Have there been any recent changes in the enforcement of anti-corruption regulations?

On July 1 2016 new rules regarding bribery in the private sector entered into force. The new legislation aims to provide a more effective legal framework for the prosecution of bribery in the private sector in view of Switzerland's globalised economy and the numerous international sports associations that are headquartered in Switzerland.

Private sector bribery is now codified as an offence in the Criminal Code. The newly introduced penal provisions are generally categorised as public offences; only in minor cases will an injured party's complaint continue to be a requirement for prosecution. In addition to the codification of new offences in the private sector, broader provisions have been introduced regarding the bribery of public officials. Going forward, bribery will also constitute a criminal offence in cases where a bribe has been paid not to a public official, but to a third party, such as a sports association.

It remains to be seen what practical impact the recent legislative changes will have on the prosecution of private sector bribery in Switzerland.

Are there plans for any changes to the law in this area?

A proposed legislative amendment protects whistleblowers, so that they can report incidents without fear of repercussions from their employers.

Which authorities are responsible for investigating bribery and corruption in your jurisdiction?

Due to Switzerland's federal structure, the state (cantonal) or federal authorities may have jurisdiction to investigate and prosecute bribery and corruption offences (Article 22 et seq of the Criminal Procedure Code), depending on the specific circumstances of the case – such as where the alleged bribery was committed. Bribery offences committed by a member of the authorities or an employee of the Swiss Confederation, or against the Swiss Confederation, are subject to federal jurisdiction (Articles 23(a) and (j) of the Criminal Procedure Code), as are offences which have been committed to a substantial extent abroad or in two or more cantons with no single canton being the predominant centre of the criminal activity (Article 24(1) of the Criminal Procedure Code).

While the Office of the Attorney General investigates bribery offences that are subject to federal jurisdiction, all other bribery investigations are handled by the relevant cantonal law enforcement authorities.
What are the key legislative and regulatory provisions relating to bribery and corruption in your jurisdiction?

The offences of bribery of public officials and bribery in the private sector are codified in the Criminal Code (Articles 322ter and 322decies). The offence of private commercial bribery in the context of the distortion of competition is codified in Article 4a of the Act against Unfair Practices.

What international anti-corruption conventions apply in your jurisdiction?

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

- The 34 Organisation for Economic Cooperation and Development (OECD) nations and Argentina, Brazil, Bulgaria, Russia, Colombia, Latvia and South Africa have signed the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions 1997. Signatory states have amended their legislation to make the bribery of foreign public officials a punishable offence. A far-reaching monitoring programme established under the convention ensures that its provisions are enacted and enforced in all signatory states.
- In 1999 the Criminal Law Convention on corruption was passed under the auspices of the Council of Europe. The convention's substantive provisions go beyond the OECD convention in so far as they prescribe the general minimum requirements for criminal law provisions required to fight private and public corruption. Switzerland acceded to the Criminal Law Convention and its 2003 Additional Protocol (both ratified on March 31 2006) and joined the Council of Europe’s Group of States against Corruption in 2006.
- The UN Convention against corruption was signed by more than 140 countries, including Switzerland, in December 2003 and came into force in 2005. It differs from the OECD and Council of Europe conventions due to its universal nature and the inclusion of provisions requiring the restitution of funds acquired through illegal and corrupt practices. The UN Convention was ratified by Switzerland in September 2009.

Further, Switzerland is a party to various bilateral treaties in matters of mutual assistance that facilitate the seizure, confiscation and repatriation of the proceeds of crimes (including corruption). It has also ratified the 1990 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of Proceeds of Crime.

What are the key corruption and bribery offences in your jurisdiction?

