THE ANTI-BRIBERY AND ANTI-CORRUPTION REVIEW

SEVENTH EDITION

Editor
Mark F Mendelsohn

THE LAWREVIEWS

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This article was first published in December 2018
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Published in the United Kingdom
by Law Business Research Ltd, London
87 Lancaster Road, London, W11 1QQ, UK

www.TheLawReviews.co.uk

ISBN 978-1-912228-68-3

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following for their learned assistance throughout the preparation of this book:

ANAGNOSTOPOULOS

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CONTENTS

PREFACE

Anti-corruption enforcement continues to be an increasingly global endeavour and this seventh edition of *The Anti-Bribery and Anti-Corruption Review* is no exception. It presents the views and observations of leading anti-corruption practitioners in jurisdictions spanning every region of the globe, including new chapters covering Canada, Israel and Korea.

Given the exceptionally large penalties levied last year against Odebrecht SA and Braskem SA, as well as those against Rolls-Royce Plc, Telia Company AB, and VimpelCom Limited, the size of the fines in global enforcement actions have declined somewhat year-on-year, but multinational cooperation in global enforcement has remained robust. For example, the September 2018 conclusion in the United States of an US$853.2 million settlement with Petróleo Brasileiro SA (Petrobras) entailed cooperation between Brazil's Federal Public Ministry (MPF), the US Department of Justice (DOJ), and the US Securities and Exchange Commission (SEC). Under the non-prosecution agreement with Petrobras, the DOJ and SEC will credit the amount the company pays to the MPF, with Brazil receiving 80 per cent (US$682,560,000) of the penalty. Likewise, the conclusion of an enforcement action against SBM Offshore NV, a Netherlands-based oil services company, and its US subsidiary entailed the participation of the MPF, the Netherlands Public Prosecution Service and the DOJ, each of which shared a combined worldwide criminal penalty in excess of US$478 million. Similarly, Keppel Offshore & Marine, Ltd, a Singapore-based shipping services company, and its US subsidiary entered into coordinated settlement agreements with the DOJ, MPF and Singapore's Corrupt Practices Investigation Bureau. In an enforcement action against Paris-based Société Générale SA and its wholly owned subsidiary, the DOJ credited half the penalty assessed in connection with the bribery charges (over US$292 million) for payments to the French National Financial Prosecutor's Office. In a related enforcement action against Maryland-based Legg Mason, Inc, the DOJ also credited amounts paid to other law enforcement authorities.

Crediting fines in this way is in keeping with the DOJ's policy, announced in May 2018, of discouraging 'piling on', and encouraging coordination with other enforcement agencies in an attempt to avoid multiple penalties for the same conduct. In the FCPA context, the new policy arguably goes further than Article 4 of the Organisation for Economic Co-operation and Development's Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, which requires signatory states with shared jurisdiction over a foreign bribery case merely to consult with each other 'with a view to determining the most appropriate jurisdiction for prosecution'. For example, notwithstanding evidence of violations of the US Foreign Corrupt Practices Act, the DOJ closed its investigation of Güralp Systems Ltd, a UK-based manufacturer of broadband seismic instrumentation and

monitoring systems, in part owing to a parallel investigation and subsequent charges brought by the UK Serious Fraud Office (SFO).

Large-scale multinational coordination has also continued in connection with ongoing efforts to prosecute corruption in international football. Since May 2015, approximately 45 individuals have been charged in the United States alone. Likewise, there have been further developments in the worldwide investigations into the misappropriation of more than US$3.5 billion in funds by senior government officials from state-owned strategic development company 1Malaysia Development Berhard (1MDB), including the arrest of former Malaysian prime minister Najib Razak, who was charged with money laundering and various other offences, and eight former officers of the Malaysian External Intelligence Organisation, including its former chief. Hundreds of millions of dollars in assets have been seized. Following a formal request from the DOJ, Indonesia impounded in Bali and agreed to convey to Malaysia a US$250 million luxury yacht belonging to Low Taek Jho, the Malaysian financier at the centre of the 1MDB scandal.

