



**COUNTRY
COMPARATIVE
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Switzerland

BRIBERY & CORRUPTION

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This country-specific Q&A provides an overview of bribery & corruption laws and regulations applicable in Switzerland.

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SWITZERLAND

BRIBERY & CORRUPTION



1. What is the legal framework (legislation/regulations) governing bribery and corruption in your jurisdiction?

Switzerland has tight criminal laws on corruption, which sanction active and passive bribery of Swiss and foreign public officials as well as active and passive commercial bribery in the private sector. All offences are included in the Swiss Criminal Code (SCC). Additionally, administrative law includes rules on hospitality, travel and entertainment expenses, as well as provisions on public procurement aimed at preventing bribery and corruption.

2. Which authorities have jurisdiction to investigate and prosecute bribery in your jurisdiction?

Bribery and corruption are investigated by the Office of the Attorney General of Switzerland (OAG) if they are committed by or against federal authorities, substantially committed abroad or committed in several cantons if there is no unambiguous focus on one canton. In all other cases, the public prosecutor's office (PPO) of the competent canton in Switzerland is responsible for investigating bribery and corruption.

3. How is bribery defined?

The law distinguishes between active and passive bribery. Active bribery is an act whereby an undue advantage is offered, promised or granted for the commission or omission of an act that is contrary to duties or depends on the exercise of discretion. Passive bribery occurs when a person solicits, elicits a promise of or accepts an undue advantage, for his or her own benefit or for the benefit a third party, for the commission or omission of an act that is contrary to his or her duties or depends on the exercise of his or her discretionary powers. In the public sector, the act must relate to official activity; in the private sector, it must relate to the professional or business activity.

Additionally, with regard to Swiss public officials, the giving or accepting of undue advantages (gifts) that are offered, promised or granted not in exchange for a specific official act, but rather with a general view to the future execution of official duties, constitutes an offence. This covers payments intended to maintain relationships and facilitation payments. However, advantages are not undue if they are allowed by staff regulations or when they are of minor value or in line with social customs. Examples for such permitted advantages are customary small Christmas presents to post office clerks, police officers or similar, modest entertainment of public officials on the occasion of a business meeting, or an appreciation gift for firefighters following their assistance.

4. Does the law distinguish between bribery of a public official and bribery of private persons? If so, how is 'public official' defined? Are there different definitions for bribery of a public official and bribery of a private person?

The SCC distinguishes between bribery of public officials, foreign public officials and private individuals. Public officials within the meaning of the bribery and corruption provisions are officials and employees of a public administrative authority or of an authority for the administration of justice as well as officially appointed experts, translators or interpreters, arbitrators or member of the armed forces, and any individuals fulfilling a public function for Switzerland, a foreign state or an international organization. Hence, under Swiss law a very broad definition of 'public officials' applies, which includes categories of individuals that may not be considered government officials elsewhere, potentially including in particular employees of state-owned or state-controlled enterprises. In practice, the Swiss courts as well as the OAG and PPO apply a very broad interpretation when assessing who qualifies as an official. The authorities rely on a 'functional' notion, based on which anyone in a position to influence business dealings with states or state-owned or

controlled entities is deemed to be a foreign official. This is particularly relevant in the context of bribery of foreign officials. In principle, the same rules apply to the bribery of public officials and private persons. The offence consists in offering, promising or giving an individual an advantage for an act or omission that is contrary to his or her duties or within his or her discretion. In addition, a connection between the granting of the advantage and the official function or, in case of private bribery, a connection to the employment or business activity is required. However, the giving or accepting of undue advantages given not in exchange for an act or omission in breach of a duty or a discretionary decision is not an offence in the private sector. Bribery of public officials and private persons are prosecuted ex officio, with the exception of minor cases of private bribery that are only prosecuted upon the request of an injured party.

5. What are the civil consequences of bribery in your jurisdiction?

In principle, anyone who is injured in their economic interests by bribery can sue the perpetrators for damages in accordance with the laws on tort (and possibly contract) as well as for the surrender of unlawfully earned profits. This entitles in particular a company whose employee was bribed to claim the amounts paid as a bribe.

