# The Anti-Bribery and Anti-Corruption Review

Fifth Edition

Editor
Mark F Mendelsohn

Law Business Research

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Editor
Mark F Mendelsohn

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# EDITOR'S PREFACE

This fifth edition of *The Anti-Bribery and Anti-Corruption Review* presents the views and observations of leading anti-corruption practitioners in jurisdictions spanning every region of the globe. The worldwide scope of this volume reflects the reality that anti-corruption enforcement has become an increasingly global endeavour.

Over the past year, the foreign bribery landscape has continued to grow increasingly complicated for multinational companies, particularly in light of the sweeping fallout from multiple high-profile corruption scandals. In Brazil, Operation Car Wash, the investigation that uncovered a sprawling embezzlement ring at state-owned oil company Petróleo Brasileiro SA (Petrobras), has ensnared politicians at the highest levels of the Brazilian government as well as numerous companies that engaged with Petrobras around the world. In March 2016, Brazilian authorities raided the home of former President Lula de Silva and detained him for questioning. Lula and his wife were subsequently indicted by Brazilian prosecutors on money laundering charges in September 2016. The Brazilian crackdown on corruption shows no signs of abating, and has expanded to include investigations related to Eletrobras, Brazil's state-owned utility.

In Malaysia, the misappropriation of more than US$3.5 billion in funds by senior government officials from state-owned strategic development company 1Malyasia Development Berhad (1MBD) has sparked worldwide investigations and asset tracing and recovery exercises. Authorities in several countries, including the United States, the United Kingdom, Switzerland, Singapore, Hong Kong and Australia have all launched probes into lenders and banks with ties to 1MDB. In July 2016, the US Department of Justice (DOJ) filed civil forfeiture complaints seeking the forfeiture and recovery of more than US$1 billion in assets associated with the laundering of misappropriated funds from 1MBD, the largest forfeiture action ever brought under the DOJ's Kleptocracy Asset Recovery Initiative.

Global efforts to combat corruption were further impacted by the massive leak in April 2016 of more than 11 million documents connected to Panama law firm Mossack Fonseca, dubbed the Panama Papers. Dating back over four decades, the Panama Papers revealed that, among other things, the law firm appears to have helped establish at least 214,000 secret shell companies and offshore accounts in known tax havens to shelter and hide the wealth of clients that included approximately 300,000 corporate entities, 12 current

and former world leaders, and at least 128 other public officials. While international law enforcement agencies have only begun to assess the contents and significance of the leaked documents, it is clear that prosecutors are looking to the Panama Papers as a road map for uncovering foreign bribery, among other offences, and furthering international corruption investigations.

In the United States, enforcement authorities continue to vigorously enforce the Foreign Corrupt Practices Act (FCPA), with the past year's cases showing a significant increase in the number of enforcement actions from 2015. The Securities and Exchange Commission (SEC) alone brought more FCPA enforcement actions within the first six months of 2016 than in any year since 2011. The investigation and enforcement focus has cut across a range of industries, including pharmaceutical and medical device companies, airlines, financial services and the telecommunications sector. While these cases continue to cover many regions, business activity in China has remained a major FCPA enforcement priority. As this edition of *The Anti-Bribery and Anti-Corruption Review* goes to print, 15 corporate enforcement actions have implicated multinationals' China operations, representing over half of all FCPA actions brought in 2016 to date.

Importantly, the past year's FCPA cases have demonstrated that the DOJ and SEC will continue to actively and aggressively pursue large-scale corporate bribery cases. In February 2016, the DOJ and SEC, together with the Public Prosecution Service of the Netherlands, entered into a US$795 million global settlement with the world's sixth-largest telecommunications company, Amsterdam-based VimpelCom Limited, a foreign issuer of publicly traded securities in the United States, and its wholly owned Uzbek subsidiary, Unitel LLC. The settlement, which resolved allegations that VimpelCom and Unitel violated the FCPA and certain Dutch laws by funnelling over US$114 million in bribe payments to a shell company beneficially owned by a government official in Uzbekistan, represents the second-largest global FCPA resolution to date and the sixth-largest in terms of penalty payments made to US regulators. The VimpelCom settlement was the culmination of significant collaboration between US regulators and international law enforcement agencies, with the DOJ proclaiming it 'one of the most significant coordinated international and multi-agency resolutions in the history of the FCPA'. In September 2016, Och-Ziff Capital Management Group agreed to pay the DOJ and SEC US$412 million for FCPA violations stemming from the hedge fund's use of third-party intermediaries, agents and business partners to pay bribes to senior government officials in Africa. The settlement represents the fourth-largest FCPA enforcement action to date.

Though not uncontroversial, self-reporting and cooperation by companies has continued to be a theme in the United States. In April 2016, the DOJ launched a one-year pilot programme to provide greater transparency on how business organisations can obtain full mitigation credit in connection with FCPA prosecutions through voluntary self-disclosures, cooperation with DOJ investigations and remediation of internal controls and compliance programmes. The DOJ memorandum announcing the initiative makes clear that any mitigation credit offered through the Pilot Program is separate from, and in addition to, any mitigation credit already available under the US Sentencing Guidelines. The DOJ further emphasised that voluntary self-reporting is the central aim of the Pilot Program, and is therefore an essential requirement for receiving maximum mitigation credit. Whether companies participating in the programme truly benefit, and whether the promise of greater transparency is realised, remains to be seen.

