligation as soon as the financial intermediary knows or has reasonable grounds to suspect that assets involved in the business relationship, notably, are connected to a criminal organisation or to the offence of money laundering.

To receive and analyse those suspicious activity reports, the CMLA creates the Money Laundering Reporting Office Switzerland (MROS), Switzerland's central money laundering office, which is an administrative unit of the Federal Office of Police (fedpol).

The MROS functions as a relay and filtration point between financial intermediaries and the law enforcement agencies. In practice, a lot of criminal proceedings, including proceedings related to bribery, start with a denunciation from the financial intermediary (*e.g.* a bank) to the MROS.

2. Corporate criminal liability

2.1 In the context of bribery/corruption, does your law recognise the concept of corporate criminal liability? E.g. can a corporate entity be found guilty of bribery?

Yes, according to Article 102, introduced in the SCC in October 2003, enterprises may also be held criminally liable under certain conditions.

2.2 If the answer to 2.1 above is "yes", please provide a brief explanation of the legal theory of corporate criminal liability (i.e. what circumstances must be established for corporate liability to arise and what form does that liability take) as well as the penalties that may be imposed upon a corporate offender.

Article 102 SCC provides for two different forms of corporate criminal liability:

The first form is a **subsidiary liability** (Article 102§1 SCC): if an offence is committed within an enterprise by an individual, within the scope of its commercial activities and in accordance with its objects, and if, due to the inadequate organisation of the enterprise, it is not possible to attribute this act to any specific natural person, then the act is attributed to the enterprise itself. The inadequate organisation must be the reason why criminal authorities could not determine which natural person actually committed the offence. Therefore, as a subsidiary

liability, enterprises may only be found guilty if no natural person may be prosecuted.

This form of corporate liability is not limited to financial offences and can theoretically be applied to any kind of offences.

The second form, much more incisive, is a **primary liability** (Article 102§2 SCC): for an exhaustive list of specific and serious offences - which include public and private bribery of Swiss and foreign public officials as well as the granting of an advantage - an enterprise may be held liable irrespective of the criminal liability of any natural person, provided it is responsible for failing to take all the reasonable organizational measures that were required in order to prevent such an offence. If a specific individual can be identified as the offender, both the offender and the enterprise may be held liable.

In both forms of liability, three cumulative objective conditions must be met:

First, the act must be committed "*within the enterprise*", which means it must be committed by an individual who has a link, either hierarchical or organisational, sufficiently close to the enterprise. The individual may be a formal or a *de facto* member of one of the enterprise's organs, a partner, or any employee, whether he exercises a directory function or not.

Secondly, the act must have been committed "*within the scope of the enterprise's commercial activities*", which means that the act must be related, even indirectly, to a market. A mere private act committed by an employee which does not have any connection with the enterprise's activities would not trigger the latter's liability.

Finally, the act must have been committed "*in accordance with the enterprise's objects*", which means that the act must be related to the enterprise's objects in such a way that it appears as a materialisation of a typical risk associated with the enterprise's activity (for example money laundering within the framework of financial intermediary's activities).

2.3 Are there any pending or expected changes to the law of corporate criminal liability in your jurisdiction? If so, please explain the proposed changes and the expected timeframe for implementation.

There are no pending or expected changes regarding the core principles of corporate criminal liabilities, but two draft amendments of related laws are currently under consultation at the Swiss parliament.

The first draft amendment concerns the Criminal Records Act ("**CRA**"). The new draft provides for the creation of a criminal record for enterprises, where the criminal judgments and the pending criminal proceedings against the latters will be registered. Tribunals will so be able to take into account the past convictions when fixing the penalty in case of subsequent convictions. Enterprises will also be able to show an extract of their criminal record to prove their good reputation in their relationships with authorities or business partners. The draft was accepted by the Swiss government in June 2014 and sent to the Parliament, which has now to debate on its adoption.

The second draft concerns the "*whistleblowing*". The proposed draft fixes the conditions regulating the report, by an employee, of suspected wrongdoings at work. It gives priority to internal reports: in principle (exceptions exist), the report will be considered licit only if the employee has addressed his report to his employer first, then to authorities, and only as last resort to the public. The employer is thus given the opportunity to remedy the identified defects itself. The draft was accepted by the Swiss government in November 2013 and sent to Parliament for debates and adoption, but the parliamentary commission in charge of the first review of the draft suggested in November 2014 to send the draft back to the Swiss government for a redrafting in a more simple and understandable way.

3. Mutual legal assistance / Co-operation

3.1 Is your jurisdiction a signatory to any bi-lateral or multi-lateral treaties or other instruments regarding mutual legal assistance / co-operation in the context of bribery & corruption? If so, which ones?

Switzerland is a member of the following instruments:

- OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions;
- Criminal Law Convention on Corruption of the Council of Europe;
- Group of States against Corruption (GRECO);
- UN Convention against corruption.

3.2 Are the regulatory/prosecution authorities in your jurisdiction parties to any formal or informal co-operation arrangements with equivalent authorities in other jurisdictions (e.g. a memorandum of understanding, etc.)? If so, please provide a brief summary of the arrangements and the other authorities/jurisdictions.