The key corruption and bribery offences are regulated in Title 19 of the Criminal Code. It contains the following corruption and bribery offences:

- Article 322ter (bribery of Swiss public officials) – offering, promising or giving an undue advantage to a Swiss public official or third party in order to cause the public official to carry out or fail to carry out an act in connection with his or her official activity which is contrary to his or her duty or dependent on his or her discretion.
- Article 322quater (bribery of Swiss public officials or the acceptance of bribes) – demanding, securing the promise of or accepting, as a Swiss public official, an undue benefit personally or for a third party in order to carry out or fail to carry out an act in connection with official activity which is contrary to duty or dependent on discretion.
- Article 322quinquies (bribery of Swiss public officials or granting a benefit) – offering, promising or providing an undue benefit to a Swiss public official or third party so that he or she carries out official duties.
- Article 322sexies (bribery of Swiss public officials or acceptance of a benefit) – demanding, securing the promise of or accepting an undue benefit, as a Swiss public official or for a third party, in order to carry out official duties.
Article 322septies (bribery of foreign public officials or bribery) – offering, promising or granting an undue benefit to a public official, who is acting for a foreign state or an international organisation, or to a third party in order to cause the public official to carry out or fail to carry out an act in connection with his or her official activity which is contrary to his or her duty or dependent on his or her discretion.

Article 322septies (bribery of foreign public officials or acceptance of bribes) – demanding, securing the promise of or accepting an undue benefit, as a public official acting for a foreign state, international organisation or third party, in order to carry out or fail to carry out an act in connection with his or her official activity which is contrary to his or her duty or dependent on his or her discretion.

Article 322octies (bribery of private individuals or bribery) – offering, promising or granting an undue benefit to an employee, agent, partner or other auxiliary of a third party, in connection with such person’s professional or commercial activity on behalf of the third party, in order to have such person carry out or fail to carry out an act contrary to the activity or within the person’s professional discretion (ie, so-called ‘active’ private sector bribery).

Article 322novies (bribery of private individuals or accepting bribes) – soliciting or accepting an undue benefit for personal gain or for a third party (ie, so-called ‘passive’ private sector bribery).

Individuals and companies can be held liable for bribery of a foreign official. If a company fails to take all reasonable organisational measures necessary to prevent bribery offences, it can be convicted pursuant to Article 102(2) of the Criminal Code, irrespective of any criminal liability attaching to natural persons.

Hospitality restrictions

Are specific restrictions in place regarding the provision of hospitality (eg, gifts, travel expenses, meals and entertainment)? If so, what are the details?

Switzerland

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The Criminal Code expressly stipulates that any advantage which is permitted under public employment law or contractually approved by a relevant third party, and any low value advantage commonly conferred in social practice, does not constitute an undue advantage under Article 322decies. For example, gifting flowers as recognition for a speech given at a seminar is generally considered to be socially accepted and common practice. However, invitations to lunch or dinner at expensive restaurants or offers of any type of entertainment may not be considered to be socially accepted and common practice and thus qualify as bribery or granting an undue advantage.

Facilitation payments

What are the rules relating to facilitation payments?

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Facilitation payments (ie, undue payments made to induce public officials to perform acts that they must perform as part of their official duties and which involve no exercise of discretion) made to Swiss public officials fall under the acceptance of an advantage and are therefore prohibited. In contrast, facilitation payments to foreign public officials do not fall within the scope of the Criminal Code’s anti-corruption offences.

Liability

Scope of liability

Can both individuals and companies be held liable under anti-corruption rules in your jurisdiction?

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Articles 322ter to 322decies of the Criminal Code were primarily conceived to apply to individuals.

However, in addition to the liability of individual perpetrators, Article 102 of the Criminal Code also establishes ancillary corporate criminal liability. If an employee commits bribery, the company may be subject to prosecution.
The company will be penalised in addition to the individual perpetrators who committed ‘active’ bribery if it is found to have failed to take the reasonable organisational measures necessary to prevent the bribery being committed (Article 102(2) of the Swiss Criminal Code).

The company may be penalised only for ‘passive’ bribery (ie, soliciting or accepting an undue benefit for personal gain or for a third party) if the individual perpetrators who committed the offence cannot be identified and the company is found to have failed to take the reasonable organisational measures necessary to identify the perpetrators (Article 102(1) of the Criminal Code).

The newly enacted Article 322octies of the Criminal Code (relating to private sector bribery) significantly increases the probability that active private sector bribery will be prosecuted and exposes companies to a greater risk of prosecution if they fail to take sufficient measures to prevent bribery. The organisational measures required by Article 102(2) of the code are not defined in law. However, it will be insufficient for companies merely to publish internal rules on compliance (eg, in a code of conduct). Instead, companies are expected to offer training to employees and introduce adequate control processes and internal avenues to report improper conduct (eg, whistleblower hotlines).