6. What are the criminal consequences of bribery in your jurisdiction?

In cases of bribery of (Swiss or foreign) public officials, individuals can be sentenced to a prison term of up to five years or a monetary penalty of up to CHF 540,000. For commercial bribery, the maximum sanctions are a prison term of up to three years or a monetary penalty of up to CHF 540,000. Companies may be sanctioned with a maximum fine of CHF 5 million. Additionally, the law provides for the disgorgement of any profits generated in connection with the bribery offence.

7. Does the law place any restrictions on hospitality, travel and entertainment expenses? Are there specific regulations restricting such expenses for foreign public officials?

There are numerous administrative laws in place that limit expenses for hospitality, travel and entertainment for Swiss officials. They remain largely unharmonized, however. No such regulations are in place for foreign

public officials, but foreign laws may provide for such rules, and the Swiss courts would examine any such expenses from the viewpoint of their likelihood to unduly influence the foreign public official.

8. Are political contributions regulated?

Switzerland currently has no specific regulations on the financing of political parties and election campaigns, with minor exceptions at the cantonal level. This has repeatedly been criticised by international organizations.

9. Are facilitation payments regulated? If not, what is the general approach to such payments?

There are no specific regulations on facilitation payments, but they may fall under the prohibition of granting or accepting undue advantages. Hence, facilitation payments are unlikely to be considered offences, unless they involve Swiss public officials, see question no. 3 above.

10. Are there any defences available?

Corporates have a compliance framework defence, see question no. 13 below. Additionally, advantages are by law not considered undue if they were allowed by staff regulations, of minor value or in line with social customs, see question no. 3 above. The general defences to criminal liability, such as state of necessity, are in theory available, but of little relevance in practice.

11. Are compliance programs a mitigating factor to reduce/eliminate liability for bribery offences in your jurisdiction?

Yes, see questions no. 12 and 13 below.

12. Who may be held liable for bribery? Only individuals, or also corporate entities?

Under Swiss criminal law, criminal liability primarily rests with the individuals. In cases of bribery of public officials and commercial bribery, however, there is a parallel corporate criminal liability for failing to take all reasonable organisational measure that would have been required to prevent the bribery offences, making the failure to implement an appropriate compliance organization a potential criminal offence. There is no mandatory guidance on the features an appropriate compliance organization should have, but in practice the

established international standards for compliance programs are applied by corporate entities and the state authorities. See also question no. 13 below.

13. Has the government published any guidance advising how to comply with anti-corruption and bribery laws in your jurisdiction? If so, what are the elements of an effective corporate compliance program?

The Swiss State Secretariat for Economic Affairs (SECO) publishes guidelines for compliance with anti-corruption and bribery laws. According to those guidelines, a robust compliance program includes (1) organisational measures (e.g. transparent business processes and competencies, dual controls, integrity clauses in contracts, due diligence processes for the selection of local agents), (2) measures relating to staff and management (e.g. awareness training, checklists, escalation and advisory processes), and (3) supervisory measures (e.g. supervision of compliance measures, regular testing, external audits). When assessing organizational measures to prevent bribery, the Swiss law enforcement authorities take into account the SECO guidelines as well as the guidance available from international organizations such as the OECD or the ICC. A failure to adhere to those guidance is seen as a strong indication of a defective organization.

14. Does the law provide protection to whistle-blowers?

With the exception of certain categories of public employees (such as public employees at the federal level), there is comparatively little protection for whistleblowers under Swiss law. Employees are bound by a duty of loyalty towards their employer as well as a duty of confidentiality that includes maintaining business secrets. They must therefore first report the offence internally within the company. Reporting the case to the authorities because management did not take appropriate remedial measures is acceptable only as a means of last resort. If employees do not adhere to these escalation principles, they may breach their contractual duties, risking legal consequences leading up to dismissal. Under Swiss law, even an unlawful termination does not make the dismissal void and may at most entitle the employee to financial compensation of up to six months' salary if the termination is deemed abusive. Therefore, employees who report cases of serious or illegal malpractice within a company to the public face a high level of legal uncertainty. The current regime for whistle-blowers in the private sector has been

repeatedly criticised, including by the OECD in a country report on Switzerland's implementation of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, but attempts to revise the existing framework have so far been unsuccessful. A draft bill attempting to codify the existing rules and provide increased legal certainty has recently failed in the parliamentary debate, ending more than ten years of discussions of the topic.

