THE ANTI-BRIBERY AND ANTI-CORRUPTION REVIEW

Sixth Edition

Editor
Mark F Mendelsohn

THE LAWREVIEWS

THE ANTI-BRIBERY AND ANTI-CORRUPTION REVIEW

SIXTH EDITION

Reproduced with permission from Law Business Research Ltd
This article was first published in November 2017
For further information please contact Nick.Barette@thelawreviews.co.uk

Editor
Mark F Mendelsohn

THE LAWREVIEWS

PUBLISHER
Gideon Roberton

SENIOR BUSINESS DEVELOPMENT MANAGER
Nick Barette

BUSINESS DEVELOPMENT MANAGERS
Thomas Lee, Joel Woods

ACCOUNT MANAGERS
Pere Aspinall, Sophie Emberson,
Laura Lynas, Jack Bagnall

PRODUCT MARKETING EXECUTIVE
Rebecca Mogridge

RESEARCHER
Arthur Hunter

EDITORIAL COORDINATOR
Gavin Jordan

HEAD OF PRODUCTION
Adam Myers

PRODUCTION EDITOR
Tessa Brummitt

SUBEDITOR
Hilary Scott

CHIEF EXECUTIVE OFFICER
Paul Howarth

Published in the United Kingdom
by Law Business Research Ltd, London
87 Lancaster Road, London, W11 1QQ, UK