I wish to thank all of the contributors for their support in producing this volume. I appreciate that they have taken time from their practices to prepare chapters that will assist practitioners and their clients in navigating the corruption minefield that exists when conducting foreign and transnational business.

**Mark F Mendelsohn**
Paul, Weiss, Rifkind, Wharton & Garrison LLP
Washington, DC
November 2016

# Chapter 20

# SWITZERLAND

*Yves Klein*[1]

## I INTRODUCTION

While Switzerland is considered one of the least corrupt countries in the world,[2] it is the second most active jurisdiction, just after the United States, in the World Bank/UNODC Stolen Asset Recovery Initiative database of asset recovery efforts.[3]

This paradox may be attributable to Switzerland's relatively low prevalence of prosecution of domestic corruption, on the one hand, and to the numerous investigations into Swiss bank accounts used to launder the proceeds of foreign bribery, on the other. The developments for the period under review reflect that situation.

Prosecution of domestic public bribery tends to depend on the proactivity of the federal and 26 cantonal attorney general's offices, as the reported cases appear to show.

The main foreign bribery investigations concern the *Petrobras*, *1MDB* and *Fédération Internationale de Football Association (FIFA)* cases, with their parallel financial regulation enforcement proceedings.

The major legislative developments are the revision of the Swiss Criminal Code in respect of private bribery, the changes to the anti-money laundering legislation and the failed attempt of adopting whistle-blower protection rules.

The present and the outlook remain the same: Swiss authorities are very reactive, and often proactive, in respect of international bribery issues, while domestic bribery remains a lower priority, mostly because it is not considered an important threat to public interest.

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1 Yves Klein is a partner at Monfrini Crettol & Partners, Geneva. He thanks Antonia Mottironi and Nathalie Torrent for their assistance in researching for this chapter. As the fourth edition of this Review did not contain a chapter on Switzerland, the two-year period preceding September 2016 is covered.

2 Switzerland ranks seventh in Transparency International's Corruption Perceptions Index 2015.

3 star.worldbank.org/corruption-cases.

## II DOMESTIC BRIBERY: LEGAL FRAMEWORK

### i Public bribery

Passive and active public bribery of Swiss public officials constitute criminal offences under Swiss law since the adoption of the Swiss Criminal Code (SCC)[4] of 1937.

The definition of public bribery is any person offering, promising or granting a public official or a third party an undue advantage (active bribery – Article 322 *quater* SCC), or for any public official to solicit or accept such an advantage (passive bribery – Article 322 *ter* SCC) to cause the public official to carry out or to 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.

A public official susceptible to public bribery is defined as 'a member of a judicial or other authority, a public official, an officially-appointed expert, translator or interpreter, an arbitrator, or a member of the armed forces'.

Public officials are defined under Article 110 Section 3 SCC as:

> *[...] the officials and employees of a public administrative authority or of an authority for the administration of justice as well as persons who hold office temporarily or are employed temporarily by a public administrative authority or by an authority for the administration of justice or who carry out official functions temporarily.*

In addition, under Article 322 *decies* Section 2 SCC, 'private individuals who fulfil official duties are subject to the same provisions as public officials'.

Based on this functional definition, in recent case law, a manager of the Zurich insurance company for cantonal civil servants, sentenced to six years of custody for bribery, was considered a public official, not only because it was a public foundation at the time of the facts, but also because it performed a public interest function.[5] In another case, an employee of the Graubunden Kantonalbank, a cantonal bank, acquitted of bribery was not considered as a public official because, even though the bank was submitted to the control of the cantonal parliament and had as a mission to contribute to the equilibrium and development of the canton, it also offered services similar to those of private banks, and thus did not strictly speaking perform official duties and its employees may not be considered as public servants.[6]

The definition of who may receive a public bribe (or advantage) is therefore quite broad under Swiss law, and not immediately apparent.

The bribe must 'cause the 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'. The breach of duty does not need to be a formal administrative act, and it may be, for example, the undue sharing of information. It may also be an omission, such as not admitting a complaint.

4 Unofficial English translations of federal laws are available on www.admin.ch/gov/en/start/federal-law.html.

5 Federal Court decision ATF 141 IV 329 of 19 August 2015.

6 Federal Court decision 6B_535/2014 of 5 January 2016.

In respect of the public official's discretion, it must be used in a specific way. The act or omission must be specific, or be behaviour that falls within the provisions on granting and accepting an advantage (Articles 322 *quinquies* and 322 *sexies* SCC).

The consideration causing bribery is defined as the offer, promise or gift of an undue advantage to the official or to a third party. The advantage consists of any objective improvement for the public official, and does not necessarily consist of a patrimonial value. It may, for example, be a prospect of promotion, or support for an election.

Under Article 322 *decies* Section 1 SCC, the following are not undue advantages:

*a* advantages permitted under public employment law or contractually approved by a third party;

*b* negligible advantages that are common social practice.

Examples are small Christmas presents or modest entertainment on the occasion of business meetings.

The penalty for individuals committing, or abetting, acts of active or passive public bribery is a custodial sentence of up to five years or a fine of up to 1,080,000 Swiss francs. The statute of limitations is 15 years.