15. How common are government authority investigations into allegations of bribery?

While government investigations into allegations of bribery naturally number less than other higher volume white collar crimes such as fraud, they have increased in the recent years, mainly in the wake of large international bribery schemes such as the Odebrecht investigation. Due to the low level of national bribery in Switzerland, investigations of purely domestic bribery is still rather rare, with the exceptional larger case occasionally making the headlines. The majority of bribery cases therefore involve international aspects, in line with the strong international focus of Switzerland's economy. Overall, however, the prosecution level is often still perceived as low. It is noteworthy that many bribery related cases raise anti-money laundering issues, either in addition to the corruption related aspects, or as the main aspect of the case as far as Switzerland is concerned. The reason lies in Switzerland's strong finance industry that in some cases still attracts tainted funds, leading to related mutual legal assistance proceedings, including the confiscation of assets, and domestic proceedings for breach of the anti-money laundering laws. Unless the corruption in question was also committed in Switzerland, no proceedings would usually be opened for corruption in such cases.

16. What are the recent and emerging trends in investigations and enforcement in your jurisdiction? Has the Covid-19 pandemic had any impact and, if so, what?

Since a few years, prosecuting international bribery and corruption has been a declared key goal of the OAG. In line with that goal, the prosecution of large international bribery schemes has steadily increased in recent years. In doing so, the Swiss authorities have frequently also resorted to so-called "special" procedures, in particular by penalty orders or abbreviated proceedings (where the accused pleads guilty and agrees on a sentence with the public prosecutor, with the court's role being limited to a review of the agreement). In some instances, the prosecutor has also agreed to close the proceedings

after reparatory payments were made voluntarily. These special proceedings are in principle highly efficient, in particular where the facts may not have been determined in all details, and allow for a quick resolution without having to resort to full prosecution. However, the OECD has criticized their widespread use as the decisions rendered may lack the necessary dissuasive effect due to overly mild sanctions, and the level of transparency is deemed insufficient as public access to such decisions is limited. Further, the OAG's proposal to introduce deferred prosecution agreements were recently rejected by the Swiss government as being alien to the Swiss legal tradition. In the recent past, the authorities have also increasingly collaborated with foreign authorities, in particular in cases of major corruption, aiming at internationally coordinating the prosecution in the various jurisdictions to render it more efficient and avoid having to discontinue investigations at a late stage due to overlaps. In corruption cases involving Swiss perpetrators, the OAG is also supporting mutual legal assistance to allow in a first step a prosecution of the main offences abroad, so that the Swiss companies can be prosecuted domestically in a second step based on the foreign conviction.

The Covid-19 pandemic has slowed down the prosecution of most white-collar crimes considerably. Bribery and corruption cases were no exception, and given their often international nature, they may in fact have been disproportionately affected. While the situation has improved to some degree, we estimate that a return to pre-pandemic efficiency will still take considerable time, not the least due to the backlog accrued during the first year of the pandemic.

17. Is there a process of judicial review for challenging government authority action and decisions?

Procedural orders and measures of the police, the public prosecutor and the courts of first instance, as well as decisions on compulsory measures, can be appealed, in principle, to a cantonal court, or in cases of federal jurisdiction to the Lower Appeals Chamber of the Federal Criminal Court. Any partial or final judgment of a cantonal court of first instance may be appealed to a cantonal court of appeals, and any partial or final judgment of the Criminal Chamber of the Federal Criminal Court can be appealed to the Higher Appeals Chamber. The appellate courts can fully review the appealed order or judgment, including legal errors, denial and delay of justice, incorrect or incomplete determination of the facts, and inappropriate exercise of discretion. An appeal against a conviction for an infraction can only be reviewed for legal errors or a

manifestly incorrect determination of the facts, and no new facts may be pleaded. Whoever participated in the appeal proceedings on a cantonal or federal level may appeal the judgment to the Federal Supreme Court, if a legally relevant interest exists. Such interest is presumed for the accused, the public prosecutor and, under certain circumstances, the injured party. The Federal Supreme Court reviews appeals only for legal errors and manifestly incorrect findings of fact. All appellate courts either remedy the injustice themselves by deciding on the merits in lieu of the lower court, or refer the matter back to the lower court for a new decision, together with instructions on how to decide certain issues. In practice, the Federal Supreme Court frequently refers the case back to the cantonal courts to decide on the merits.