At an even more fundamental level, and in concert with the growing trend towards multinational cooperation in global enforcement, this past year, around the world, countries have adopted important enhancements to their anti-corruption laws. Argentina established criminal liability for domestic and foreign companies and imposed strict liability for various offences, including active domestic bribery, transnational bribery and participating in the offence of illicit enrichment of public officials. Canada implemented legislation outlawing 'facilitation payments', which are made to government officials to facilitate routine transactions, such as permits. In China, the Standing Committee of the National People's Congress adopted amendments to the country's Anti-Unfair Competition Law that specify the range of prohibited recipients of bribes and expand the definition of prohibited bribery to include bribery for the purpose of obtaining transaction opportunities or competitive advantages. The amendments also impose, with limited exceptions, vicarious liability on employers for bribery committed by employees, and provide for increased penalties. India passed the Prevention of Corruption (Amendment) Act, which criminalises giving an 'undue advantage' to a public official, establishes criminal liability for corporations and creates a specific offence penalising corporate management. Furthermore, Italy announced a new law aimed at strengthening protection for whistle-blowers, while Peru passed a law imposing criminal liability on domestic and foreign corporations.

A significant trend in legislative changes this past year was the widespread introduction of alternative forms of resolution for companies, short of criminal conviction and often referred to as deferred prosecution agreements (DPAs). Argentina, as part of its new law establishing criminal liability for domestic and foreign companies, introduced 'effective collaboration agreements', which allow for non- and deferred-prosecution agreements. Canada created a legal regime for 'remediation agreements' to resolve corporate offences under the Criminal Code and the Corruption of Foreign Public Officials Act. Singapore also introduced similar new legislation. Notably, these new DPA regimes, unlike non-prosecution agreements in the American regime, but in keeping with US DPAs and the regime in the United Kingdom, all require court approval of any proposed agreement. Additionally, in November 2017, France announced its first deferred prosecution agreement under the Sapin II Law with HSBC Private Bank (Suisse) SA, enacted in December 2016.

There have also been a number of significant developments in data protection laws that affect the conduct of international investigations, of which the EU General Data Protection Regulation (GDPR) is the most well known and impactful. In the first court ruling

concerning the application of the GDPR, a German court held that the Internet Corporation for Assigned Names and Numbers could no longer demand from a registrar of domain information data containing, among other things, the contact information for domain name registrants, administrators and technicians. Meanwhile, a number of developments affect the ability of law enforcement authorities to compel production of certain records from outside their national borders. For example, in the United States, Congress passed the Clarifying Lawful Overseas Use of Data Act (or CLOUD Act), which expressly requires email service providers to preserve and disclose to law enforcement electronic data within their possession, custody or control even when that data is located outside the United States. Following two decisions of the Court of Appeal of England and Wales, the SFO can compel production of documents held outside the United Kingdom by companies incorporated outside the United Kingdom, but the protections of 'litigation privilege' will still be accorded to documents produced in internal investigations. It will be interesting to see how courts and companies navigate these differing and evolving legal regimes in the year ahead.

The chapters in this book, which contain a wealth of learning about these significant developments around the world, will serve as a useful place to begin. They will help to guide practitioners and their clients when navigating the perils of corruption in the conduct of foreign and transnational business, and of related internal and government investigations. I wish to thank all the contributors for their support in producing this volume and for taking time from their practices to prepare these chapters.

Mark F Mendelsohn
Paul, Weiss, Rifkind, Wharton & Garrison LLP
Washington, DC
November 2018

Chapter 24

SWITZERLAND

Yves Klein and Claire A Daams[1]

I INTRODUCTION

While Switzerland is considered one of the least corrupt countries in the world,[2] it is also the second most active jurisdiction, 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 known domestic corruption cases, resulting in a corresponding low number of prosecutions of domestic bribery. This is disproportionate to the numerous investigations into Swiss bank accounts used to launder the proceeds of foreign bribery.

