



Corporate Law Newsletter

Switzerland tightens the screw on corruption

Background

The recent events surrounding the Fédération International Football Association with its headquarters in Zurich, Switzerland ("FIFA") and the corruption scandals involving Petrobras have put Switzerland under an international spotlight. Whilst bribery of domestic and foreign officials is embedded in the Swiss Criminal Code (see Arts. 322 *ter et seq.*) and is prosecuted *ex officio*, to date bribery of private individuals is codified in the Swiss Act against Unfair Competition and is prosecuted upon request of an injured party only (see Arts. 4a and 23 Unfair Competition Act).

The reason for the inclusion of bribery of private individuals within the framework of unfair competition, for the first time already back in 1943, was that the actionable wrong of corruption of private individuals was at that time seen primarily in the distortion of the fair competition between participants in the market and not as a wrong the prosecution of which is in the general public interest. Consequently, the bribery of private individuals could not be prosecuted *ex officio* but only upon a formal complaint filed by a party concerned.

The act of 1943 did not foresee a separate penalization for passive bribery of private individuals (i.e. accepting bribes by private individuals). Passive bribery for private individuals was specifically included in the Unfair Competition Act in the revision of 2006, and is prosecuted upon the request of a concerned party only.

Today, corruption is, however, seen as a wrong permeating all aspects of society and affecting the public welfare at large, the prevention and sanction of which is in the general public interest. By prying away corruption of private individuals from the unfair competition frame work, it will also become and made clear that bribing officers from organizations which do not *per se* have a commercial purpose such as the

FIFA or the International Olympic committee or other international private organizations having their seat in Switzerland are not exempted from the application of the Swiss anti-corruption frame work.

Therefore, under the revised law, which became effective July 1st, 2016, bribery of private individuals constitutes a criminal offence and is moved into the Swiss Criminal Code. The requirement of a prior complaint by an interested party for the prosecution is discarded.

Bribery of private individuals to be prosecuted *ex officio*

The Swiss anti-corruption framework was the subject of a report by GRECO (Groupe d'Etats contre la corruption) in 2011. GRECO commends Switzerland's solid body of criminal legislation on corruption. It notes, however, that the number of convictions is low in relation to the number of investigations opened, particularly as regards bribery in the private sector and bribery of foreign public officials, despite Switzerland's important role in the international economy.

In accordance with the recommendation of GRECO the requirement for a prior complaint before prosecutions are brought for bribery in the private sector is being abolished. Thus, in future, except for minor cases, bribery of private individuals will be prosecuted *ex officio*. Only minor cases will be prosecuted upon prior complaint. Unfortunately the revised law does not define which cases are considered as minor cases, and thus, it remains to be seen what criteria will be established in practice to define minor cases. During the debate of the Swiss Federal Council amongst others, the amount at issue and the impact on health and safety were discussed as criteria.

In its interim compliance report on Switzerland which was published on August 25, 2016 GRECO



concludes that by the revised law Switzerland has satisfactorily implemented its recommendation regarding bribery of private individuals made in the report of 2011.

Not for profit organisations will also be subject to the application of the Swiss anti-corruption framework

Under the old legal framework, it was still somewhat unclear and disputed amongst experts, whether bribery of an officer of a not for profit organisation is caught, since arguably these organisations do not exercise a commercial activity and therefore the unfair competition act, including the provisions on bribery contained therein, may not be applicable to these organisations.

By moving the bribery of private individuals into the Swiss Criminal Code, the requirement of distortion of competition becomes obsolete. Given the recent events surrounding FIFA such a clarification is most welcome. Whether the conviction rate for private bribery will be increasing, once it will be prosecuted *ex officio*, remains to be seen.

Primary liability of enterprises for active bribery

It is important to note that also an enterprise itself can be subject to criminal sanctions; this criminal liability of enterprises is in principle a subsidiary liability, in case the criminal act cannot be attributed to an individual. For active bribery, however, Art. 102 para 2 Swiss Criminal Code foresees a primary liability for enterprises independent from an individual or his/her sanctioning. An extension of the primary criminal liability of enterprises for passive bribery was however rejected.

To defend themselves against criminal sanctions, enterprises must have the requisite organisation and tools to prevent bribery within their organisation. Regular workshops for the employees who are particularly at risk (procurement and sales) are therefore essential, as well as clear internal policies on what benefits employees may accept, such as an invitation to dinner, but not for a weekend with a golf tournament in a five star hotel are needed. Once such policies are established it is equally important that the policies be enforced by the enterprise to avoid a criminal liability for the enterprise itself.

August 31, 2016

Arlette Pfister and David Käzig

For further information please contact:
Arlette Pfister (a.pfister@thouvenin.com) or
David Käzig (d.kaenzig@thouvenin.com)

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