PESTALOZZI

ATTORNEYS AT LAW

Swiss Criminal Laws on Bribery: Reforms as of July 2016

01.06.2016

Pestalozzi Rechtsanwälte AG
Feldeggstrasse 4
CH-8008 Zürich
T +41 44 217 91 11
zrh@pestalozzilaw.com

Pestalozzi Avocats SA
Cours de Rive 13
CH-1204 Genève
T +41 22 999 96 00
gva@pestalozzilaw.com

pestalozzilaw.com

As of July 1, 2016, bribery in the private sector is subject to stricter rules and could more easily lead to criminal prosecution. Swiss and foreign companies operating in Switzerland, as well as their board members, have to reassess and, if required, revise their existing compliance and anti-corruption measures. In the absence of tighter anti-corruption measures, if an act of bribery were committed by an individual within the company, the company itself and its board members may also become personally liable and be subject to criminal prosecution. This is of particular importance for small or medium size enterprises that may not have yet implemented adequate anti-corruption measures – now is the time to act.

Key takeaways:

- **Criminal liability for bribery in the private sector no longer depends on a negative effect on competition**
- **Authorities to prosecute bribery in the private sector «ex officio» (i.e., without a complaint having been filed)**
- **Besides the individuals involved, the company may also incur criminal liability if adequate measures preventing bribery are found to have not been implemented**
- **In the event of bribery occurring in a company, the board members may incur personal civil and criminal liability, if adequate anti-corruption measures are found to have not been implemented**
- **Affects Swiss and foreign companies • Small and medium size enterprises are just as likely to be affected**

1. Tightening of Anti-Bribery Enforcement

To date, acts of bribery in the private sector have been regulated under the Unfair Competition Act (UWG), and have only been subject to criminal prosecution if a criminal complaint has been filed by an interested party. Additionally, the act of bribery would have to result in a distortion of competition, as defined under the UWG. It is most likely owing to these restrictions that there have not been any reported cases of private sector bribery in the Swiss courts thus far.

As of July 1, 2016, private sector bribery will fall under the Swiss Penal Code (StGB) (as is already the case for the bribery of public officials). The offence will hold a custodial sentence of up to three years or a monetary penalty for any person who:

- offers, promises or grants an undue benefit to an employee, agent, partner or other auxiliary person of a third party, in connection with such person's professional or commercial activity on behalf of the third party, with the purpose of having such person carry out or fail to carry out an act contrary to that activity, or within the person's professional discretion (so-called "active" private sector bribery art. 322octies StGB); or

- takes bribes by soliciting or accepting an undue benefit (bribe) for himself or for a third party (so-called "passive" private sector bribery art. 322novies StGB).

These reforms will have the following implications:

- a criminal conviction will no longer depend on the act of bribery in the private sector leading to a distortion of competition;

- private sector bribery will be considered a public offence, i.e. it will be prosecuted ex officio (regardless of whether a complaint has been filed).

Consequently, bribery in the private sector will now be prosecuted in a similar manner to bribery of Swiss or foreign public officials. To further align the different criminal provisions on bribery:

- granting undue benefits to public officials (art. 322quinquies and 322sexies StGB) now also covers granting such benefits "in favour of a third party" (as opposed to granting the benefit solely to the public official); and

- benefits which conform with public service regulations or which have been contractually approved, as well as socially accepted benefits of negligible value, are not "undue benefits".

2. Relevance for Swiss and Foreign Companies

If an act of bribery occurs within a company, the company itself may become subject to prosecution.

The company will be penalized in addition to the individual(s) who committed "active" bribery if it is found responsible for having failed to take all reasonably required organizational measures to prevent the bribery occurring in the first place (art. 102 para. 2 StGB).

In the case of "passive" bribery, the company may only be penalized if the individual(s) who committed the crime cannot be identified and the company is found responsible for having failed to take all the reasonably required organizational measures in order that the perpetrator(s) of such acts could be identified (art. 102 para. 1 StGB).

With respect to the criminal liability of the company the following is notable:

- even part of the crime being committed in Switzerland is sufficient to trigger a criminal prosecution under Swiss law (e.g. offer or acceptance of the bribe in Switzerland; use of Swiss bank accounts). Thus, the changes are relevant for both Swiss and foreign companies;

- reputational damage aside, a company could also be subject to a fine of up to CHF 5 million. Additionally, profits from any deal concluded involving bribes may be seized;

- as bribery in the private sector is now an ex officio / public offence, the risk of prosecution has increased significantly. Only in minor cases will bribery be excluded from being considered a public offence, and thereby only prosecuted following a complaint. The law does not elaborate what constitutes a "minor case", however, it is anticipated that the courts will shed light on this in due course.