Investigation and prosecution of allegations of bribery remain largely dependent on the proactivity of the federal and 26 cantonal attorney generals' offices, as well as on the number of complaints and suspicious financial transaction reports received.

Because of the length and complexity of foreign bribery investigations, the main cases in 2017–2018 concerned the *Petrobras*, *1MDB* and *FIFA* cases, with their parallel financial regulation enforcement proceedings. Resolved cases involved a company specialised in port infrastructure and one in oil trading.

Since 1 July 2016, private-to-private corruption has been criminalised in the Swiss Criminal Code.[4] In addition, paying bribes to third parties, including sport associations, has been penalised.

The present situation and the outlook remain the same: Swiss authorities are very active in respect of enforcing international bribery cases, while domestic bribery remains a lower priority, mostly because fewer cases are detected.

II DOMESTIC BRIBERY: LEGAL FRAMEWORK

i Public bribery

The conclusion of the Organisation for Economic Co-operation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions in 1997 caused important changes in the existing domestic anti-corruption

1 Yves Klein is a senior partner at Monfrini Bitton Klein and Claire Daams is a partner at Legal Remedy RMD.Legal.

2 Together with Finland and Norway, Switzerland ranks third in Transparency International's Corruption Perceptions Index 2017.

3 star.worldbank.org/corruption-cases.

4 Until then private corruption was prohibited under Article 4(a) of the Federal Act on unfair competition.

provisions in the Swiss Criminal Code (SCC)[5] as well as the creation of a separate chapter on this topic. These changes entered into force on 1 May 2000.[6] Further revisions have taken place since. Both active and passive bribery of Swiss public officials constitute criminal offences under Swiss law.

Public bribery is defined as any person offering, promising or giving a public official or a third party an undue advantage (active bribery – Article 322 *ter* SCC), or for any public official to solicit or accept such an advantage (passive bribery – Article 322 *quater* SCC) to cause the public official to carry out or to omit to carry out an act in connection with his or her official activity, which is contrary to the official's duty or that fall within his or her discretionary power.

Public officials susceptible to public bribery include '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'.

Article 110, Section 3 SCC defines public officials 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.*

Article 322 *decies*, Section 2 SCC, foresees that 'private individuals fulfilling official duties are subject to the same provisions as public officials'.

The Swiss legislature has opted to broadly define the group of people who may receive a public bribe (or advantage).

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, but could, for example, consist of the undue sharing of information. It may also be an omission, such as not admitting a complaint.

The official's act or omission must be specific, or fall within the provisions of granting and accepting an advantage (Articles 322 *quinquies* and 322 *sexies* SCC).

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

The following advantages do not qualify as undue under Article 322 *decies*, Section 1 SCC:

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

b negligible advantages that are common social practice.

Examples of the above include a bouquet of flowers to express appreciation for giving a speech, a small Christmas present or modest entertainment on the occasion of business meetings.

5 At the time of writing, the most recent but unofficial English translation of the SCC is the one as of March 2018, available at https://www.admin.ch/gov/en/start/federal-law/classified-compilation.html.

6 AS 2000 1121 1126, BBl. 1999 5497.

The penalty for natural persons committing or abetting acts of active or passive public bribery is a custodial sentence of up to five years or a pecuniary penalty of up to 540,000 Swiss francs.[7] 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[8] (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.[9]

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 pecuniary penalty of up to 540,000 Swiss francs. The statute of limitations is 10 years.

iii Private bribery

Under Articles 322 *octies* and 322 *novies* SCC, both of which entered into force on 1 July 2016, 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 so 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 of learning of the offence (Articles 322 *octies*, Section 2 and 322 *novies*, Section 2 SCC).

