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Bribery in the Private Sector – “Few Men Have Virtue to Withstand the Highest Bidder”

GEORGE WASHINGTON, *The Writings of George Washington* (by Jared Sparks), Volume VI, 1847.



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Switzerland has further tightened its legislation against bribery. As a consequence, an enterprise may be subject to prosecution if one of its employees bribes someone, regardless of whether the recipient of the bribe is a public official, and may be exposed to a fine of up to CHF 5 million.

Tightening of Swiss anti-corruption legislation

Initially and over decades, Swiss anti-corruption legislation targeted dishonest officials in Switzerland. Parliament's main concern was to protect the integrity of the Swiss civil service and the public's trust in the impartiality of the administration. In 2000, it became illegal in Switzerland to actively bribe *foreign* (i.e., non-Swiss) officials. Subsequently, the tax law changed as well and it was no longer possible to deduct bribes from taxable income.

In 2003, corporate criminal liability was introduced, so that a legal entity – not only an individual – could be subject to prosecution for bribery, if the legal entity had failed to take “*all necessary and reasonable organisational measures*” to prevent such acts.

In 2006, a further step in the development of comprehensive anti-corruption law was made: in accordance with Switzerland's ratification of the Criminal Law Convention on Corruption of the Council of Europe, passive bribery in the private sector was explicitly prohibited. Under the new Article 4a of Switzerland's Unfair Competition Act (UCA), both the person that bribes (“active bribery in the private sector”) and the person that accepts the bribe (“passive bribery in the private sector”) are subject to criminal prosecution.

Although active bribery in the private sector was an offence before the 2006 legislation and passive bribery could – under certain circumstances – be punished under other provisions of criminal law (e.g., disloyal management), the recent legislation is an

important step. First, the scope of criminal liability for (active) bribery in the private sector has become much wider, in particular in connection with corporate criminal liability. Second, an enterprise may be fined up to CHF 5 million if one of its employees (or another individual acting on behalf of the enterprise) is guilty of bribery in the private sector. Third, the individual employee – who offered or accepted a bribe – may be punished with imprisonment of up to three years or fined up to CHF 1.08 million.

What is “bribery in the private sector”?

Bribery in the private sector requires a triangular relationship: the briber “*offers, promises or grants*” an “*undue*” advantage to the person bribed who is under a loyalty obligation vis-à-vis a third party (e.g., his or her employer).

The distinction between “private” and “public” bribery may be difficult to make. Under Swiss law, a *functional* approach is applied and the question is one of substance, not form: whoever performs a public function is considered a “public official”.

Active bribery is committed by someone who “*offers, promises or grants*” an “*undue advantage*”, if this advantage is intended to influence the recipient to act or to omit something “*in violation of his duties*” or “*subject to discretion*”. Passive bribery means that someone “*requests, receives promises of or accepts*” an advantage.

Whilst everyone may qualify as a briber, the recipient of the advantage must be “*an employee, partner,*

agent or any other auxiliary person of a third party in the private sector". Criminalisation of bribery in the private sector primarily aims at protecting the duty of loyalty owed to the third party. Although the wording of Article 4a UCA is ambiguous, it is generally assumed that there must be, expressly or implicitly, an obligation of loyalty owed by the recipient of the bribe to the third party. However, whether the recipient actually breaches his duty of loyalty to his principal is not relevant; it is sufficient that the advantage was *intended to cause* such result.

What is still legal?

Because the criminalisation of bribery in the private sector aims at protecting the trust reposed by the third party in the person who is bribed, an advantage offered with the approval of the third party is unproblematic. As a consequence, any advantage offered to someone who is under such a duty of loyalty should be disclosed to the beneficiary of that duty whenever possible.

Furthermore, customary advantages of minor importance are not considered "*undue*" advantages and are thus lawful.

Although any undue advantage offered to a public official "*with regard to his official functions*" may constitute a criminal offence, bribery in the private sector requires a closer connection between the advantage and the (intended) act or omission of the recipient. An advantage is illegal only if the advantage is granted particularly "*for*" such act or omission. There must be some kind of an agreement as to a "*quid pro quo*" of the advantage and the (determined or at least determinable) disloyal act of the person bribed. Thus, offering an advantage in the private sector (as well as to foreign public officials) is legal if the advantage is not intended to influence a specific act or omission but merely serves to cultivate a relationship.

In what cases do Swiss courts have jurisdiction?

Swiss jurisdiction is established if the act of bribery was committed in Switzerland, and this is the case where the briber or the recipient acted in Switzerland.

In addition, it may suffice if private bribery is committed by a Swiss national or to the detriment of a Swiss national, if the conduct also is a criminal offence in the country in which the bribery was committed (principle of "double criminality").

Therefore, a company may be prosecuted and punished for bribery under Swiss law even if its employee,

etc. bribed another foreigner somewhere abroad, provided that the company has its registered offices in Switzerland or if measures to prevent bribery should have been taken in Switzerland.

How to avoid corruption

Because an enterprise may be prosecuted for failing to take necessary actions to prevent bribery, such actions should be taken. Although the strategy to prevent bribery requires an action plan tailored to the specific risks and business needs, a few principles generally apply:

First, one should analyse the specific risks in order to identify risky transactions or circumstances. Second, a clear strategy should be set up to minimize the identified risks. The strategy is likely to call for a broad spectrum of measures, such as a code of conduct defining the company's policy on offering and receiving advantages, the making of specific rules to be observed, internal information campaigns and anti-bribery training. As a rule, procurement and sales processes should be reviewed. Third, such measures need to be implemented and their implementation should be constantly monitored.

Even the best strategy, however, will not guarantee a "bribery-free" business, but the measures taken will at least give some comfort if one day the prosecutor knocks on the door.

The ww&p NewsLetter provides comments on new developments and significant issues of Swiss law. These comments are not intended to provide legal advice. Before taking action or relying on the comments and the information given, addressees of this NewsLetter should seek specific advice on the matters which concern them.

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