Can agents or facilitating parties be held liable for bribery offences and if so, under what circumstances?

Agents and facilitating parties are liable under the Criminal Code if they commit a bribery offence or assist the main perpetrator of the bribery offence.

Any individual or legal entity standing behind the agent or facilitating party may also be held liable if the agent or facilitating party acted on its instruction or if the instructing individual or legal entity should reasonably have known about the bribery.

Can foreign companies be prosecuted for corruption in your jurisdiction?

Foreign companies can be prosecuted in Switzerland provided that a factual nexus connects the matter to Switzerland and establishes Swiss jurisdiction. A bribery offence being committed through the Swiss branch of a foreign company or bribes being transferred through bank accounts located in Switzerland are generally considered by the Swiss authorities to create a sufficient factual nexus to Switzerland.

The provisions on corporate criminal liability, together with the offence of bribing a foreign official, confer broad jurisdiction on the Swiss judicial authorities and extraterritorial jurisdiction in cases where the only factor connecting the offence to Switzerland is the lack of adequate corporate organisation (Article 102 of the Criminal Code). In a recent case against the French-based company Alstom Group, Alstom Switzerland was held criminally liable for failing to prevent the bribery of foreign officials and convicted for bribing foreign officials. Although eventually only the Swiss-based company Alstom Switzerland was fined, the Swiss authorities also conducted their investigation against Alstom in France, regardless of the fact that the parent company’s registered office was outside Switzerland and all bribes were paid outside Switzerland. The Swiss authorities claimed extraterritorial jurisdiction over the French parent company on the basis that failure to implement adequate organisational measures had occurred at least partially in Switzerland.

Whistleblowing and self-reporting

Are whistleblowers protected in your jurisdiction?

There is no legal duty for companies in Switzerland to establish whistleblower hotlines. However, corporate liability pursuant to Article 102(2) of the Criminal Code has the effect that – in addition to the primary perpetrator – the employing company...
may also be penalised for the offence if it “can be held responsible for failing to take all the organizational measures that were reasonably required in order to prevent such an offence”.

Further, in mid-2015, the Federal Police implemented a web-based (external) reporting platform which allows the general public to report information directly on criminal acts of corruption and to do so anonymously if desired. The anonymity of the person reporting the information is guaranteed. The reported information is reviewed for criminal relevance and, if necessary, forwarded for investigation to the relevant department within the Federal Criminal Police or to the competent external authority (eg, the cantonal police).

However, under Swiss law, whistleblowers expose themselves to civil and criminal penalties. Apart from some limited exceptions, there are no laws protecting whistleblowers.

In employment law, employees are generally required to report to their employer internally before reporting any grievances to the authorities and may inform the public of misconduct only as a last resort. Further, the Swiss courts regularly treat disclosing confidential information to the public as a criminal offence, such as breaching manufacturing or business secrecy (Article 162 of the Criminal Code) or banking secrecy (Article 47 of the Banking Act).

The Federal Council has recently proposed inserting a new provision in the Code of Obligations which would allow whistleblowers to report misconduct to the authorities without breaching their duties to their employer, so long as they internally report the matter to their employer first. Further, it has also proposed adding whistleblowing to the Criminal Code’s statutory grounds of justification. This would protect whistleblowers from being held criminally liable for reporting misconduct. However, it is unclear whether and the extent to which these proposals will come into force.

Self-reporting

Is it common for leniency to be shown to organisations that self-report and/or cooperate with authorities? If so, what process must be followed?

There is no statutory duty in Swiss law for companies to report violations of anti-bribery laws and relating accounting irregularities. However, there are general reporting obligations relating to legal, compliance, reputational and operational risks in certain regulated sectors. The Federal Act on Combating Money Laundering and Terrorist Financing also imposes obligations on financial intermediaries to notify the authorities of suspected money-laundering activities.

Dispute resolution and risk management

Pre-court settlements

Is it possible for anti-corruption cases to be settled before trial by means of plea bargaining or settlement agreements?