The penalty for active and passive private bribery is a custodial sentence not exceeding three years or a pecuniary penalty of up to 540,000 Swiss francs. By opting for this level of maximum sanctions the Swiss legislature has chosen to exclude private bribery as a predicate offence to money laundering. The statute of limitations is 10 years.

III ENFORCEMENT: DOMESTIC BRIBERY

Over the past year, there have been slightly more reports in relation to domestic public bribery.

Among the pending investigations, one of the most notorious cases is that of the Federal Secretariat for the Economy (SECO), where IT services, some of them allegedly non-existent, were purchased for millions of Swiss francs from two Swiss companies for kickbacks paid to a SECO civil servant. The criminal investigation, which started in 2014, is still under way and was extended in 2017 to six further individuals and now includes 10 persons in total.

7 In force since 1 January 2018.

8 In force since 1 July 2016.

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

Two other cases concern the Swiss National Railway Company (CFF). The first case involves a former CFF project leader who succeeded in awarding a total of 604 contracts in relation to electrical systems to two small enterprises belonging to his acquaintances. In return, the project leader received more than 1 million Swiss francs in kickback payments. The overall damage to CFF has been estimated at several million Swiss francs. This case, involving six persons, is at trial stage before the Federal Criminal Court. The second CFF case is still under investigation and involves a total of 14 persons, four of whom are former CFF employees.

A fourth case relates to a state-owned technology concern specialising in, *inter alia*, arms manufacturing. A senior staff member is under investigation on suspicion of having received significant kickback payments in relation to illegal arms deals.

Other smaller cases that has been reported involve the Federal Office of Roads and a publicly owned company in the canton of Geneva.

Finally two cases of allegations of bribery, one in relation to a national politician and one to a cantonal politician, have been reported. In both cases, the immunity of the politicians involved has been lifted and the investigations are ongoing.

It is unclear how many unreported cases of corruption are under investigation at cantonal level.

One possible explanation for the higher rate of investigation by the Office of the Attorney General of the Swiss Confederation and by the canton 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.

In September 2015, the Federal Police[10] created an (anonymous) anti-corruption reporting platform,[11] which serves to report any acts of private and public bribery, in Switzerland or abroad. In 2016, 125 reports were filed on this platform, of which 29 were related to allegations of corruption, 63 concerned other crimes (cantonal competence) and 33 were considered irrelevant. Half of the reports were filed anonymously.[12] At the time of writing, the Federal Police had not published the number of reports it received in 2017. In its Phase 4 evaluation report on the implementation of the OECD Anti-Bribery Convention, the OECD's Working Group on Bribery noted that no cases of foreign bribery originating from whistle-blower reports had been brought to the attention of the cantonal or federal Office of the Attorney General.[13]

IV FOREIGN BRIBERY: LEGAL FRAMEWORK

Bribery of foreign public officials includes offering, promising or granting a foreign public official or a third party an undue advantage (active bribery), or for any foreign public official

10 www.fightingcorruption.ch.

11 fedpol.integrityplatform.org.

12 www.fedpol.admin.ch/fedpol/de/home/kriminalitaet/korruption/meldungen.html.

13 OECD Phase 4 evaluation report of Switzerland, adopted on 15 March 2018, http://www.oecd.org/corruption/anti-bribery/Switzerland-Phase-4-Report-ENG.pdf.

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 to 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', also applies to foreign bribery. The definition of what constitutes an official duty is based on the applicable foreign law.

On 1 October 2014,[14] the Federal Criminal Court confirmed that Riadh Ben Aissa, a manager of the Canadian company SNC-Lavalin, had paid bribes to Saadi Gaddafi, the son of former Libyan dictator Muammar Gaddafi, to settle disputes and secure the conclusion of public contracts from Libyan state entities. Because of his position in the ruling family and his *de facto* decision-making power, Saadi Gaddafi was considered a foreign public official. This interpretation is coherent with the autonomous definition of foreign public official used in Article 1 of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.

