Trends and Developments

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Trends and Developments of Swiss Anti-Corruption Law

Overview of the Swiss government's strategy to fight corruption

On 25 November 2020, the Swiss government (Federal Council) published a press release confirming the adoption of the first Swiss anti-corruption strategy to be implemented between 2021 and 2024. Although the strategy is directed at the federal administration, it is also intended to have a wider reach within the private sector.

It defines 11 objectives and 42 measures that are to be implemented by 2024 in order to prevent, detect and eradicate corruption in Switzerland. It also addresses international pending issues in the field. It does, therefore, refer to recommendations made by the OECD Working Group and GRECO (the Group of States against Corruption created by the Council of Europe).

A Swiss government agency referred to as the Interdepartmental Working Group on Combating Corruption (IWG) has been in charge of drafting the Swiss government's Anti-Corruption Strategy 2021–2024 and of monitoring its implementation. The latest report of the IWG was published in July 2024 and provides a detailed assessment of how the national strategy was carried out during the years 2021–2023.

The IWG co-ordinates the anti-corruption activities of federal government offices and agencies at various levels. It includes representatives from the Federal Administration and the Office of the Federal Attorney General (OFAG) of Switzerland. Independent experts and representatives from the cantons, cities, business community and civil society are also involved in workshops.

Strengthening of Swiss anti-corruption legislation

Over the past four years, legislative action linked to combating corruption may be summarised as follows.

- The Swiss Federal Act on Money Laundering of 10 October 1997 has been amended to give more sweeping powers to the Money Laundering Reporting Office (MROS), which is Switzerland's Financial Intelligence Unit. The amendments were tailored to meet recommendations made by the Working Group of the OECD and of the Financial Action Task Force (FATF).
- In 2024, the government introduced a bill purporting to create a national register of ultimate beneficial owners of Swiss legal entities and to extend client identification, record keeping and reporting obligations to legal and accounting professionals involved in specified services and transactions that are deemed to carry an enhanced risk of money laundering. The government draft bill is currently being debated by the Swiss Parliament.
- Draft legislation designed to increase the protection of whistle-blowers in the private sector has failed to meet the approval of the Swiss Parliament. The lack of adequate protection of whistle-blowers has been identified as one of the main weaknesses of the Swiss anti-corruption regime.

Perception of corruption in Switzerland

The perception of corruption in Switzerland remains relatively low compared to other similarly developed economies. The Corruption Perception Index (CPI) which is published every year by Transparency International (TI) has constantly placed Switzerland in the league of nations with the lowest perception of corruption. However, in 2021 and 2022, the global score attributed to

Switzerland by TI was slightly reduced to take into account a number of unresolved issues, including a lack of transparency in political lobbying, the financing of political parties and the management of conflicts of interest between the public and private sectors.

A recent survey conducted by a prestigious academic institution (*Ecole Polytechnique Fédérale de Zürich*) has confirmed the high level of trust of the Swiss population in its major institutions, ie, the federal government, the federal parliament, the courts, the police and the armed forces.

Corruption-related convictions in Switzerland

Between 2021 and 2023, the Federal Office of Statistics had registered 52 convictions for corruption related offences in Switzerland.

The number of convictions has remained relatively stable, in spite of the strengthening of anti-corruption legislation. Many corruption-related criminal investigations and proceedings are focused on transnational corruption and thus, Switzerland is considered (together with the United States) as one of the main enforcers of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Convention).

Swiss experts in criminal law and criminology have expressed doubts as to whether the official number of convictions truthfully reflects the number of corruption-related offences with a jurisdictional link to Switzerland. It has been suggested that, in many instances, potentially unlawful conduct has not been reported. The lack of incentives for self-reporting potential bribery has been identified as one of the flaws of Switzerland's anti-corruption model.

Furthermore, official statistics do not conflate convictions for corruption and for money laundering although corruption is frequently a predicate offence of money laundering.

Main cases of corruption since 2021

Here are a few significant cases involving corruption-related offences in Switzerland since 2021.