Bribery cases may be resolved through the following mechanisms:

- **Accelerated procedure** – under Article 358 of the Criminal Procedure Code, an accused and the prosecutor can agree on an ‘accelerated procedure’. An accelerated procedure allows accused companies or individuals to negotiate a plea bargain with the prosecutor. The decision to use the accelerated procedure is up to the prosecutor. If the parties agree, the accused party must admit all facts necessary to secure a conviction. The prosecutor will then serve an indictment on the accused, including the sentence to be imposed. If the accused party accepts the indictment, the presiding court will review the terms of the indictment in a hearing and make a final decision on the matter. If the parties cannot agree, all documents provided by the companies or the individuals within the accelerated procedure will be destroyed and cannot be used within the ordinary criminal procedure. The acting prosecutor who negotiated the plea bargain will also be barred from acting in the ordinary criminal procedure.
- **Minor relevance** – in the case of minor relevance under Article 52 of the Criminal Code, accused companies and individuals may be exempted from punishment or the proceedings may be discontinued.
- **Reparation** – pursuant to Article 53 of the Criminal Code, the competent authority will refrain from prosecuting, bringing to court or punishing a committed offence if:
  - the offender has made reparation for the loss, damage or injury or made every reasonable effort to right the wrong that it has caused;
  - the authority considers that an unsuspended sentence is unnecessary to deter the offender from committing
further offences; and

- the interests of the general public and persons harmed in the prosecution are negligible.

Particularly with bribery offences committed by companies or organisations, it is common for a proportionate amount of money to be paid in reparation to a charitable organisation or other legal entity acting in the public interest. In practice, the company or organisation will make such payment after discussions with the competent authority.

- Summary penalty order procedure – a summary penalty order is a procedure without trial (Article 352 of the Criminal Procedural Code). Under this procedure, the prosecutor can issue a penalty order which the accused party can accept or challenge within 10 days. If challenged, the matter proceeds to trial before the criminal court. If accepted, the penalty order becomes the final judgment in the matter. The proceedings are not public. In contrast to the accelerated procedure, the summary procedure's issues are not publically disclosed if an accused chooses not to challenge the penalty order. Although originally designed to address petty crimes, this procedure has been increasingly used to deal with large corporate crime cases.

Swiss anti-corruption law does not provide for credit or leniency during an investigation. However, the cooperative behaviour of an accused individual or company may be taken into account when determining a sentence.

Are any types of payment procedure exempt from liability under the corruption regulations in your jurisdiction?

**Switzerland**

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Article 322 decies (1) of the Criminal Code incorporates elements of two provisions (Article 322 octies (2) of the Criminal Code and Article 4a(2) of the Act Against Unfair Practices) to exclude from the ambit of an undue advantage:

- accepting or conferring advantages which conform with public service regulations or have been contractually approved; and
- socially accepted advantages of negligible value.

It is recommended that clear guidance is provided on what qualifies as the acceptable conferral and acceptance of financial advantage in binding regulations (eg, in an employment contract or code of conduct). The acceptance or conferral of advantages to which an employee is entitled (eg, discounts or loyalty rewards) do not fall within the new criminal provisions.

What other defences are available and who can qualify?

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Not applicable.

What compliance procedures and policies can a company put in place to assist in the creation of safe harbours?

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Article 102(2) of the Criminal Code exposes companies to a significant risk of prosecution if they fail to take sufficient measures to counter the risk of bribery. Companies are advised to review their internal policies and regulations to ensure that they meet the requirements for adequate internal organisation under Article 102(2) of the Criminal Code.

Companies may be required to update their internal codes of conduct, in addition to:

- introducing employee training;
- implementing specific control processes;
- establishing internal avenues for reporting improper conduct (eg, whistleblower hotlines); and
- enhancing contracts for the provision of goods and services.

Companies may also consider the upcoming International Standardisation Organisation (ISO) Standard 37001 on anti-
bribery management systems, which is expected to be published in late 2016. An ISO certificate under Standard 37001 will not necessarily be sufficient to ring-fence all risks and liability, but would be an additional and effective tool to protect the company and its management and board members from criminal conviction or breaches of fiduciary duty.