As was mentioned in the previous edition of this publication, the Federal Criminal Court took a different view in the Gazprom case, in which it acquitted the employees who were under suspicion of having received bribes in relation to several large projects in Russia and Poland. The Federal Criminal Court justified its decision by saying that, despite the autonomous definition of public officials used in the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, one would still need to clarify whether the employees were public officials according to the law of the state in which they were employed. Since Gazprom had been privatised prior to the payment of the alleged bribes, the Court came to the view that its employees had no functional role as public officials.[15] This case law sets a precedent that is likely to impact future cases involving officials of state-owned enterprises.

The penalty for individuals committing, or abetting, active or passive bribery of a foreign public official is a custodial sentence of up to five years or a pecuniary penalty of up to 540,000 Swiss francs. The statute of limitations is 15 years.

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

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

15 www.bundesstrafgericht.ch, SK.2015.17 and SK.2016.17.

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, is obliged to hold commercial accounts.

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 958(f), 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 958(e), 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 has to assume originate from a 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 shall 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).

The vast majority of bribery investigations start in Switzerland on the basis of suspicious-transaction reports. Those reports are taken very seriously and, if there are well-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. Requests for mutual legal assistance are the second most important source for detecting bribery cases.

VI ENFORCEMENT: FOREIGN BRIBERY AND ASSOCIATED OFFENCES

According to published decisions, press releases, annual activity reports of the OAGS[16] and of the Federal Office of Justice,[17] Switzerland was at the centre of several of the main global 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 OAG 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).

In total, over 1,000 bank accounts held in 40 Swiss banks are under investigation. 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$1 billion has been frozen.

Since the start of the investigation, an amount of about US$200 million has already been returned to Brazil. This high-priority case remains ongoing and has led to over 50 requests for mutual legal assistance, which are being handled by the OAGS together with the Federal Office of Justice.

16 https://www.bundesanwaltschaft.ch/mpc/en/home/taetigkeitsberichte/taetigkeitsberichte-der-ba.html.

17 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 some of these banks[18] and concluded its proceedings against banks in Lugano, Zurich[19] and Geneva.

ii 1MDB

On 14 August 2015, the OAGS initiated criminal investigations against two former officials of the Malaysian state-owned fund 1Malaysia Development Berhad (1MDB) 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 during the period 2009–2013 (relating to Petrosaudi, SRC, Genting/Tanjong and ADMIC) for around US$4 billion.

Since summer 2018, mutual legal assistance between Malaysia and Switzerland has been expected to be resumed.

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,[20] 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.

Shortly after the appointment of the current Attorney General of Malaysia in June 2018, a working visit took place between him and the Swiss Attorney General to discuss cooperation between these two authorities with regard to this case. Six persons and two banks are under investigation.[21]

iii FIFA

The Fédération Internationale de Football Association (FIFA) is an association governed by Swiss law, founded in 1904 and based in Zurich.

On 10 March 2015, the OAGS initiated criminal investigations for criminal mismanagement (Article 158 SCC) and money laundering (Article 305 *bis* SCC) in

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

19 https://www.finma.ch/en/news/2018/02/20180201-mm-pkb/; https://www.finma.ch/en/news/2018/02/20180201-mm-pkb/.

20 '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.

21 https://www.bundesanwaltschaft.ch/mpc/de/home/medien/archiv-medienmitteilungen/news-seite.msg-id-71536.html.