### ii Undue advantage

It is a crime for any person to offer, promise or grant a public official or a third party an advantage (granting an advantage – Article 322 *quinquies* SCC), or for any public official to solicit or accept an advantage for himself, herself or a third party[7] (accepting an advantage – Article 322 *sexies* SCC), so that the public official carries out his or her official duties.

Typically, this may be a payment to accelerate the handling of a case by the public official or regular payments that may not be linked to a specific breach of duties.

The advantage must concern the future and the reward for a past behaviour does not qualify under this provision.[8]

When the advantage is granted to a third party, the public official must somehow be aware of its existence.

The penalty for granting or accepting an advantage is a custodial sentence not exceeding three years or a fine of up to 1,080,000 Swiss francs. The statute of limitations is 10 years.

### iii Private bribery

Under Articles 322 *octies* and 322 *novies* SCC, in force since 1 July 2016 (see Legislative Developments, Section VIII, *infra*), it is a crime to offer, promise or give an employee, company member, agent or any other auxiliary to a third party in the private sector, an undue advantage in order that the person carries out or fails to carry out an act in connection with his or her official activities, which is contrary to his or her duties or dependent on his or her discretion, and to demand, secure the promise of or accept such an advantage.

In minor cases, the offence will only be prosecuted upon complaint of the aggrieved person within three months from learning of the offence (Articles 322 *octies* Section 2 and 322 *novies* Section 2 SCC).

7 In force since 1 July 2016.

8 Federal Court decision ATF 135 IV 204 of 21 August 2009.

The penalty for active and passive private bribery is a custodial sentence not exceeding three years or a fine of up to 1,080,000 Swiss francs. The statute of limitations is 10 years.

## III ENFORCEMENT: DOMESTIC BRIBERY

Over the past two years, few cases of domestic public bribery conviction have been reported, leading in all cases to suspended custody or fines.

At the federal level, several of the investigations into domestic bribery have been initiated based on denunciations of the Federal Audit Service. Most of them concern the purchase of IT services.

On 15 September 2015, the head of acquisitions of the Federal Tax Administration was found guilty of several counts of receiving an undue advantage (Article 322 *sexies* SCC) in connection with payments received from two Swiss companies relating to the acquisition of IT services (the *Insieme Project* case) and sentenced to suspended custody of 16 months and a fine of 27,000 Swiss francs. The managers of the two companies were found guilty of several counts of granting an advantage (Article 322 *quinquies* SCC) and sentenced to suspended fines of 15,000 and 10,000 Swiss francs. The Office of the Attorney General of Switzerland (OAGS) had also included in its accusation criminal mismanagement of public interests (Article 314 SCC), forgery of a document by a public official (Article 317 SCC) as well as active and passive bribery (Articles 322 *ter* and 322 *quater* SCC), but was not followed by the Federal Criminal Court.

Among the pending investigations, the most notorious case is that of the Federal Secretariat for the Economy (SECO), where IT services, some of them allegedly inexistent, for amounts of several dozens of millions of Swiss francs were purchased from two Swiss companies against kickbacks to a SECO civil servant. The criminal investigation, which started in 2014, might be completed before the end of 2016. Other cases of minor importance have been reported (Federal Office of Roads, Customs Administration, Tax Administration, Office for the Environment).

At the cantonal level, the main media reports on public bribery concern Geneva. On 7 June 2016, a former manager of SIG, the Geneva state-controlled utilities company, was convicted of passive bribery for having solicited a bribe of 100,000 Swiss francs from a contractor who was negotiating a contract of supply of wind turbines. The contractor reported the case, which led to the initiation of the criminal investigation by Office of the Attorney General of Geneva. The public official was sentenced to a suspended fine of 28,800 Swiss francs, plus the payment of 98,000 Swiss francs in damages to SIG. Half a dozen other cases of corruption are under investigation in Geneva.

It is difficult to tell how many other unreported cases of corruption are being investigated in other cantons.

One possible explanation for the higher rate of investigation by the Swiss Confederation and by Geneva is that both have proactive and independent financial inspection services (the Swiss Federal Audit Office and the Geneva Court of Audits).

In respect of private bribery, the new Articles 322 *octies* and 322 *novies* SCC only entered into force on 1 July 2016, and no cases have been reported as yet. This did not prevent, however, the Office of the Attorney General of Switzerland from initiating no less than three criminal investigations for fraud (Article 146 SCC), criminal mismanagement (Article 158 SCC), money laundering (Article 305 *bis* SCC) and misappropriation (Article 138 SCC) in connection with the FIFA bribery allegations (see Section VI, *infra*).

In September 2015, the Federal Police[9] created an anonymous anti-corruption reporting platform (fedpol.integrityplatform.org), on which any acts of private and public bribery, in Switzerland or abroad, may be reported.

## IV FOREIGN BRIBERY: LEGAL FRAMEWORK

Bribery of a foreign public official consists to offer, promise or grant a foreign public official or a third party an undue advantage (active bribery), or for any foreign public official to solicit or accept such an advantage (passive bribery) to cause the public official to carry out or to 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 discretion (Article 322 *septies* SCC).

A foreign public official susceptible of public bribery is described as a:

> *[...] member of a judicial or other authority, a public official, an officially-appointed expert, translator or interpreter, an arbitrator, or a member of the armed forces of a foreign state or of an international organisation.*

Article 322 *decies* Section 2 SCC, which provides that 'private individuals who fulfil official duties are subject to the same provisions as public officials', applies also to foreign bribery. The definition of what constitutes an official duty is based on the applicable foreign law.