- In the Canton of Zurich, public officials put together a scheme in 2020 and 2021 whereby bribes were covertly paid to intermediaries in exchange for facilitating the granting of driving licences.
- In the City of Bienne, public officials granted immigration visas to female foreigners in exchange for cash or sexual gratification. The corrupt scheme was implemented over a number of years but was only reported by the victims in late 2023.
- At the end of 2023, Trafigura, a large trader in commodities based in Geneva, was indicted for having bribed public officials in Angola. This will be the first time that a Swiss court (the Federal Criminal Court or FCC) will be judging a corporate entity for the corruption of foreign public officials.
- In March 2023, the Court of Appeal of the Canton of Geneva confirmed the conviction of Beny Steinmetz for having corruptly influenced the awarding of mining rights in the Republic of Guinea. Mr Steinmetz was sentenced to three years of imprisonment (partly suspended) and has appealed this judgment to the Swiss Federal Tribunal which is Switzerland's Supreme Court.
- On 30 September and 1 October 2024, the former Head of financial transactions for Europe, Africa and the Middle East of Gunvor, a large commodity trader based in Geneva, was on trial before the FCC on charges of

having paid bribes in excess of USD35 million to public officials of the Republic of Congo (Congo Brazzaville) in 2010 and 2011 to secure oil deals in that country.
- On 5 August 2024, OFAG issued a Summary Penalty Order (SPO) (cf. infra, Section 9) against Glencore, a multinational mining group based in Switzerland, for having failed to take all reasonable and necessary organisational measures to manage the risks of corrupt practices in relation to the acquisition in 2011 of minority participations in two mining companies from the national mining company in the Democratic Republic of Congo (DRC) at a price which was below the market value of the shares. It was alleged that Glencore benefitted from the transaction. Glencore was ordered to pay a fine of CHF2 million and to disgorge CHF150 million. Glencore was given credit for its co-operation with the prosecuting authority.

On the same day, OFAG announced that it had discontinued criminal investigations against the company in relation to its mining activities in the DRC between 2007 and 2017, including the renegotiation in 2008–2009 of a joint-venture with the DRC's national mining company.

It is apparent from the cases identified above that the focus of Swiss law enforcement is on transnational corruption involving companies and individuals operating in Switzerland rather than on domestic corruption.

What progress has been made in the implementation of the Swiss anti-corruption strategy?

It has been acknowledged, in particular by the Working Group of the OECD, that Switzerland has always been a proactive country and a reliable partner in the global fight against corruption. In terms of mutual assistance in criminal matters, Switzerland has a longstanding reputation of co-operation. Treaty provisions governing international co-operation in criminal matters are broadly interpreted in favour of the requesting state and Swiss law enforcement authorities frequently provide spontaneous information to foreign states who are then invited to submit a formal request for mutual assistance.

Switzerland has participated in several joint investigation schemes as well as in co-ordinated settlements with law enforcement authorities of other jurisdictions with a view to resolving charges brought against multinational companies for corrupt practices.

Such co-ordinated resolutions have occurred in the following cases.

- In December 2016, Odebrecht, a Brazilian petrochemical company, and its affiliate Braskem SA, agreed to a USD3.5 billion global settlement to resolve charges with US, Brazilian and Swiss authorities arising out of alleged schemes to pay bribes to foreign officials around the world.
- In December 2022, ABB, a Swiss-based global technology company listed on the New York Stock Exchange, entered into a co-ordinated settlement with the United States, South Africa and Switzerland to resolve charges linked to corrupt payments to South Africa's state-owned energy company and agreed to pay a sum in excess of USD315 million.
- In January 2024, OFAG convicted Gunvor, sentencing it to pay a total amount of approximately CHF86.7 million, including a fine of CHF4.3 million. Investigations conducted by OFAG against the Geneva-based commodities trading company found that it

did not take all the reasonable and necessary organisational measures, between February 2013 and February 2017, to prevent the commission by its employees of bribery of public officials in Ecuador in relation to its petroleum trading activities in that country. The conviction intervened in the context of a co-ordinated outcome with the United States. It is interesting to note that OFAG opened a criminal investigation in 2021 after having taken sight of court documents in the context of criminal proceedings brought in the United States.
- In the above-mentioned case involving Glencore, OFAG co-operated extensively with Dutch law enforcement (the Dutch Public Prosecution Service) with a view to resolving charges for the same conduct which had been brought in the Netherlands.