3. Personal Risks for Management and Board Members

A company's management and its board members could be held personally liable pursuant to civil and criminal charges against them, even if they are not personally or directly involved in the acts of bribery.

For instance, if the board failed to ensure the implementation of adequate measures to prevent bribery, this could lead to personal civil liability of the board members (breach of fiduciary duty, art. 754 of the Swiss Code of Obligations). In particular, if the company is subjected to a fine following a criminal conviction for lack of reasonably required organizational measures (see section 2), personal liability of the board members for breaching their fiduciary duties could result.

In addition, a criminal prosecution against management or members of the board cannot be excluded in circumstances where they fail to implement measures to prevent bribery within the organization. These individual(s) may be convicted due to such omissions ("strafrechtliche Geschäftsherrenhaftung").

4. Recommendations for the Management and the Board

As demonstrated by the criminal conviction of Alstom by the Swiss authorities for the bribery of foreign public officials, resulting in a fine and seizure of profits of approx. CHF 39 million in Switzerland, the standard of compliance measures required by the criminal prosecution authorities is high. Internal regulations and directives alone are insufficient. Compliance must also be effectively enforced.

In light of general compliance principles as well as international standards (e.g., the ISO standard 37001 "Anti-bribery management systems" which is currently available as a close to final draft and is expected to be final by end of 2016), the following is advisable:

- Risk assessment considering the size, business processes and partners as well as the geographic reach of the company (in particular to identify activities and business partners

with increased bribery risk)

- Internal communication of regulations
- Clear rules on permitted benefits
- Adequate employee information and training
- Control and enforcement of internal regulations with an adequately resourced and trained compliance team
- Steps to specifically address increased risk exposures, such as approval of transactions at a higher level of authority as opposed to by local management, due diligence of involved personnel and partners, review of (financial) incentives of employees, and changes in contracts to be protected against business partners' corruption risks
- Define actions to be taken in the case of suspected bribery or breach of internal directives, e.g. internal investigation, informing the board and, if required, regulators, instruction of external counsel to benefit from legal privilege, disciplinary sanctions and communication
- Whistleblower hotline/reporting office
- Continual review and improvement of the risk assessments, regulations and prevention measures (at the very least every time the company changes its field of activity).

5. Recommendations for Multinationals and SMEs

Multinationals are typically sensitized and used to anti-corruption measures. This also holds true for corruption in the private sector by virtue of, for example, the UK Bribery Act (but not to the US Foreign Corrupt Practices Act). These companies should review their prevention measures (see section 4) in light and accordance with the stricter compliance standards required by the Swiss criminal prosecution authorities.

With regard to small and medium-sized enterprises (SMEs) there may be less sensitivity with respect to corruption risks. Should a company have not yet implemented any anti-corruption prevention measures, it should immediately do so in view of the risks of civil or criminal charges against the company itself and its management and board members personally.

In the near future the company may also consider obtaining an ISO certificate under standard 37001 "anti-bribery management systems"). This will not necessarily be sufficient to ring-fence against all risks and liability, but would certainly provide a helpful basis to protect the company and its management and board members from criminal conviction or breaches of

fiduciary duty claims.

Checklist for the Board of Directors

1. **Has the board of directors analyzed the corruption risks (incl. risk for bribery in the private sector)?**
2. **Have elevated risks been identified and have they been addressed adequately?**
3. **Have internal regulations been amended to reflect bribery in the private sector?**
4. **Is communication and enforcement of internal anti-corruption regulations ensured?**
5. **Is the compliance department adequately staffed and trained?**
6. **Have procedures been defined in the event of bribery occurring in the company?**
7. **Are anti-corruption measures reviewed regularly?**

Jakob Hoehn

Senior Counsel
Attorney at law, Dr.iur.

Pestalozzi Attorneys at Law Ltd
Feldeggstrasse 4
8008 Zurich
Switzerland
T +41 44 217 92 81
jakob.hoehn@pestalozzilaw.com



Severin Roelli

Partner
Attorney at law, LL.M.

Pestalozzi Attorneys at Law Ltd
Feldeggstrasse 4
8008 Zurich
Switzerland
T +41 44 217 92 68
severin.roelli@pestalozzilaw.com



Beat Schwarz

Partner
Attorney at law

Pestalozzi Attorneys at Law Ltd
Feldeggstrasse 4
8008 Zurich
Switzerland
T +41 44 217 92 44
beat.schwarz@pestalozzilaw.com



Christian Leuenberger

Partner
Attorney at law, Dr. iur.
Co-Head Capital Markets

Pestalozzi Attorneys at Law Ltd
Feldeggstrasse 4
8008 Zurich
Switzerland
T +41 44 217 92 13
christian.leuenberger@pestalozzilaw.com