In addition, on 1 October 2014,[10] the Federal Criminal Court admitted that Riadh Ben Aissa, a manager of the Canadian company SNC-Lavalin, to settle disputes and secure the conclusion of public contracts from Libyan state entities, had paid bribes to Saadi Gaddafi, the son of former Libyan dictator Muammar Gaddafi, who, because of his position in the ruling family and his *de facto* decision-making power, was to be considered a foreign public official.

The penalty for individuals committing, or abetting to, acts of active or passive bribery of a foreign public official is a custodial sentence of up to five years or a fine of up to 1.08 million Swiss francs. The statute of limitations is 15 years.

The granting or accepting of an undue advantage by a foreign public official do not constitute criminal offences under Swiss law.

## V ASSOCIATED OFFENCES: FINANCIAL RECORD-KEEPING AND MONEY LAUNDERING

### i Record-keeping

Pursuant to Article 957 of the Swiss Code of Obligations (SCO), any person or company who has to register with the Register of Commerce, namely anyone conducting a commercial activity, must hold commercial accounts.

9 www.fightingcorruption.ch.

10 Federal Criminal Court judgment SK.2014.24 of 1 October 2014 issued in the context of abridged proceedings (Article 358 CPC).

The accounting records and the accounting vouchers, together with the annual report and the audit report, must be retained for 10 years following the expiry of the financial year (Article 958f Section 1 SCO).

In addition to shareholders, creditors with an interest worthy of protection may request to inspect the annual report and the audit reports (Article 958e Section 2 SCO).

**ii Money laundering**

Pursuant to Article 305 *bis* SCC, in force since 1 August 1990, whoever carries out an act that is aimed at frustrating the identification of the origin, the tracing or the forfeiture of assets that he or she knows or must assume originate from felony or aggravated tax misdemeanour shall be liable to a custodial sentence not exceeding three years or to a monetary penalty.

The assets must originate from a felony, namely a crime punishable by custody for more than three years (Article 10 Section 2 SCC). Domestic and foreign public bribery are felonies.

The offender shall also be punishable for money laundering if the predicate offence was committed abroad and was also punishable in the jurisdiction where it was committed (Article 305 *bis* Section 3 SCC). If the predicate offence was committed abroad, the qualification as a felony is effected by transposing the facts as if they had been committed in Switzerland.

The Federal Act on the Prevention of Money Laundering in the Financial Sector or Law on Money Laundering (MLA), in force since 1 April 1998, applies to all financial intermediaries, including banks, investment funds managers, insurances, securities traders and all persons who, on a professional basis, accept or hold on to deposit assets belonging to others or who assist in the investment or transfer of such assets by having a power of disposal in their respect.

The MLA contains provisions on the duties of verifying the identity of the contracting party, of identifying the beneficial owner, of clarifying the economic background of transactions, of documenting these steps, of keeping records thereof for 10 years and of submitting to monitoring and audits by the Swiss Financial Market Supervisory Authority (FINMA) or a self-regulatory organisation (for non-regulated professions).

Article 9 MLA requests financial intermediaries to immediately file a report with the Money Laundering Reporting Office Switzerland (MROS) if it knows or has reasonable suspicions that assets involved in the business relationship:

*a* are connected to a criminal offence in the meaning of Article 260 *ter* SCC (participation or support of a criminal organisation) or Article 305 *bis* SCC (money laundering);

*b* are the proceeds of a felony or of a qualified fiscal misdemeanour (Article 305 *bis* Section 1 *bis* SCC);

*c* are subject to the power of disposal of a criminal organisation (Article 260 *ter* SCC); or

*d* serve the financing of terrorism (Article 260 *quinquies* SCC).

The financial intermediary must freeze the assets entrusted to him or her that are connected with the report filed under Article 9 MLA as soon as MROS notifies it that it forwarded the report to the competent prosecution authority (Article 10 MLA). It must maintain the freeze on the assets until it receives a freezing order from the competent prosecution authority, but at the most for five working days from the time it received the notification from MROS

of the report having been forwarded to the competent prosecution authority, and may not inform the person affected or third parties until that delay has elapsed (provided he or she does not receive a gag order from the authorities).

Many bribery investigations start in Switzerland on the basis of suspicious transaction reports. Those reports are taken very seriously and, if there are founded suspicions of bribery, the OAGS initiates a criminal investigation and almost systematically sends a request for mutual assistance to the country of the public official who was allegedly bribed, which usually in turn leads to the opening of a criminal investigation in that country and to requests for mutual assistance to Switzerland.

## VI ENFORCEMENT: FOREIGN BRIBERY AND ASSOCIATED OFFENCES

Based on published decisions, press releases, annual activity reports of the OAGS[11] and of the Federal Office of Justice,[12] Switzerland was at the centre of several of the main worldwide enforcement proceedings.

### i Petrobras

The investigation into systemic corruption at Petrobras, the Brazilian semi-state-owned oil company, which started in Brazil in March 2014, was almost immediately followed by criminal investigations in Switzerland, initiated following suspicious transactions reports made by Swiss banks and other financial intermediaries upon reading news about the Brazilian investigations in the local and international media.

Since April 2014, the OAGS has initiated over 60 criminal investigations into bribes paid to managers of Petrobras and politicians for active and passive bribery (Article 322 *septies* SCC) and money laundering (Article 305 *bis* SCC).