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 on the suspicion 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. The OAGS continues to conduct a large number of criminal investigations in relation to FIFA and opened a new case in 2017 concerning FIFA's former Secretary General, Jérôme Valcke, and other persons. The investigation concerns allegations of private bribery under the legal provisions applicable prior to the introduction of private-to-private corruption in the SCC.[22]

iv Port infrastructure

A controversial issue arose in relation to the resolution of a case involving a foreign company specialising in port infrastructure projects that had paid bribes to foreign public officials in various African countries. Employees of the company involved had ordered disputed payments amounting to US$21 million over a period of several years. The financial intermediary involved was sanctioned for complicity in foreign bribery. The sanction imposed consisted of a suspended pecuniary penalty of 25,200 Swiss francs. The related financial benefits (bonuses) were confiscated.[23]

v Gunvor

On 28 August 2018, a former oil trader with Gunvor Group was convicted and given an 18-month suspended jail sentence by the Federal Criminal Tribunal[24] after admitting to bribing foreign public officials to secure oil cargoes from the Republic of Congo and Ivory Coast. The judgment was issued in the context of abridged proceedings under Article 358 CPC. The criminal investigation was initiated by the Office of the Attorney General of Switzerland in 2011 following a Swiss bank's suspicious-transaction report under Article 9 MLA. On 19 May 2017, the criminal proceedings were extended to the Geneva branch of the Netherlands-registered Gunvor International BV, and Gunvor's swiss entity, Gunvor SA for criminal liability (Article 102 SCC) in connection with the bribery of foreign public officials. The criminal investigation into Gunvor is still pending.

vi BSGR

In 2013, the Office of the Attorney General of Geneva initiated criminal proceedings in respect of suspicions of bribes paid from Geneva to public officials of the Republic of Guinea in respect of the granting of mining rights worth US$5 billion to the BSGR group of companies. Criminal investigations have been initiated in Guinea, the United States and Israel. In 2014, BSGR brought arbitral proceedings before the International Centre for Settlement of

22 https://www.bundesanwaltschaft.ch/mpc/de/home/taetigkeitsberichte/taetigkeitsberichte-der-ba.html, p. 20.

23 OECD Phase 4 evaluation report of Switzerland, p. 43.

24 Judgment SK.2018.38.

Investment Disputes (ICSID)[25] challenging the withdrawal of the mining rights by Guinea, who filed a counterclaim in the arbitration proceedings in respect of the damage caused by the acts of bribery. On 16 March 2017, the Office of the Attorney General of Geneva admitted Guinea as a plaintiff in the criminal proceedings, a decision that was ultimately upheld by the Federal Court on 17 October 2017,[26] which held that Guinea did not need to establish the existence of pecuniary damage to be granted plaintiff status, as acts of bribery directly harm the state by perverting its decision-making process. On 14 March 2018, the Federal Court also held that the existence of mutual assistance proceedings between Switzerland and Guinea did not preclude Guinea from using evidence obtained in the Geneva criminal proceedings in the context of the ICSID arbitration proceedings.[27]

VII INTERNATIONAL ORGANISATIONS AND AGREEMENTS

Switzerland, which is not a member of the European Union, is a member of the United Nations, the OECD 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;

b Council of Europe Criminal Law Convention Against Corruption of 1998; and

c United Nations Convention against Corruption of 2003.

VIII LEGISLATIVE DEVELOPMENTS

It has been recognised at international level, that whistle-blowers can be a valuable source of detection of foreign bribery cases. Effective safeguards should therefore be provided, both in law and in practice, to encourage whistle-blowers to speak out. These safeguards should not be limited to labour law, but should also offer protection from retaliation other than dismissal, such as from prosecution for violation of various types of secrecy provisions.[28] The Swiss legal framework in this regard has been deemed inadequate.[29] A first draft bill was rejected by parliament in 2015. Meanwhile the draft bill, proposing a partial revision of the Code of Obligations, has been revised. The Federal Council adopted the additional message accompanying the draft bill on 21 September 2018.

25 ICSID Case No. ARB/14/22 (the materials of the proceedings are publicly available on the ICSID website under the UNCITRAL Rules on Transparency in Treaty-Based Investor–State Arbitration).