www.TheLawReviews.co.uk

ISBN 978-1-910813-93-5

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

THE LAW REVIEWS

THE MERGERS AND ACQUISITIONS REVIEW

THE RESTRUCTURING REVIEW

THE PRIVATE COMPETITION ENFORCEMENT REVIEW

THE DISPUTE RESOLUTION REVIEW

THE EMPLOYMENT LAW REVIEW

THE PUBLIC COMPETITION ENFORCEMENT REVIEW

THE BANKING REGULATION REVIEW

THE INTERNATIONAL ARBITRATION REVIEW

THE MERGER CONTROL REVIEW

THE TECHNOLOGY, MEDIA AND TELECOMMUNICATIONS REVIEW

THE INWARD INVESTMENT AND INTERNATIONAL TAXATION REVIEW

THE CORPORATE GOVERNANCE REVIEW

THE CORPORATE IMMIGRATION REVIEW

THE INTERNATIONAL INVESTIGATIONS REVIEW

THE PROJECTS AND CONSTRUCTION REVIEW

THE INTERNATIONAL CAPITAL MARKETS REVIEW

THE REAL ESTATE LAW REVIEW

THE PRIVATE EQUITY REVIEW

THE ENERGY REGULATION AND MARKETS REVIEW

THE INTELLECTUAL PROPERTY REVIEW

THE ASSET MANAGEMENT REVIEW

THE PRIVATE WEALTH AND PRIVATE CLIENT REVIEW

THE MINING LAW REVIEW

THE EXECUTIVE REMUNERATION REVIEW

THE ANTI-BRIBERY AND ANTI-CORRUPTION REVIEW

THE CARTELS AND LENIENCY REVIEW

THE TAX DISPUTES AND LITIGATION REVIEW

THE LIFE SCIENCES LAW REVIEW

THE INSURANCE AND REINSURANCE LAW REVIEW

THE GOVERNMENT PROCUREMENT REVIEW

THE DOMINANCE AND MONOPOLIES REVIEW

THE AVIATION LAW REVIEW

THE FOREIGN INVESTMENT REGULATION REVIEW

THE ASSET TRACING AND RECOVERY REVIEW

THE INSOLVENCY REVIEW

THE OIL AND GAS LAW REVIEW

THE FRANCHISE LAW REVIEW

THE PRODUCT REGULATION AND LIABILITY REVIEW

THE SHIPPING LAW REVIEW

THE ACQUISITION AND LEVERAGED FINANCE REVIEW

THE PRIVACY, DATA PROTECTION AND CYBERSECURITY LAW REVIEW

THE PUBLIC–PRIVATE PARTNERSHIP LAW REVIEW

THE TRANSPORT FINANCE LAW REVIEW

THE SECURITIES LITIGATION REVIEW

THE LENDING AND SECURED FINANCE REVIEW

THE INTERNATIONAL TRADE LAW REVIEW

THE SPORTS LAW REVIEW

THE INVESTMENT TREATY ARBITRATION REVIEW

THE GAMBLING LAW REVIEW

THE INTELLECTUAL PROPERTY AND ANTITRUST REVIEW

THE REAL ESTATE M&A AND PRIVATE EQUITY REVIEW

THE SHAREHOLDER RIGHTS AND ACTIVISM REVIEW

THE ISLAMIC FINANCE AND MARKETS LAW REVIEW

THE ENVIRONMENT AND CLIMATE CHANGE LAW REVIEW

THE CONSUMER FINANCE LAW REVIEW

THE INITIAL PUBLIC OFFERINGS REVIEW

THE CLASS ACTIONS LAW REVIEW

THE TRANSFER PRICING LAW REVIEW

THE BANKING LITIGATION LAW REVIEW

THE HEALTHCARE LAW REVIEW

THE PATENT LITIGATION LAW REVIEW

www.TheLawReviews.co.uk

ACKNOWLEDGEMENTS

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

ANAGNOSTOPOULOS

AZB & PARTNERS

BAKER & PARTNERS

BCL SOLICITORS LLP

BONN STEICHEN & PARTNERS

CLARK WILSON LLP

DECHERT

ESTUDIO BECCAR VARELA

FERRERE

HANNES SNELLMAN ATTORNEYS LTD

HERBERT SMITH FREEHILLS CIS LLP

HOGAN LOVELLS

JOHNSON WINTER & SLATTERY

JONES DAY

KOLCUOĞLU DEMİRKAN KOÇAKLI

LEE HISHAMMUDDIN ALLEN & GLEDHILL

MONFRINI BITTON KLEIN

MORI HAMADA & MATSUMOTO

PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP

PINHEIRO NETO ADVOGADOS

SOŁTYSIŃSKI KAWECKI & SZLĘZAK

STETTER RECHTSANWÄLTE

STUDIO LEGALE PISANO

VIEIRA DE ALMEIDA

CONTENTS

PREFACE vii
Mark F Mendelsohn

Chapter 1 ARGENTINA 1
Maximiliano D'Auro, Manuel Beccar Varela, Dorothea Garff, Francisco Zavalía and Tadeo Leandro Fernández

Chapter 2 AUSTRALIA 11
Robert R Wyld and Jasmine Forde

Chapter 3 BRAZIL 41
Ricardo Pagliari Levy and Heloisa Figueiredo Ferraz de Andrade Vianna

Chapter 4 CANADA 53
Christopher J Ramsay

Chapter 5 CHINA 68
Kareena Teh and Philip Kwok

Chapter 6 ECUADOR 80
Javier Robalino Orellana, Jesús Beltrán and Ernesto Velasco

Chapter 7 ENGLAND AND WALES 94
Shaul Brazil and John Binns

Chapter 8 FRANCE 106
Antonin Lévy

Chapter 9 GERMANY 118
Sabine Stetter

Chapter 10 GREECE 128
Ilias G Anagnostopoulos and Jerina (Gerasimoula) Zapanti

Chapter 11 HONG KONG 137
Kareena Teh

Chapter 12 INDIA 149
Aditya Vikram Bhat and Shwetank Ginodia

Chapter 13 ITALY 162
Roberto Pisano

Chapter 14 JAPAN 175
Kana Manabe, Hideaki Roy Umetsu and Shiho Ono

Chapter 15 JERSEY 185
Simon Thomas and Lynne Gregory

Chapter 16 LUXEMBOURG 195
Anne Morel

Chapter 17 MALAYSIA 204
Rosli Dahlan and Muhammad Faizal Faiz Mohd Hasani

Chapter 18 MEXICO 220
Oliver J Armas, Luis Enrique Graham and Thomas N Pieper

Chapter 19 NETHERLANDS 231
Aldo Verbruggen

Chapter 20 POLAND 244
Tomasz Konopka

Chapter 21 PORTUGAL 256
Sofia Ribeiro Branco and Joana Bernardo

Chapter 22 RUSSIA 266
Alexei Panich and Sergei Eremin

Chapter 23 SWEDEN....277
David Ackebo, Elisabeth Vestin and Emelie Jansson

Chapter 24 SWITZERLAND....289
Yves Klein and Claire A Daams

Chapter 25 TURKEY....301
Okan Demirkan, Begüm Biçer İlikay and Başak İslim

Chapter 26 UNITED STATES....312
Mark F Mendelsohn

Appendix 1 ABOUT THE AUTHORS....337
Appendix 2 CONTRIBUTING LAW FIRMS' CONTACT DETAILS....357

