

Bribery and Corruption in Switzerland: A Summary

Legal Framework

Businesses dealing with bribery and corruption face challenges in identifying and investigating irregularities. They must ensure adequate reporting tools and centralize reporting of significant incidents, and they may need to rely on external specialists and legal counsel. Balancing uncovering irregularities with protecting legal interests poses further complexities in criminal investigations.

Switzerland has strict criminal laws against corruption, covering bribery in public and private sectors. The Swiss Criminal Code (SCC) addresses these offenses, and administrative rules also regulate hospitality, travel, entertainment expenses, and public procurement to prevent bribery.

The Office of the Attorney General of Switzerland (OAG) investigates bribery and corruption involving federal authorities, cases that occur abroad, and those that involve multiple cantons without a clear focus on one. For all other instances, the public prosecutor's office (PPO) of the relevant canton in Switzerland is responsible for investigating bribery and corruption.

The law differentiates between active and passive bribery. Active bribery involves offering, promising, or granting an undue advantage for the commission or omission of an act contrary to duties. Passive corruption occurs when a person solicits, promises, or accepts a disproportionate advantage for their benefit or a third party's benefit for the commission or omission of an act contrary to their duties. The act must relate to official activities in the public sector, and in the private sector, it must relate to professional or business activities. The giving or accepting undue advantages to Swiss public officials, not in exchange for a specific official act but given the execution of official duties, constitutes an offense. However, some advantages are allowed, such as small Christmas presents or modest entertainment in line with social customs.

The Swiss Criminal Code (SCC) defines bribery of public officials, foreign public officials, and private individuals separately. It broadly defines public officials as officials and employees of public administrative authorities or authorities for the administration of justice, as well as other individuals fulfilling a public function for Switzerland, a foreign state, or an international organization. Swiss law applies a functional notion to determine who qualifies as an official, which may include employees of state-owned or state-controlled enterprises. Bribery of public officials and private persons is prosecuted ex officio, except in minor cases of private bribery, which require a request from the injured party for prosecution.

International cooperation

Recently, authorities have increased cooperation with foreign counterparts, particularly in major corruption cases. This aims to streamline international prosecutions and prevent overlapping investigations. The OAG supports

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legal assistance for foreign prosecutions involving Swiss individuals, followed by domestic prosecution. Efforts are underway to introduce deferred prosecution agreements or similar mechanisms into Swiss law, following OECD recommendations. However, these efforts are in the early stages.

Criminal Liability

In Switzerland, individuals are primarily responsible for criminal liability. However, in cases of bribery involving public officials and commercial bribery, companies can also be held criminally liable if they fail to implement adequate organizational measures to prevent bribery offenses. This failure to establish an effective compliance organization can be considered a criminal offense, with no specific requirements outlined. Instead, corporate entities and state authorities typically follow established international standards for compliance programs.

Anyone harmed by bribery can sue for damages under tort or contract laws and seek the return of unlawfully gained profits. Additionally, a company can reclaim bribes paid to an employee.

Bribery of Swiss or foreign public officials can result in up to five years in prison or a fine of up to CHF 540,000 for individuals. Commercial bribery carries a maximum penalty of three years in jail or a fine of up to CHF 540,000. Companies may face fines of up to CHF 5 million, and profits obtained through bribery can be recovered under the law.

Swiss law currently does not allow for Deferred Prosecution Agreements, and despite initial support from the Office of the Attorney General, attempts to introduce them failed in 2019. Efforts to teach them are currently in the early stages.

Public prosecutors can end criminal investigations if the perpetrator has compensated for any harm caused. This option now only applies to minor cases of little public interest and requires a guilty plea, making it unattractive for businesses. Additionally, special procedures like penalty orders or abbreviated proceedings can be used, where the accused admits guilt and agrees on a sentence with the public prosecutor. The OECD has criticized these procedures for their lack of deterrent effect due to mild sanctions and limited transparency. Despite the criticism, the Office of the Attorney General continues to use these procedures to resolve major international bribery investigations.

Swiss officials are subject to administrative laws limiting hospitality, travel, and entertainment spending. These laws are only partially consistent. There are no specific regulations for the expenses of foreign public officials in Switzerland, but foreign laws may contain such provisions. Swiss courts would evaluate any expenses to determine if they are likely to influence the foreign public official unduly.

In the past, Switzerland lacked specific regulations regarding financing political parties and election campaigns, except at the cantonal level, which drew criticism from international organizations. However, Switzerland has recently introduced legislation requiring the disclosure of political contributions. The new rules mandate that political parties, independent federal parliamentarians, and parliamentary candidates disclose certain information, including significant donations and contributions to elections and popular vote campaigns. While these rules mark a substantial change in Swiss political culture, they are limited in scope and still need to catch up to the regulations of many other countries.

Facilitation payments are not explicitly regulated but may violate rules against granting or accepting undue advantages. Therefore, if they involve Swiss public officials, such costs are likely to be considered offenses.

Compliance with anti-corruption and bribery laws

The Swiss State Secretariat for Economic Affairs (SECO) has issued guidelines for complying with anti-corruption and bribery laws. These guidelines recommend a robust compliance program, including organizational, staff, and management measures and supervisory measures to prevent bribery. Failure to adhere to this guidance strongly indicates a defective organization.

In Switzerland, whistle-blower protection is limited, except for some federal public employees. Employees must first report wrongdoing internally and only go to authorities as a last resort. Failing to follow these steps can lead to legal consequences and dismissal. The current system for private sector whistle-blowers has faced criticism, but attempts to update it have been unsuccessful.

Government investigations into bribery have increased in recent years, especially after international cases like the Odebrecht investigation. While domestic bribery cases are rare in Switzerland, most cases involve international aspects due to the country's strong international focus. However, prosecution levels are often seen as low. Many bribery cases also raise anti-money laundering issues because of Switzerland's strong finance industry. Unless corruption also occurred in Switzerland, corruption proceedings are usually not open in such cases.

Decisions and measures by the police, public prosecutors, and first-instance courts can be appealed to a cantonal court or the Lower Appeals Chamber of the Federal Criminal Court for federal cases. Cantonal court judgments can be appealed to a cantonal court of appeals, while decisions from the Federal Criminal Court's Criminal Chamber can be appealed to the Higher Appeals Chamber. Appellate courts review orders and judgments for legal errors, denial of justice, incorrect determination of facts, and improper discretion. Appeals against minor offense convictions can only be reviewed for legal errors or fact discrepancies, and no new facts can be introduced. Anyone involved in appeal proceedings can appeal to the Federal Supreme Court if there is a legally significant interest. The Supreme Court reviews appeals for legal errors and incorrect factual findings. Appellate courts may rectify injustice or send the issue back to the lower court for a new decision.

The legal privilege under Swiss law protects information exchanged with lawyers acting professionally. It also covers accountants and forensic specialists working with the lawyer. This protection applies to Swiss attorneys and EU lawyers authorized to practice in Switzerland. Documents involved in communication between a person or business and external counsel do not have to be disclosed or seized in civil, criminal, or administrative proceedings. However, in-house counsel communications are not privileged under Swiss law. It's important to note that legal privilege does not extend to tasks outsourced to external counsel if the underlying legal obligation belongs to the company itself, specifically in compliance matters related to anti-money laundering laws. Therefore, internal investigation reports analyzing breaches of anti-money laundering provisions are not considered legally privileged.