The MROS announced to the OAGS suspicious transaction reports from Swiss financial intermediaries regarding over 300 Swiss bank accounts. In total, over 1,000 accounts with 40 Swiss banks have been investigated. The accounts, most of which were held by domicile companies, are beneficially owned by managers of Petrobras, Brazilian politicians, Brazilian and foreign construction companies who used them to pay bribes, or agents who paid or received bribes on their behalf. A sum exceeding US$800 million has been frozen.

Switzerland and Brazil are closely cooperating in the investigations and have exchanged several requests for mutual assistance. The Attorney General of Switzerland and the Attorney General of Brazil, as well as members of their teams, have met several times in Berne and in Brasilia. Discussions are under way about the setting up of a Joint Investigation Team with the aim of speeding up the proceedings being conducted by the two prosecution authorities.

All appeals against the domestic and mutual assistance freeze orders and the transmittal of documents to Brazil have been rejected.

In 2015 and 2016, US$120 million and US$70 million were transferred from Switzerland to Brazil with the consent of the account holders in the context of the implementation of plea bargaining agreements between suspects and the Brazilian Attorney General's Office.

11 www.bundesanwaltschaft.ch/dokumentation/00024/index.html?lang=en.

12 www.bj.admin.ch/bj/en/home/sicherheit/rechtshilfe/strafsachen.html.

FINMA has investigated over 15 Swiss banks in respect of anti-money laundering due diligence failures in connection with the *Petrobras* case, and has started enforcement proceedings against three banks.[13] The OAGS has not yet initiated criminal proceedings against those banks on the basis of Article 102 Section 2 SCC.

### ii 1MDB

On 14 August 2015, the OAGS initiated criminal investigations against two former officials of the Malaysian state-owned fund 1MDB (1Malaysia Development Berhad) and persons unknown on suspicion of bribery of foreign public officials (Article 322 *septies* SCC), mismanagement of public interests (Article 314 SCC), money laundering (Article 305 *bis* SCC) and criminal mismanagement (Article 158 SCC), in respect of four cases involving allegations of criminal conduct and covering the period from 2009 to 2013 (relating to Petrosaudi, SRC, Genting/Tanjong and ADMIC) for around US$4 billion.

In February 2016, after preliminary discussions with the Malaysian authorities, Switzerland sent Malaysia a request for mutual assistance.

In April 2016, the OAGS extended its proceedings to two former Emirati officials, in charge of Abu Dhabi sovereign funds. Switzerland also sent requests for mutual legal assistance to Luxembourg and Singapore.

In parallel, FINMA initiated enforcement actions against three banks. On 23 May 2016, FINMA issued a decision against BSI SA, founding it in serious breach of anti-money laundering rules,[14] ordering the disgorgement of its profits (95 million Swiss francs). BSI SA has appealed the decision. Two bankers are under investigation.

The following day, the OAGS announced that it had initiated criminal proceedings against BSI SA, suspecting deficiencies in the internal organisation of BSI SA within the meaning of Article 102 Section 2 SCC.

On 20 July 2016, US Attorney General Loretta E Lynch announced the filing of civil forfeiture complaints seeking the forfeiture and recovery of more than US$1 billion in assets associated with an international conspiracy to launder funds misappropriated from 1MDB.[15]

### iii FIFA

FIFA is an association governed by Swiss law founded in 1904 and based in Zurich. The Attorney General's Office for the Eastern District of New York has been investigating members of the FIFA Executive Board, who were suspected of accepting over US$100 million in bribes and kickbacks since the early 1990s in connection with the allocation of football competitions

13 www.finma.ch/en/~/media/finma/dokumente/dokumentencenter/myfinma/finma-publikationen/referate-und-artikel/20160407-rf-bnm-jmk-2016-de.pdf?la=en.

14 'The deficiencies identified constitute serious breaches of the statutory due diligence requirements in relation to money laundering and serious violations of the principles of adequate risk management and appropriate organisation. BSI was therefore in serious breach of the requirements for proper business conduct. Right up to top management level there was a lack of critical attitude needed to identify, limit and oversee the substantial legal and reputational risks inherent in the relationships.' (www.finma.ch/en/news/2016/05/20160524-mm-bsi).

15 www.justice.gov/opa/pr/united-states-seeks-recover-more-1-billion-obtained-corruption-involving-malaysian-sovereign.

and media rights. In that context, on 6 March 2015, the United States requested mutual legal assistance from Switzerland requesting the handover of documents concerning over 50 Swiss bank accounts, 35 of which were frozen. On 21 May 2015, the United States requested the arrest of several individuals in view of their extradition, seven of which were arrested on 27 May 2015. Two additional high-ranking officials were arrested on 3 December 2015. Eight of the FIFA officials were extradited to the United States and one to Uruguay, the last one in May 2016. Before competing extradition requests from the United States and Nicaragua, the Swiss authorities gave preference to the United States, notably because the nexus was stronger, to ensure equality of treatment among the suspects and because Nicaragua does not extradite its nationals.[16] A first batch of bank documents was sent to the United States in December 2015. The frozen assets currently represent in excess of US$80 million.