PREFACE

This sixth 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, including new chapters covering Argentina, Canada, Jersey and Sweden. The worldwide scope of this volume reflects the reality that anti-corruption enforcement has become an increasingly global endeavour.

Over the past year, the ripple effects from several ongoing high-profile global corruption scandals have continued to dominate the foreign and domestic bribery landscape. Most notably, in Brazil, Operation Car Wash, the wide-ranging investigation that uncovered a colossal bribery and embezzlement ring at state-owned oil company Petróleo Brasileiro SA (Petrobras), has implicated many domestic and multinational firms across a range of industries, and touched a growing number of foreign countries, leading to cross-border cooperation by enforcement agencies and one of the largest foreign bribery settlements in history. In December 2016, Odebrecht SA, the largest construction company in Latin America, and its subsidiary Braskem SA, a Brazilian petrochemical company, entered coordinated settlement agreements to pay approximately US$3.5 billion in fines and penalties to authorities in Brazil, the United States and Switzerland for making improper payments to government officials, including officials at Petrobras, Brazilian politicians and officials, and political parties through Odebrecht's off-book accounts in exchange for improper business advantages, including contracts with Petrobras. Additionally, J&F Investimentos SA, the parent company of the world's largest meatpacker JBS SA, entered a leniency agreement with Brazil's Federal Prosecutor's Office, agreeing to pay US$3.2 billion for its role in corrupting more than a thousand politicians over the course of a decade. Over the past year, Brazilian enforcement authorities have increasingly utilised plea bargains and leniency agreements both to secure cooperating witnesses and encourage companies to pay fines that ultimately reduce the financial and reputational impact from harsh sanctions.

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 Berhad (1MDB). The Swiss Office of the Attorney General has been pursuing a money laundering investigation into 1MDB and two Swiss private banks with the help of Singapore, Luxembourg, and the US Department of Justice (DOJ). In June 2017, the DOJ filed additional civil forfeiture complaints seeking recovery of assets valued at approximately US$540 million. Combined with the DOJ's June 2016 civil forfeiture complaints to recover more than US$1 billion in assets, this remains the largest civil forfeiture action ever brought under the DOJ's Kleptocracy Asset Recovery Initiative. The DOJ has also turned its focus to a criminal investigation into

1MDB, particularly in relation to funds used to acquire real estate and other assets in the United States.

Judicial and legislative developments over the past year have further clarified the breadth and scope of anti-corruption investigations and enforcement. For instance, in December 2016, the French parliament passed the Sapin II law, a corporate anti-corruption law that, among other things, established the French Anti-Corruption Agency and required companies with 500 or more employees to establish a compliance programme by mid 2017. In May 2017, the UK High Court in *Director of the Serious Fraud Office v. Eurasian Natural Resources Corporation Ltd* reduced the scope of litigation privilege to communications created to obtain information when the litigation is in progress or reasonably imminent, is adversarial, and the communication's primary purpose is conducting the litigation. If upheld, this has an impact on how investigative internal investigations in the UK are structured so as to maintain legal privilege. Finally, in June 2017, the US Supreme Court held in a unanimous decision in *Kokesh v. SEC* that claims for disgorgement brought by the Securities and Exchange Commission (SEC) were subject to a five-year statute of limitations, thereby limiting the SEC's ability to seek monetary penalties for misconduct that occurred more than five years before the enforcement action.