26 Decision 1B_261/2017.

27 Decision 1B_521/2017.

28 Examples include official secrecy according to Article 320 SCC (public sector), the duty of care and loyalty (Article 321a (4) CO), commercial secrecy (Article 162 SCC), professional secrecy for certain professions (Article 321 SCC), bank secrecy (Article 47 LB) and secrecy in the accounting profession (Article 730b (2) CO) (private sector).

29 OECD Phase 4 report, p. 14.

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 over 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 CPC requires cantons to have as investigating authorities a cantonal police and a cantonal attorney general's 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 1(j) 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 (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 offences (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 to date in this respect remains 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.[30] 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 CPC enhances the possibilities of negotiation between the parties, namely between the attorney general's office, the suspect and the plaintiff,[31] 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 1(e) 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 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,[32] 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 716(b), Section 2 and 728(a), Section 1.3 SCO).

As mentioned above, under Article 102 SCC, a company will be liable for punishment 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.

30 http://star.worldbank.org/corruption-cases/sites/corruption-cases/files/Alstom_Summary_Punishment_Order_Nov_22_2011.pdf.

31 Under the CPC, 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).

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

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, the most significant developments in the future will probably continue to concern the detection of foreign bribery cases based on cases of money laundering. More case law is likely to be developed on the definition of a foreign public official.

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

Even though the active enforcement of Switzerland's prosecution authorities is commended internationally, the country continues to be criticised by several international organisations for the low level of sanctions and lack of effective whistle-blower protection. Additional changes in legislation or practice may ensue.

The Group of States against Corruption continues to criticise Switzerland for failing to regulate on the transparency of political party funding, as well as for failing to make private bribery a predicate offence to money laundering.

Similarly, it appears that the upcoming Financial Action Task Force mutual evaluation report on 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 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 senior partner at Monfrini Bitton Klein, 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.

He is recognised in asset recovery and business crime by *Chambers* and *Who's Who Legal* (he has been a *Who's Who Legal* Asset Recovery Thought Leader since 2016 and has been ranked in *Who's Who Legal*'s Highest Regarded Individuals in Asset Recovery since 2013).

Yves Klein is the immediate former chair of the Asset Recovery Subcommittee of the International Bar Association's Anti-Corruption Committee and is the Switzerland representative for 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 Italian and German.

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Dr Claire A Daams is a Swiss lawyer. She is admitted to the Dutch bar (1997) and holds law degrees from several European universities, as well as a doctorate in criminal law and criminal procedure from the University of Basel (2003). She was in private practice in the Netherlands for nine years as a lawyer and tax adviser and consultant, before serving as senior researcher and lecturer at the law faculty of the University of Basel and assistant to the President of the OECD's Working Group on Bribery. From 2003–2015 she was a federal prosecutor in the Office of the Attorney General of Switzerland, responsible for complex and multi-jurisdictional cases of international bribery and corruption, money laundering, fraud and other financial crimes. During this period, she represented the OAG at the OECD's Working Group on Bribery, was elected its vice-chair and chaired its law enforcement committee. In January

2016, she joined the Basel Institute on Governance as Head of Legal and Case Consultancy of the Institute's International Centre for Asset Recovery (ICAR). Together with her staff, she advised developing and transitional countries in Africa, the Americas, Asia and eastern and south-eastern Europe on investigations of transnational cases of bribery, corruption and money laundering with a view to recovering assets related to these crimes. She has taught mutual assistance law at the University of Bern since 2009. She returned to private practice on 1 July 2017 and is registered with the Geneva Bar Commission as a lawyer from an EU/AA Member State authorised to practise in Switzerland under her home title (Advocaat at the Netherlands Bar).

Claire Daams is Secretary of the IBA's Anti-Corruption Committee and the Switzerland representative for the Roxin Alliance, a global network of lawyers specialising in cross-border business crime, internal investigations and asset recovery. She speaks Dutch, English, French, German, Italian and Spanish.

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ISBN 978-1-912228-68-3