On 10 March 2015, the OAGS initiated criminal investigations for criminal mismanagement (Article 158 SCC) and money laundering (Article 305 *bis* SCC) in connection with the allocation of the FIFA World Cups of 2018 to Russia and of 2022 to Qatar. On 24 September 2015, the OAGS initiated criminal investigations for suspicions of criminal mismanagement (Article 158 SCC) and misappropriation (Article 138 SC) against the then president of FIFA Joseph Blatter. On 6 November 2015, the OAGS initiated criminal investigations for fraud (Article 146 SCC), criminal mismanagement (Article 158 SCC), money laundering (Article 305 *bis* SCC) and misappropriation (Article 138 SCC) against several members of the executive board of the organising committee of the German Football Association for the 2006 World Cup in Germany.

### iv Other significant enforcement proceedings

In addition to the above cases, criminal investigations and mutual assistance proceedings are pending in respect of the following jurisdictions: Algeria (Sonatrach); Canada (SNC Lavalin); the Czech Republic (Mosteck Uhelna Spolecnost); Egypt (former President Hosni Mubarak and his entourage); France (financing of political campaign by Libya); Greece; Guinea; Italy (ENI); Kazakhstan; Nigeria; Russia (Gazprom[17]); Spain; Taiwan; and Tunisia (former President Zine Ben Ali and his entourage; money laundering by HSBC Private Bank (Suisse) SA).[18]

## VII INTERNATIONAL ORGANISATIONS AND AGREEMENTS

Switzerland, who is not a member of the European Union, notably is a member of the United Nations, the Organisation for Economic Cooperation and Development Convention and the Council of Europe, and is a party to the following international agreements:

*a* OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions of 1997;

16 Federal Court Decision 1C_143/2016 of 2 May 2016.

17 In as yet unpublished decisions, on 1 April and 12 July 2016, the Federal Criminal Court acquitted former managers of Gazprom and ABB of the accusation of corruption because managers of Gazprom could not be considered as foreign public officials.

18 See Federal Criminal Court decision BG.2015.28 of 2 December 2015 on a conflict of jurisdiction between the Office of the Attorney General of Switzerland and that of Geneva on HSBC.

*b* Council of Europe Criminal Law Convention Against Corruption of 1998; and
*c* United Nations Convention against Corruption of 2003.

## VIII LEGISLATIVE DEVELOPMENTS

Several important laws have been adopted by Switzerland in 2015 and 2016 that will enhance the prosecution of public and private bribery.

### i Revision of the bribery provisions of the Swiss Criminal Code

The revision concerns mostly private bribery, as well as an extension of the offence of undue advantage.

Since the adoption of the Unfair Competition Act in 1943, active private bribery has been a crime under Swiss law (Articles 4a and 23 Unfair Competition Act). In 2006, passive private bribery became a crime following the ratification by Switzerland of the Council of Europe Civil Law Convention on Corruption. The provisions punishing private bribery were contained in the Unfair Competition Act and had two severe limitations: to be a crime, the behaviour had to take place in the context of economic competition; and for the offence to be prosecuted, its victim had to file a criminal complaint within three months of learning of the crime.

As a consequence, very few criminal investigations took place, and there exists no published judicial decision of conviction of anyone for active or passive private bribery. In practice, severe cases of passive and active private bribery were qualified respectively as criminal mismanagement (Article 158 SCC) and abetment or instigation of that crime.

In 2008, the Council of Europe Group of States against Corruption (GRECO) criticised Switzerland for its lack of prosecution or conviction of private bribery, indicating that it suspected that the phenomenon of private corruption might be more widespread than reported.[19]

In addition, since 2000, allegations of kickbacks within the sports international federations seated in Switzerland have been increasingly reported in the Swiss and international media.

As a consequence, in 2013, the Federal Council initiated consultations about expanding the provisions applicable to both public and private bribery and sent its dispatch to the Swiss parliament on 30 April 2014, which was adopted into law on 25 September 2015 and entered into force on 1 July 2016.

The provisions criminalising private bribery move from the Unfair Competition Act to the Swiss Criminal Code (Articles 322 *octies* and 322 *novies* SCC), thus eliminating the economic competition condition. Under Articles 322 *octies* Section 2 and 322 *novies* Section 2 SCC, a criminal complaint will be necessary for the prosecution of the offence only

19 See GRECO, 'Joint First and Second Evaluation Rounds Evaluation Report on Switzerland', 4 August 2008, Section 69.

in minor cases.[20] The parliament debate minutes indicate that such minor cases might occur in the case of a single payment of a few thousand Swiss francs creating no health or safety risk, without fraudulent means or organised groups.

In addition, Articles 322 *quinquies* and 322 *sexies* SCC on undue advantage were amended so as to include advantage to a third party.

### ii Revision of money laundering laws to implement FATF recommendations

On 13 December 2013, the Federal Council sent a dispatch to the Swiss parliament to adapt Swiss anti-money laundering laws to the 2012 recommendations of the Financial Action Task Force (FATF), which was adopted into law on 12 December 2014 and entered into force on 1 July 2015 and 1 January 2016. The law brings changes in the following seven areas:

*a* improvement of transparency regarding legal entities, in particular with respect to bearer shares;

*b* tightening of duties of financial intermediaries with regard to the identification of the beneficial owner of legal entities;

*c* broadening of the definition of politically exposed persons (PEP) to include domestic PEP as well as PEP of intergovernmental agencies and international sports organisations;

*d* qualification of serious tax crimes as predicate offences to money laundering;

*e* duties of care in connection with cash payments in sales transactions;

*f* increase of the effectiveness of the system of suspicious activity reporting of the MROS; and

*g* sanctions in the area of financing of terrorism.