Continuing a recent trend, the enforcement actions this year reflect cooperation between authorities all over the globe to investigate and charge companies involved in corruption scandals. For example, the successful investigation into Odebrecht SA and Braskem SA was a result of cooperation between the DOJ, the Brazilian Federal Prosecutor's Office and the Swiss Office of the Attorney General. Likewise, in January 2017, the DOJ, the UK's Serious Fraud Office and the Brazilian Federal Prosecutor's Office reached an US$800 million coordinated settlement agreement with Rolls-Royce Plc, a UK-based multinational engineering company that manufactures, designs and distributes power systems, for its role in a bribery scheme involving payments to foreign officials around the globe in exchange for government contracts. And recently in September 2017, in the only corporate Foreign Corrupt Practices Act (FCPA) enforcement action under the Trump administration to date, Swedish international telecommunications company Telia Company AB and its subsidiary entered coordinated settlement agreements with the DOJ, SEC and the Public Prosecution Service of the Netherlands, agreeing to pay US$965 million in fines and penalties for making bribe payments of over US$331 million to an Uzbek official in exchange for expansion into the Uzbek telecommunications market. This is the second settlement arising from the expansive collaborative investigation into bribe payments made to an Uzbek government official; Amsterdam-based telecommunications company VimpelCom Limited and its subsidiary entered a US$795 million global settlement last year to resolve similar allegations as a result of cooperation between enforcement agencies in, among others, Belgium, Bermuda, the British Virgin Islands, the Cayman Islands, Estonia, France, Ireland, the Netherlands, Norway, Spain, Sweden and Switzerland.

In the United States, the DOJ has continued to emphasise the importance of an effective compliance programme and self-reporting. In February 2017, the DOJ Fraud Section released a guidance document, 'Evaluation of Corporate Compliance Programs', identifying a list of 119 common questions that the Fraud Section may ask in evaluating corporate compliance programmes in the context of a criminal investigation. Relatedly, April 2017 marked the one-year anniversary of the DOJ's Pilot Program, aimed at providing 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 Pilot Program remains in effect under the current administration, but its future remains uncertain as the DOJ continues to assess its utility and efficacy. To date, the DOJ has issued seven declinations to companies that self-reported and disgorged profits under the Pilot Program, with no monitorship requirements.

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 2017

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 prosecution 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 largely depend on the (pro-) activity of the federal and 26 cantonal attorney-generals' offices, as well as the number of complaints and suspicious financial transaction reports received.

The main foreign bribery investigations in 2016–2017 concerned the *Petrobras*, *1MDB, FIFA*, *Yara* and *Gazprom* cases, with their parallel financial regulation enforcement proceedings.

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 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 the public interest.

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 provisions in the Swiss Criminal Code (SCC)[5] as well as the creation of a separate chapter

1 Yves Klein is a senior partner and Claire A Daams is a senior counsel at Monfrini Bitton Klein.

2 Switzerland ranks fifth in Transparency International's Corruption Perceptions Index 2016.

3 star.worldbank.org/corruption-cases.

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

5 At the time of writing, the most recent but unofficial English translation of the SCC (as of January 2017) is available at www.admin.ch/gov/en/start/federal-law/classified-compilation.html. The changes as of 1 September 2017 have not yet been included.

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 following two examples illustrate the application of this functional definition in practice. A manager of the Zurich insurance company for cantonal civil servants was considered a public official, first because the company was a public foundation at the time of the facts, and secondly because the company performed a function in the public interest. The manager was convicted of bribery and sentenced to six years in custody.[7] In another case, however, an employee of the Grison Cantonal Bank was not considered as a public official and acquitted of bribery. The employee was subject to the supervision of the cantonal parliament and contributed to the bank's mission to increase the equilibrium and development of the canton. However, the bank also offered services similar to those of private banks, so did not solely carry out official duties. Its employees cannot, therefore, be considered public servants.[8]

As these two examples show, 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).

6 AS 2000 1121 1126, BBl. 1999 5497.

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

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

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.

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 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[9] (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.[10]

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, 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 from learning of the offence (Articles 322 *octies*, Section 2 and 322 *novies*, Section 2 SCC).

9 In force since 1 July 2016.

10 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. 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, few cases of domestic public bribery have been reported on.