Switzerland has also been praised for its proactive approach in seizing and confiscating assets identified as proceeds of corrupt activity. Law enforcement authorities have ordered the freezing or the seizure of assets at a preliminary stage of criminal investigations.

In addition, Swiss authorities have made efforts to address the interests of victims in obtaining restitution. The ability of victims, including foreign states, to participate in Swiss criminal investigations is one of the specific features of Swiss law that needs to be kept in mind.

Switzerland has a successful record regarding restitution of ill-gotten assets to foreign states or to NGOs in the form of poverty reduction programmes. To date, Switzerland has been able to return more than USD2 billion illicitly acquired assets involving politically exposed persons and senior government officials. Switzerland has also conducted successful negotiations that led to restitution of assets in at least nine cases.

Sources have indicated that in Switzerland anti-bribery and anti-money laundering measures are closely linked and that Switzerland has managed to ensure strong support within the private sector to detect transnational bribery schemes. There is also a strong co-operation between OFAG and regulatory bodies such as the Swiss Financial Market Supervisory Authority (FINMA) and MROS. In its most recent report regarding Switzerland, the Working Group of the OECD has highlighted the fact that a number of corruption-related investigations have been prompted by the filing of suspicious transaction reports originating from the financial sector.

Perceived weaknesses of the Swiss anti-corruption model

The main weaknesses of the Swiss legal framework in combating corruption have been identified in the monitoring process conducted under the OECD Convention and the United Nations Convention Against Corruption (UNCAC).

- The level of sanctions and in particular the maximum fine for legal entities (CHF5 million) are considered to be too low to have a deterrent effect.
- The lack of incentives for self-reporting has resulted in insufficient co-operation of companies with law enforcement authorities.
- Insufficient whistle-blower protection also affects effective detection of bribery.
- The transparency of the judicial system needs to be improved, particularly in relation to non-trial resolutions of corruption-related cases.

The Swiss government is aware that the high evidentiary threshold that is currently required is an obstacle to the successful prosecution of

companies potentially involved in transnational corruption. For this reason, Switzerland will, in the coming years, consider the feasibility of reversing the burden of proof, when significant and unexplained enrichment of public officials is observed and/or to adopt leniency programmes to enhance self-reporting.

The growing significance of corporate criminal liability

One of the main trends of Swiss anti-corruption law is the increased use by prosecuting authorities of corporate criminal liability which is governed by Article 102 of the Swiss Criminal Code (SCC). Article 102 of the SCC does not define any criminal conduct per se, but is considered as a general provision of Swiss criminal law attributing, if certain requirements are met, criminal liability to a company (or any other undertaking) for the criminal conduct of an individual acting within the company.

In order to establish corporate liability in respect of certain specified offences that include the corruption of Swiss and foreign public officials as well as money laundering, the prosecuting authority must show that the company has failed to take all the reasonable and necessary organisational measures that are required to prevent the perpetration of an offence.

Since 2003, OFAG has secured 13 SPOs and three convictions from the FCC under Article 102 of the SCC, with approximately 20 more cases currently in progress. The majority of these cases involve corruption, accounting for 11 out of the 13 SPOs. Fines imposed have ranged from CHF1 million to a maximum of CHF4.3 million, the latter being the record set in the Gunvor case, with an average fine of CHF2.8 million. Confiscation orders have varied between CHF70,000 and CHF112.5 million.

Non-trial resolution of corruption-related investigations

Corruption related investigations and prosecutions are generally conducted by OFAG. There is a growing trend within OFAG to achieve a non-trial resolution of charges brought against companies under Article 102 of the SCC.

The main procedural tool available to resolve criminal charges in Switzerland is the Summary Penalty Order (SPO). According to public data, more than 90% of criminal cases that have not been dropped are settled by means of an SPO.

The SPO complies with the requirement of a speedy trial. The prosecution authority acts as the sole authority in charge of the investigations, prosecution and sentencing. There is no indictment and no trial in court. This possibility may be contemplated in situations where the relevant facts have been acknowledged by the defendant or where the prosecutor deems those facts to be sufficiently established by the investigation of the case.