It is expected that those measures will increase the reporting of cases of laundering of the proceeds of public bribery.

### iii Failed attempt to adopt a law on whistle-blowing

Another major legislative debate concerned the creation of a whistle-blower status under Swiss labour law. To date, legislative protection of whistle-blowers only exists for public officials of the Swiss Confederation and of the 20 cantons who have opted for the duty of public officials to report crimes to the competent authorities (Article 302 Section 2 CPC).

In 2008, the Federal Council started a consultation on the protection of whistle-blowers against dismissal in the private sector. A second consultation took place in 2010 and, on 20 November 2013, the Federal Council sent its dispatch to the Swiss parliament. The bill provided for the protection of whistle-blowers against dismissal, provided they follow a certain procedure (report first to their employer; second to competent authorities in the event of inaction of the employer for 60 days; then to the public if the competent authority fails to inform the whistle-blower about the proceedings' status in a timely manner). The protection against dismissal would concern the reporting of 'irregularities', namely criminal offences,

20 This exception was not provided for in the Federal Council's dispatch. The higher chamber of the Swiss parliament, the Council of States, had proposed alternative wording, maintaining the condition of a criminal complaint, 'if no public interest was harmed or threatened'. Following the protests of GRECO in its 19 June 2015 interim report (Sections 9–10), the current wording was adopted.

unlawful acts and breaches of the employer's internal rules and regulations. The protection was limited to deeming the whistle-blower's dismissal abusive, entitling the whistle-blower to a compensation representing up to six months of salary. The bill also provided for an incentive for companies to introduce an internal reporting mechanism, as a consequence of which the employee would not be allowed to address a report to an external authority. The bill was criticised for not meeting international best practices, for being a regression in comparison to Swiss case law and for being too complex.[21] On 10 September 2015, for motives varying depending on the political parties, parliament sent the bill back to the Federal Council for redrafting.

## IX OTHER LAWS AFFECTING THE RESPONSE TO CORRUPTION

### i Jurisdiction

Switzerland is a federal state composed of 26 cantons. Constitutionally, cantons have competence over all attributions that are not expressly allocated to the Confederation.

The Confederation has exclusive legislative competence over substantive criminal law under the SCC of 1937 and criminal law of procedure, as well as the Criminal Procedure Code (CPC) of 2007 (cantonal competence remains for judicial organisation). The Confederation also has exclusive competence to enter into international treaties.

At the federal level, the Office of the Attorney General of Switzerland and, under its supervision, the Federal Police, are responsible for investigating crimes. The Swiss Code of Penal Procedure requires cantons to have as investigating authorities a cantonal police and a cantonal attorney general office.

Whoever commits a crime in Switzerland is subject to Swiss criminal law (Article 3 SCC). A crime is deemed to have been committed where the offender acted, or failed to act contrary to duty, or where a result occurred (Article 8 SCC).

The prosecution and trial of criminal offences is under the competence of cantons, unless the law provides otherwise (Article 22 CPC).

Federal authorities have jurisdictions over offences committed by federal officials or against the Confederation (Article 23 Section 1j. CPC). They also have compulsory jurisdiction over the prosecution of crimes of money laundering, corruption and organised crime if the offences were mainly carried out abroad or in several cantons, if no canton manifestly appears to be predominantly concerned (Article 24 Section 1 CPC).

### ii Criminal liability of companies

Since 1 October 2003, companies, namely Swiss or foreign legal entities under private law, legal entities under public law, companies and sole proprietorships, can be held punishable for a criminal offence (Article 102 SCC).

Corporate liability may occur in two instances: first, if any felony or misdemeanour was committed in the context of the company's business activity and if, because of the deficient organisation of the company, that act cannot be attributed to a specific individual

21 See notably the White Paper published in April 2015 by ECS Ethics an Compliance Switzerland (www.ethics-compliance.ch/wp-content/uploads/1430387571/ecs-white-paper_whistleblower-protection-in-the-swiss-private-sector_apr.pdf).

(Article 102 Section 1 SCC); second, in the case of specific offences (participation in a criminal organisation (Article 260 *ter* SCC), financing of terrorism (Article 260 *quinquies* SCC), money laundering (Article 305 *bis* SCC), bribing of Swiss officials (Article 322 *ter* SCC), granting of an advantage to a Swiss official (Article 322 *quinquies* SCC), bribing of a foreign official (Article 322 *septies* SCC) and private active bribery (Article 322 *octies* SCC)), the company shall be punishable independently of the criminal liability of individuals if the company did not take all the reasonable and necessary organisational measures to prevent such crimes (Article 102 Section 2 SCC).

Companies shall be punishable with fines of up to 5 million Swiss francs. A disgorgement of profits may be ordered, as well as damages to the person harmed by the crime. The ban on exercise of a profession may only be imposed upon an individual (Article 67 SCC).