18. Are there any planned developments or reforms of bribery and anti-corruption laws in your jurisdiction?

In 2016, Switzerland has overhauled its anti-bribery provisions, incorporating the provisions against bribery in the private sector into the Criminal Code (instead of the Unfair Competition Act, as was previously the case). There are no immediate plans to revise the anticorruption laws at this time. The current implementation of anti-money laundering provisions by Switzerland were subject to a regular international review by the FATF, resulting in an enhanced follow-up process. Switzerland has revised FINMA's Money Laundering Ordinance, introducing in particular tougher rules on the verification of beneficial owners, ensuring that client relationship information is regularly updated, and expanding the scope of the rules applicable to relations with increased risks and to the group-wide observation of anti-money laundering principles. Further, the Anti-Money-Laundering Act was revised, introducing in particular stricter rules in connection with the verification and updating of beneficial ownership and client information. Further, the laws governing public procurement was recently overhauled, further harmonizing the various existing federal and cantonal laws, as well as implementing the requirements of the revised WTO Government Procurement Agreement. One pillar of the revision is the introduction of tighter rules preventing bribery and corruption in public procurement.

19. To which international anti-corruption conventions is your country party?

Switzerland is a signatory to the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (1997), which it had

co-developed and fully implemented since it came into force. Switzerland has also ratified the UN Convention against Corruption (2003) and the Council of Europe's Criminal Law Convention on Corruption (1999), but not its Civil Law Convention on Corruption (1999). Further, Switzerland has further ratified the UN Convention Against Transnational Organized Crime (2000) that also contains undertakings to prohibit and sanction corruption of public officials.

20. Do you have a concept of legal privilege in your jurisdiction which applies to lawyer-led investigations? If so, please provide details on the extent of that protection.

Legal privilege exists under Swiss law, in principle broadly protecting information exchanged with lawyers acting in their professional capacity as lawyers (but not if acting in a mere business capacity). Legal privilege also covers any auxiliaries of the lawyer, e.g. external accountants, forensic specialists etc. Based on the wording of the statutory law, this protection applies only to Swiss attorneys and EU lawyers authorised to practise in Switzerland, and it is not clear whether it also covers advice from external counsel from other jurisdictions. In civil, criminal or administrative proceedings, documents do not have to be disclosed, and cannot be seized, if they are part of the communication between a person or business and outside counsel, irrespective of their location. Lawyers may also refuse to testify. The legal privilege only extends to external counsel; documents and communication from in-house counsel are not privileged under Swiss law. Legal privilege fully applies to documents sent to or from external counsel, provided that these documents were created by Swiss attorneys or EU lawyers authorised to practice in Switzerland. Privilege does not extend, however, to pre-existing data or documents, even if it is handed or processed by a lawyer. Sharing information with another target does not, in principle, amount to a waiver of the legal privilege. In recent controversial decisions, the Federal Supreme Court has clarified that legal privilege does not extend to tasks outsourced to external counsel if the underlying legal obligation belongs to the company itself, namely compliance obligations relating to anti-money laundering laws. As a result, internal investigation reports analyzing breaches of the anti-money laundering provisions were held not to be legally privileged.

21. How much importance does your

government place on tackling bribery and corruption? How do you think your jurisdiction's approach to anti-bribery and corruption compares on an international scale?

The Federal Prosecutor's Office has stated that combatting foreign bribery and corruption is a key priority for the Swiss government. In line with this policy, the number of prosecutions and convictions has steadily risen in the past years. The Swiss government also pursues an active role regarding mutual legal assistance, supporting foreign investigations of corruption. In absolute terms, however, the case numbers still lag behind those of other jurisdictions. While this can be explained to some extent with the integrity of Switzerland's economy as well as certain procedural peculiarities, the comparatively low level of prosecution has nonetheless drawn certain criticism from the OECD, and the OECD has invited Switzerland to pursue an even more active role in prosecuting bribery and corruption.