Although corruption is a serious offence in Switzerland, the SPO has been held to be an acceptable means of resolving criminal charges, mainly (if not exclusively) when the defendant is a company that has failed to take reasonable and necessary organisational measures to prevent corruption.

A negotiated resolution of corruption-related charges may be achieved in situations where the defendant agrees to waive the right to object to the SPO which shall then become a final and enforceable decision with the same legal effect as a judgment handed down by a court.

The OECD Working Group has expressed reservations as to whether the SPO meets the treaty

requirement that sanctions must be effective, dissuasive and proportionate. Furthermore, issues have been raised as to the lack of transparency of the process. Indeed, if the SPO remains undisputed, there is no public trial or judicial review of any kind. The order itself is not made public either, although it may be consulted by authorised persons (such as journalists) upon request over a limited period of time (30 days). This means that the vast majority of SPOs are not disclosed to the public and few cases resolved by means of an SPO give rise to a press release. This has an impact on legal predictability.

From a strategic perspective, SPOs may be an attractive option to defendants who wish to obtain a faster and more expeditious outcome, rather than facing lengthy proceedings and a heavily publicised trial. The fact that the defendant is not required to admit the underlying facts, provided that they can be established otherwise, may be appealing to defendants who wish to avoid any acknowledgement of criminal liability. In the absence of clear guidance of the law itself, the prosecuting authority will have significant leeway in managing the process. For instance, some prosecutors will agree to draw up a statement of facts which will then be informally reviewed and approved by the defendant. Others will adopt a more guarded approach which will not involve any interaction with the defendant. Furthermore, some prosecutors will agree to hold confidential discussions with the defendant and its legal team, although there is no legal obligation to do so.

Swiss law also gives the prosecutor the possibility of discontinuing the criminal proceedings, if the following requirements are met:

- the offender admits the relevant facts;
- the offender has taken reasonable steps to repair the damage caused by its wrongdoing; and
- there is no significant public interest or private interest of the victim warranting the prosecution and trial of the defendant.

Over the past few years, OFAG has taken a policy decision to refrain from using the reparation route in cases involving corruption or money laundering linked to a predicate offence of corruption. This policy is predicated on the assumption that such cases will always go beyond the threshold of non-significant public interest.

Switzerland has considered the option of creating an instrument similar to a Deferred Prosecution Agreement (DPA) with a view to incentivising companies to self-report, to co-operate with law enforcement authorities and to improve their internal governance and compliance function.

In August 2019, the Federal Council refused to consider further the bill proposed by the OFAG to incorporate this instrument into Swiss law. The government raised a number of objections, including the absence of an admission of guilt and the lack of an effective judicial control over the process.

There is strong disagreement with this position on the ground. Legal practitioners and OFAG as well as the private sector and NGOs such as TI have all advocated the introduction of a procedural tool similar to the DPA or to the French Convention Judiciaire d'Intérêt Public (CJIP).

There are strong arguments to support that approach. Currently, the most commonly used vehicle for a non-trial resolution of criminal charges against companies remains the SPO. However, the SPO amounts to a conviction

which may have adverse collateral consequences. Rather than facing the legal and reputational risks associated with a conviction, a number of companies will refrain from self-reporting potential wrongdoing. Thus, the prospect of a negotiated resolution of criminal charges that avoid the stigma of conviction is likely to incentivise self-reporting, co-operation with law enforcement as well as the upgrading of corporate governance and compliance programmes. A further benefit of a DPA is the monitoring by independent professionals of the company's business activities over a specified period of time.

The chances of introducing DPAs into Swiss law will increase if due provision is made for an adequate court's supervision in order to address public interest concerns that companies may be paying sums of money to obtain immunity from prosecution. Judicial control should ensure that a court will carefully review whether the agreement reached between the defendant company and the prosecuting authority is appropriate in light of all the circumstances of the case which may include the seriousness of the underlying offence, the level of co-operation given by the company, the effective improvement of its internal organisation, the adequacy of the monitoring process as well as the disgorgement of ill-gotten benefits in the form of a confiscation order or of a compensatory claim.