The most relevant decision in this respect is a 22 November 2011 sentencing order of the OAGS, under which Alstom Network Schweiz AG, a Swiss company who was responsible for the Alstom Group's global compliance, was found guilty of a breach of Article 102 Section 2 SCC in conjunction with Article 322 *septies* SCC in connection with bribes paid to foreign officials of three countries.[22] All the bribes, whether paid in or from Switzerland or abroad, by several of the companies of the Group were taken into account. Also, all profits of the Group, which were calculated on the basis of the Earnings Before Interest and Tax margin generated by the corruptly obtained contracts, were taken into account in the calculation of the disgorgement of profits of 36.4 million Swiss francs. A fine of 2.5 million Swiss francs was imposed.

### iii Negotiated criminal settlements

The Swiss Criminal Procedure Code enhances the possibilities of negotiation between the parties, namely between the attorney general's office, the suspect and the plaintiff,[23] with the view of incentivising the compensation of the aggrieved person by providing two explicit (discontinuance of the criminal proceedings in the event of compensation of the aggrieved person under Articles 53 SCC and 319 Section 1e. CPC; abridged proceedings under Article 358 CPC), and one implicit (sentencing order under Article 352 CPC) means of negotiating structured criminal settlements.

### iv Criminal organisation

The participation in, or support of, a criminal organisation, namely an organisation that keeps its structure and personal composition secret and pursues the purpose of committing violent crimes or of enriching itself by criminal means, is punishable with a custodial sentence

22 star.worldbank.org/corruption-cases/sites/corruption-cases/files/Alstom_Summary_Punishment_Order_Nov_22_2011.pdf.

23 Under the Swiss Criminal Procedure Code, the person, company or entity aggrieved by a criminal offence may, upon making a declaration to that end, participate in the criminal investigation with full party rights. It may also choose to sue the perpetrator for civil damages in the context of the criminal trial. The aggrieved person is also entitled to claim the allocation of forfeited assets and fine upon presentation of an enforceable damages award or an out-of-court settlement with the perpetrator. Foreign states aggrieved by bribes are entitled to be admitted as plaintiffs in Swiss criminal proceedings (see Federal Criminal Court decision BB.2011.130 of 20 March 2013).

of up to five years (Article 260 *ter* SCC). The offender shall also be punishable if he or she committed the crime abroad, provided the organisation carries out, or intends to carry out, its criminal activity fully or partially in Switzerland. A kleptocrat and his or her entourage may constitute a criminal organisation,[24] and employees of companies who had paid bribes to members of the said entourage and had assisted them to open or monitor bank accounts in Switzerland have been convicted of support of a criminal organisation.

## X COMPLIANCE

Swiss corporations are required to have internal control processes, which are to be reviewed by an auditor (Articles 716b Section 2 and 728a Section 1.3 SCO).

As mentioned above, under Article 102 SCC, a company will be punishable if a criminal offence committed within the company cannot be attributed to a specific individual because of the deficient organisation of the company or, in respect of the listed offences, if the company did not take all the reasonable and necessary organisational measures to prevent them.

There is therefore a strong incentive for Swiss companies and companies active in Switzerland to document the decisions made by their employees and to take organisational measures to prevent active public and private bribery, as well as money laundering.

## XI OUTLOOK AND CONCLUSIONS

As is currently the case and as a consequence of the legislative changes adopted over the past two years, which will in all likelihood increase the reporting of the laundering of bribery proceeds, the most relevant developments in the future will probably continue to concern cases of money laundering related to foreign bribery offences. More case law is likely to be developed on the definition of foreign public official.

The prosecution of private bribery is also likely to increase as a consequence of the recent legislative amendments.

Even though the action of Switzerland's prosecution authorities is commended internationally, the country continues to be criticised by several international organisations, and additional changes in legislation or practice may ensue.

GRECO has repeatedly criticised Switzerland for failing to regulate on the transparency of political funding, as well as for failing to make private bribery a predicate offence to money laundering.

Similarly, it appears that the upcoming FATF mutual evaluation report of Switzerland will be critical of several failings in money laundering prevention, notably in respect of the forming of foreign offshore structures by Swiss professionals; the opening and monitoring of

24 Federal Court decision 6B_422/2013 of 6 May 2013.

Swiss bank accounts; the low number of suspicious transaction reports, in particular before the initiation of criminal investigations; and the level of sanctions imposed by FINMA on banks and bankers.

Switzerland will play its part in response to the higher demand of the international community for more transparency and enhanced efforts in the fight against cross-border corruption.

## Appendix 1

# ABOUT THE AUTHORS

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Yves Klein is a Swiss international asset recovery lawyer, and a partner at Monfrini Crettol & Partners, Geneva. His main activity consists in litigating and coordinating transnational asset recovery proceedings before civil, criminal and bankruptcy courts on behalf of victims of economic crimes. In that context, Yves Klein and his partners have over the past 20 years represented and advised more than a dozen foreign governments in cross-border asset recovery proceedings regarding the proceeds of corruption, recovering in excess of US$2 billion (Nigeria, Tunisia and Brazil, notably). He is also active in transnational recovery proceedings on behalf of companies, foreign bankruptcy estates (notably Stanford International Bank Ltd, in liquidation) and individual victims of economic crimes.

He has published on tracing and recovery of assets and anti-corruption issues since 1996, and regularly speaks at international conferences on these matters.

Yves Klein is chair of the Asset Recovery Subcommittee of the International Bar Association's Anti-Corruption Committee and is representative for Switzerland of ICC FraudNet, the world's leading asset recovery network, operating under the auspices of the International Chamber of Commerce. He is fluent in French, English, Portuguese and Spanish, and speaks some Italian and German.

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