**Record keeping and reporting**

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<tr>
<th>What legislation governs the requirements for record keeping and accounting in your jurisdiction?</th>
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<tr>
<td>Switzerland</td>
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<td><strong>Bär &amp; Karrer</strong></td>
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<tr>
<td>Record keeping and accounting obligations are mainly addressed in the Code of Obligations (Articles 957 et seq). The acceptable standards are the:</td>
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<tr>
<td>- International Financial Reporting Standards (IFRS);</td>
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<td>- IFRS for small and medium-sized enterprises;</td>
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<td>- Swiss generally accepted accounting principles (GAAP);</td>
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<td>- US-GAAP; and</td>
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<tr>
<td>- the International Public Sector Accounting Standard for public sector entities. Special rules apply in regulated sectors (e.g., financial services).</td>
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<td>Articles 727 et seq of the Code of Obligations on external auditors apply to all entities regardless of their legal organisation and state a general duty to appoint external auditors. Further, Article 716a of the Code of Obligations states that the board of directors of a Swiss stock corporation bears responsibility for the organisation of the accounting, financial control and financial planning systems as required for the proper management of the company and must also supervise the persons entrusted with managing the company.</td>
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<th>What are the requirements for record keeping?</th>
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<td><strong>Bär &amp; Karrer</strong></td>
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<tr>
<td>All legal entities, sole proprietorships and partnerships which have achieved sales revenues of at least Sfr500,000 in the past financial year must keep accounts and file financial reports in accordance with Articles 957 et seq of the Code of Obligations. More specifically, the accounting records and vouchers, together with the annual and audit report, must be retained for 10 years (Article 958f of the Code of Obligations).</td>
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**Reporting**

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<th>What are the requirements for companies regarding disclosure of potential violations of anti-corruption regulations?</th>
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<td>Switzerland</td>
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<td><strong>Bär &amp; Karrer</strong></td>
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<tr>
<td>There is no statutory reporting duty regarding violations of anti-bribery laws and relating accounting irregularities under Swiss law. However, in regulated sectors (e.g., financial services) there are general reporting duties regarding legal, compliance, reputational and operational risks. Further, financial intermediaries must notify the authorities if they suspect money-laundering activities, pursuant to the Federal Act on Combating Money Laundering.</td>
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**Penalties**

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<th>What penalties are available to the courts for violations of corruption laws by individuals?</th>
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<td>Switzerland</td>
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Bribing a Swiss or foreign public official (Articles 322ter and 322septies of the Criminal Code) is considered a felony under Swiss law. The court can sentence the convicted individual to a custodial sentence not exceeding five years or receive a monetary penalty of up to Sfr1,080,000. Further, the penalty may include:

- prohibitions on practising a profession (Article 67 of the Criminal Code);
- publication of the judgment (Article 68 of the Criminal Code); and
- the administrative penalty of deportation from Switzerland for foreigners (Articles 62(b) and 63(1)(a) of the Federal Act on Foreign Nationals).

Individuals found guilty of bribing private individuals (Articles 322octies and 322novies of the Criminal Code) may be sentenced to a custodial sentence of up to three years or receive a monetary penalty of up to Sfr1,080,000.

Individuals found guilty of giving or accepting undue advantages contrary to Articles 322quinquies to 322sexies of the Criminal Code may be sentenced to a custodial sentence of up to three years or financial penalty of up to Sfr1,080,000.

Companies or organisations

What penalties are available to the courts for violations of corruption laws by companies or organisations?

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The courts can issue a company or organisation with a fine of up to Sfr5,000,000 for violating the anti-corruption provisions in Article 102(1) of the Criminal Code. In fixing the fine, the court will assess:

- the seriousness of the violation;
- the severity of the organisational inadequacies and the loss or damage caused; and
- the means of the company or organisation.

In addition to the sentence imposed for violating anti-corruption provisions, the court may also order the forfeiture of assets acquired through the bribery offence (Article 70 of the Criminal Code). If the assets are no longer available, the court may order compensation of the equivalent value to be paid to the state. While fines are capped at Sfr5,000,000, there is no limit on the value of assets that may be subject to forfeiture. Consequently, the financial risk for a company is considerably higher if this penalty is applied.

Law stated date

Correct as of

Please state the date as of which the law stated here is accurate.

Switzerland

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July 1 2016.