In December 2016, the Federal Criminal Court decided one case, which was in the domain of obtaining IT services to the benefit of one of the federal offices. The case involved the head of IT services in the federal office concerned, an external project manager and two managers of external suppliers. All four were convicted for bribery and sanctioned with custodial sentences (partially suspended) as well as fines. The conviction of the external project manager is noteworthy because he was considered to be a public official. This renewed application of the functional definition mentioned before was based on the fact that he also performed tasks in evaluating public procurement bids for this federal office. He was therefore considered to have substantial influence on the decision-making processes in that office, even if he did not make the decisions himself. The external suppliers were aware of this and paid the project manager to their benefit.[11]

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 non-existent, were purchased for millions of Swiss francs from two Swiss companies against kickbacks paid to a SECO civil servant. The criminal investigation, which started in 2014, has been extended in 2017 to six further individuals and now includes 10 persons in total. Other cases of minor importance have been reported that involve the Federal Office of Roads, Customs Administration, Tax Administration, Office for the Environment.

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 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.

In September 2015, the Federal Police[12] created an (anonymous) anti-corruption reporting platform,[13] 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.[14]

11 www.bundesstrafgericht.ch, SK. 2016.5.

12 www.fightingcorruption.ch.

13 fedpol.integrityplatform.org.

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

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 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,[15] 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. Due to his position in the ruling family and his *de facto* decision-making power, Saadi Gaddafi was 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 does 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, 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).

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

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).

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

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 case

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$800 million has been frozen.

Since the start of the investigation, an amount of about US$200 million has already been returned to Brazil. As part of the conclusion of an aspect of this case, in cooperation with the Brazilian and US Authorities, the OAGS has issued a criminal punishment order against the construction company Odebrecht, at the end of 2016. The company was held criminally liable (Article 102 SCC) in connection with the bribery of foreign public officials. The sanction imposed consists of a fine of 4.5 million Swiss francs and criminal asset forfeiture of 200 million Swiss francs.

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.[18] The OAGS has not yet initiated criminal proceedings against those banks on the basis of Article 102, Section 2 SCC.

ii 1MDB case

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.

In February 2016, Switzerland sent Malaysia a request for mutual assistance, which the Malaysian authorities ultimately refused.

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

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

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

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,[19] 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.[20]

iii FIFA case

The Fédération Internationale de Football Association (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 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. In the course of the year, the remaining documents that were requested through the MLA have been transferred.

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 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.

19 '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.

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

iv Yara case

A subsidiary of the Norwegian company Yara International had been used to pay bribes to the son of a former oil minister in Libya. After the conviction of the parent company for paying bribes to various countries in 2014, the OAGS concluded its case by issuing three criminal punishment orders. One of these was directed at the Swiss subsidiary, which was held criminally liable for paying bribes to foreign public officials. The other two were issued against the two managers of the company that were involved, one of which was sanctioned for aiding and abetting to foreign bribery.

v Gazprom case

In 2010, the OAGS initiated a criminal investigation concerning the alleged payment of bribes to foreign public officials in relation to several large projects of the Russian gas company Gazprom in Russia and Poland. The Federal Criminal Court acquitted the employees involved. It explained that its decision was motivated by the fact that, despite the autonomous definition of public officials used in the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, it was still necessary 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 were not public officials.[21]

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

No significant legislative development has occurred in the past year.

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.

21 www.bundesstragericht.ch, SK.2015.17 and SK.2016.17. The latter has been appealed.

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 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.

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

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,[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 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,[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 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.

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

23 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).

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

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.

The Group of States against Corruption has repeatedly criticised 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 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 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

YVES KLEIN

Monfrini Bitton Klein

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 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.

CLAIRE A DAAMS

Monfrini Bitton Klein

Dr Claire A Daams is a Swiss lawyer. She is admitted to the Dutch bar (1998) 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 joined Monfrini Bitton Klein on 1 July 2017 and is registered by the Geneva Bar Commission as a lawyer from an EU/EAA Member State authorised to practise in Switzerland under her home title (Advocaat at the Netherlands Bar). She speaks Dutch, English, French, German, Italian and Spanish.

MONFRINI BITTON KLEIN

Place du Molard 3
1204 Geneva
Switzerland
Tel: +41 22 310 22 66
Fax: +41 22 310 24 86
yklein@mbk.law
cdaams@mbk.law
www.mbk.law

Strategic Research Sponsor of the
ABA Section of International Law

Law
Business
Research

ISBN 978-1-910813-93-5