



Newsletter - July 2016

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ATTORNEYS AT LAW

Criminalizing corruption – New criminal provisions on private bribery

Raised awareness

Summer 2015 saw some high profile police arrests in an up-market Zurich hotel. Special police force members apprehended several executives of FIFA bodies. A New York court had requested their arrest and extradition to the United States in connection with allegations that these persons had received bribes in the amount of USD 100 million.

Background

Corruption does not always take such a central and theatrical scene. Bribery is by its nature a clandestine and secretive affair. Nevertheless, the effects of worldwide corruption are vastly damaging. According to estimates by the World Bank, each year 1 trillion US Dollars are paid in bribes (USD 1,000,000,000,000), usually to the detriment of developing countries.

International bodies and NGOs have long since demanded stricter legislation to prevent bribery and associated corrupt practices. Switzerland, although viewed regularly as one of the ten least corrupt countries globally, has nevertheless frequently been target of criticism with regard to its anti-corruption laws. As a hub of globalised business and destiny of choice for the headquarters of large international sporting federations (IOC, FIFA, UEFA, IIHF to name a few), Switzerland has frequently been in the focus of corruption committed by persons affiliated to these organisations. There has been mounting pressure on Switzerland to amend what has been viewed as ineffective legislation against corruption.

Legal situation until the end of June 2016

Although Switzerland introduced an anti-bribery provision for corrupt behaviour in the private sector into its national law already in 2006, the fact that the provision was contained in a separate act dealing with illegitimate market practices (Federal Act Against Unfair Competition, AUC) coupled with the fact that the crime was not pursued ex officio but required a person to lay criminal charges, made the provision de facto ineffective. A survey conducted by the Swiss Federal Office of Justice in 2012 and 2014 revealed that the provision had not led to a single court conviction for active or passive bribery.

Research had shown that the insertion in the AUC with its market focus together with the requirement to file a criminal complaint had deterred many victims of bribery from turning to the prosecuting authorities. In the view of the Swiss government, private corruption warranted more scrutiny by law enforcement authorities. The reputation of Switzerland as registration place for sports federations, the effects of corrupt practices on public funds, the potential effects on public health and safety all have prompted the Swiss government to reconsider its approach.



New bribery article in Criminal Code

As of July 1, 2016, the provision prohibiting bribery in the private sector has been transferred into the main Swiss Criminal Code as a new art. 322^{ocites} (active bribery, i.e. punishing the briber) and art. 322^{novies} (passive bribery, i.e. punishing the solicitor of a bribe). Although the material content of the provisions has remained unchanged, it should be noted that the complaint requirement has been dropped together with the negative influence on the private market and the situation of competitors. The crimes still carry a maximum sentence of three years' imprisonment, thus not a trivial cavalier offence. Any person attempting to offer to another person with managerial capacity an undue benefit in order to induce him to behave contrary to his contractual or fiduciary duties or to make use of his discretion in an inappropriate manner, may face criminal charges and a custodial sentence of several years. The same sentence is applicable to a person who solicits a bribe by an external party.

Potential implications

The new law will no doubt heighten the awareness of law enforcement authorities since as an ex officio crime, they will be held to pursue and bring to prosecution by their own accord corrupt behaviour they come across. The introduction into the main Criminal Code will also shift the focus of the public at large to the criminality of bribery. As a crime contained in the main penal law, it will no longer be seen as a special crime that has no or little implications for the general public. Since the territorial scope of the Swiss provision is wide and it is sufficient if any part of the corrupt action took place in Switzerland (also receiving the bribery funds into a Swiss bank account), it may be assumed that there will be an increase in criminal investigations. In view of the fact that bribery concerns have also been raised in connection with certain practices in the banking and investment area (payment of retrocessions to asset managers), the norm in its new guise may well give rise to more prosecution in the private sector. Clients are well advised to ensure that their dealings with producers and customers are contractually sound and their compliance measures are in place.

Since active bribery is also an act that can lead to corporate criminal liability for companies, with financial penalties up to CHF 5 million, ensuring corruption free dealings in the corporate field should be a top priority for any company.



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