22. Generally how serious are organisations in your country about preventing bribery and corruption?

The large majority of Swiss businesses takes the prevention of bribery and corruption seriously and invests in compliance programmes that either meet the legal requirements or even strive to reach the current compliance gold standard. This is in particular the case for large multinationals that have implemented a global compliance standard that applies throughout the group. However, we also observe that a minority of Swiss businesses still has not implemented a sufficient anticorruption compliance framework, and needs to further strengthen its compliance to avoid incurring a potential liability for failing to implement adequate procedures.

23. What are the biggest challenges enforcement agencies/regulators face when investigating and prosecuting cases of bribery and corruption in your jurisdiction?

Generally, Swiss law enforcement agencies suffer from the same limited resources as many of their colleagues abroad, leading to a need to select the key cases carefully in order to prosecute them successfully. In international cases in particular, Swiss prosecutors frequently struggle with obtaining the necessary evidence from abroad to prosecute Swiss businesses and

the responsible management, despite considerable efforts to obtain access to evidence by means of mutual legal assistance. This applies mutatis mutandis to the prosecution of money laundering offences, where the assets in question stem from corrupt foreign business activities. On the other hand, recent efforts to coordinate the Swiss prosecution with the activities of foreign authorities has shown certain promising results. In domestic cases in particular, it seems that bribery in the private sector is not prosecuted to the full extent possible, mainly due to a lack of access of the authorities to the information required for a successful prosecution, as well as a noticeable lack of interest in such prosecution on the side of the affected private sector.

24. What are the biggest challenges businesses face when investigating bribery and corruption issues?

Companies investigating bribery and corruption issues face a number of issues. Among others, an obvious one concerns the discovery of the irregularities. Companies must ensure that they have adequate reporting tools in place, and they are well advised to ensure that major incidents are reported centrally so that any follow-up action can be organized based on the specific circumstances of the case. A second challenge consists of ensuring that the reported incidents are investigated in an appropriate manner. Only the larger enterprises will have a dedicated internal investigations resources that can deal with complex matters, and most companies will want to rely on external specialists that have the required experience. Given the prosecution risks for the company itself, many companies retain external legal counsel to lead the investigation. A third challenge consists of balancing the interests of the company in discovering the full scope of the irregularities and their root causes while protecting its own legal interests in the criminal investigation. In the course of any criminal investigation, complex strategic issues may arise, including attorney-client privilege, multi-jurisdictional coordination of proceedings and difficult decisions at the management level where the interests of retain key managers may conflict with the company's duty to sanction misconduct.

25. What do you consider will be the most

significant corruption-related challenges posed to businesses in your jurisdiction over the next 18 months?

The key challenge for businesses will consist in continuing implementing and further strengthening their compliance organization. This may be a particular challenge in an environment where an unbroken trend of increasing regulation clashes with a post-Covid economy in which many companies may have other priorities than focusing on compliance and governance issues.

At the same time, the global Covid-19 crisis and its outfalls will not stop the increasing prosecution of bribery in Switzerland and abroad. This combination may lead to high legal risks in the case of compliance failures that may materialize in future years. Given the considerable business risks that a conviction for bribery offences can entail, businesses are well advised not to relax their efforts to effectively combat bribery and corruption risks within their organization, despite the extraordinary economic circumstances of the recent past.

26. How would you improve the legal framework and process for preventing, investigating and prosecuting cases of bribery and corruption?

The Swiss legal framework is, in essence, robust, as far as bribery and corruption is concerned. As the OECD has highlighted, one key element that should be improved is the transparency of the proceedings and judgments rendered in corruption related cases, as this transparency is a key element when it comes to ensuring the public trust in Switzerland's legal system. Further, Switzerland should continue to ensure that the legal privilege remains fully intact regarding internal investigations of corruption related irregularities. The current trend of limiting privilege with the argument that the respective internal investigations were part of the businesses' own compliance obligations should be reconsidered. Otherwise, there is a serious risk that companies may refrain from fully investigating potential compliance shortfalls to avoid any adverse impact on their legal position in criminal proceedings, thereby considerably weakening the overall effectiveness of their compliance.

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