Since Switzerland does not have a specific regulatory authority responsible for bribery issues, there is no such co-operation arrangement with equivalent authorities.

4. Cases

4.1 Please describe in brief three (3) cases of bribery/corruption in (or involving) your jurisdiction which illustrate the trend towards cross-border/global investigation and enforcement of anti-bribery laws. For example, cases where:

a. your jurisdiction's law(s) were enforced on an extra-territorial basis;

b. there was a degree of cooperation/assistance provided by your jurisdiction to another jurisdiction, or vice versa; and/or

c. penalities were imposed by your jurisdiction as well as by other jurisdictions, in relation to the same set of facts.

Despite the important tightening of its legislation on bribery and corruption, Switzerland has not seen a noticeable increase in cases judged. The most important and interesting case in the last years remains the Alstom case.

Proceedings against Alstom Network (Alstom Switzerland)

In November 2011, the Swiss Office of the Attorney Geneneral (the "**OAG**") issued a summary punishment order against Alstom Network Schweiz AG ("**Alstom Network**") for having failed to take all necessary and reasonable measures to prevent the bribery of foreign public officials in Latvia, Tunisia and Malaysia.

Alstom, with its head offices in France, is a group with a global presence and a leading position worldwide in the energy, transport and power generation industry. Due to its areas of activities, Alstom's clients are mostly States or public authorities. As many other group active in these industries, Alstom had a longstanding tradition of appointing consultants, in particular to secure projects in foreign countries. The usual arrangement with those included the payment of success fees if the contract was awarded to Alstom.

From 2000 onwards, Alstom decided to centralize its internal proceedings for these consultancy agreements for its various worldwide business units within one department in Paris and founded two companies, among which Alstom Network in

Switzerland, to centralize the execution of the compliance procedures and payments in connection with those consultancy agreements.

The two-year investigation, which included the search and the seizure of documents in Alstom Network's offices as well as the submission of numerous requests for mutual legal assistance to foreign criminal prosecution authorities, established that consultants mandated by Alstom on the basis of the above-mentioned consultancy agreements had forwarded considerable part of their success fees to foreign public officials in Latvia, Tunisia and Malaysia, and thereby had influenced the latter in favour of Alstom.

In its summary punishment order, the OAG noted that if Alstom had a compliance programme which was correct in principle and suitable for preventing corruption, the latter was inadequately implemented, that the compliance unit was not sufficiently staffed nor sufficiently trained and questioned whether the compliance unit was sufficiently independent from the group's sales interests since it was functionally attached to a business unit and was also responsible to support the employees during their sales work.

Based on these considerations, the OAG concluded that Alstom Network had failed to meet the standards for an international group employing over 75,000 persons worldwide, as a result of which it was impossible for Alstom Network to prevent instances of corruption. The OAG pronounced a fine of CHF 2.5 million for having failed to take all reasonable measures required by article 102§2 SCC, and found Alstom Network liable to pay CHF 36.4 million equivalent to the benefits earned from the corruptly-obtained contracts.

Proceedings against Alstom France

Interestingly, the OAG decided to reach out to the French parent enterprise and bring proceedings against it too. The OAG was of the opinion that Alstom France was partly responsible for the lack of adequate organisation identified in the Swiss subsidiary. These proceedings were however eventually dismissed, based on Alstom France's effort of reparation (Alstom France paid CHF 1 million as reparation which were then transferred to the International Committee of the Red Cross, demonstrated willingness to cooperate and considerably improved its internal compliance procedures before and after the launching of the investigations).

Nevertheless, this case shows that Swiss authorities do not hesitate to reach out to foreign offenders when the act has been partially committed in Switzerland, even if this link is relatively loose.

Proceedings against Zine El-Abidine BEN ALI and his clan

Since 2011, Tunisian authorities have initiated various criminal proceedings against Tunisia's ex President Zine El-Abidine Ben Ali and several members of his clan suspected to have participated to acts assimilable to misconduct in public office, bribery, money laundering or participation to a criminal organisation.

In this context, the Republic of Tunisia has sent to Swiss authorities various requests for international mutual legal assistance in criminal matters demanding, in particular, the attachments of Swiss bank accounts owned by the ex President and/or his close relatives as well as information relating to those accounts.

In parallel to the opening of international mutual legal assistance proceedings triggered by those requests, Swiss criminal authorities almost systematically opened pure national criminal proceedings against the persons and entities concerned by thoses proceedings, in particular for passive bribery of a foreign official and money laundering. As explained above indeed, Switzerland considers that the existence of a Swiss bank account to which the bribe was paid is sufficient to trigger its jurisdiction to prosecute the suspect, even though all protagonists are abroad and all negotiations took place outside Switzerland, as it happened in this case.

To our knowledge, the investigations are still pending and no final decision has been taken yet in relation to those various cases.

Nevertheless, the proceedings against Zine El-Abidine BEN ALI and his clan are a good example of the willingness of the Swiss criminal authorities to take on cases of bribery and money laundering of an essentially international nature, as soon as Swiss bank accounts are involved.