Dear clients and business friends,

Among the 178 countries surveyed in Transparency International’s 2012 Corruption Perception Index, Switzerland ranks at number 6, which makes it part of an elite group of countries that are the least prone to corruption. If nothing else, this finding could lull Swiss companies into a false sense of security.

The 2011 “Alstom” case, in which a Swiss subsidiary of the French Alstom group was fined CHF 2.5 million and ordered to pay CHF 36.4 million in compensation for bribery of a foreign official, clearly shows that corruption is an issue for local firms and that the Swiss law enforcement authorities are disposed to prosecute such crimes and impose harsh sanctions.

In terms of risk assessment and avoidance, it thus certainly makes sense for any Swiss undertaking to engage with the issue of corruption and the prevention thereof within its own organisational structures.

This issue of Legal News discusses the possible corruption-related risks and provides guidance on how to deal with them.

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Corruption: criminal liability of the undertaking and organisational precautions

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1. Elements of a crime of corruption in the Swiss Criminal Code

For Swiss companies, the following elements of a crime of corruption of the Swiss Criminal Code (StGB) are of relevance:

- Bribery of Swiss public officials (Art. 322ter StGB);
- Granting an advantage to Swiss public officials (Art. 322quinquies StGB);
- Bribery of foreign public officials (Art. 322septies StGB);
- Active and passive bribery of private persons (Art. 4a of the Federal Unfair Competition Act “bribery of private persons”).

The offenses involving bribery of public officials concern the granting of an undue advantage for the purpose of influencing a specific official activity of the public official in question (e.g. the issuance of a permit). In contrast, in the context of granting an advantage, the allocation in question is made with a view to how the public official in questions exercises his duties in general, with the hope that said official will exercise his official duties in a way that is beneficial to the person conferring the benefit. Thus the granting of an advantage is also referred to colloquially as “baiting” or “grooming”.

Since 2006 it has been illegal to both actively bribe a private person or to accept a bribe as a private person. Nevertheless, the granting of an advantage and the acceptance of such an advantage are not covered under the statutory definition of bribery of a private person, since lawmakers considered it difficult to separate private and commercial advantages such as in the case of gifts among friends who are also business partners.

2. Criminal liability of the undertaking

2.1 The crime of inadequate organisation

In addition to the criminal liability of those individuals involved in one of the aforementioned corruption offenses, an undertaking involved in such crimes can also be criminally liable in application of Art. 102 StGB. The criminal liability of an undertaking due to corruption is actually the criminal liability inherent to inadequate organisation of the undertaking:

- If corruption is committed in an undertaking in the exercise of commercial activities in accordance with the objects of the undertaking and if it is not possible to attribute this act to any specific natural person due to the inadequate organisation of the undertaking, then the offense shall be attributed to the undertaking (so-called “subsidiary punishability”);
- If an offence is committed involving the bribery of a foreign or Swiss public official, or involving the granting of an advantage or bribery of private persons, the undertaking shall be penalized irrespective of the criminal liability of any natural persons, provided the undertaking is responsible for failing to take all necessary and reasonable
organisational measures that were required in order to prevent such an offence (so-called “cumulative or concurrent punishability”).

Either way, the undertaking can expect to be fined up to CHF 5 million. However, forfeiture pursuant to Art. 70 StGB is much more prejudicial to an undertaking, subject to which uncapped sums can be confiscated if they were obtained by means of a criminal act, or if such sums were used in order to induce or reward a criminal act.

In its 2012 activity report, the Federal Prosecutor’s Office made it clear that in its view, it is sufficient to find criminal liability if a parent undertaking or subsidiary has its registered office in Switzerland and can be shown to suffer from organisational deficiencies where a foreign public official was bribed abroad. In coming to this conclusion, the Federal Prosecutor’s Office has shown that it favours the trend towards extra-territorial application of anti-corruption statutes such as those in the US and Great Britain (see in this context EY Legal News August 2012 “Corruption-related risks and their prevention for internationally active companies”).

2.2 Obligation to prevent criminal acts
Swiss undertakings are thus subject to an obligation to organise themselves in such a manner that corruption offenses can be avoided internally. Accordingly, the undertaking makes itself criminally liable if it can be shown to suffer from organisational deficiencies that were casual to the failure to prevent the corruption offense, and where proper organisational measures could reasonably have been taken.

3. Organisational measures

3.1 Organisational measures in general
Derived from the principal’s liability under civil law, every undertaking must exercise the appropriate degree of care in the selection, instruction and oversight of its auxiliaries (employees, agents, consultants, intermediaries etc.). Where it fails to do so, it will likewise have violated its duty to take the necessary general organisational measures required of it.

3.2 Specific measures
In addition to these general organisational measures, every undertaking is recommended to take additional measures to prevent corruption. Based on experience, such measures would include the following:

- Unambiguous and firm rejection of corruption by the executive bodies (board of directors, executive board) so as to set an example and to provide a strong symbol of the undertaking's credibility and efforts to fight corruption.
- Performing a risk analysis that takes into account the risks of corruption inherent to the branch, such as intense competitive pressures, low margins, substitutable products etc. as well as taking into account the risks of corruption that prevail in those countries in which the undertaking operates. In addition, any risks inherent to the undertaking itself should be taken into account (e.g. low salaries, past cases of corruption in the undertaking and of business partners, performance-based salary scales etc.). For internationally active undertakings, a more in-depth risk analysis should also be considered, focusing on the undertaking’s foreign intermediaries, agents, consultants etc.
- Drafting internal corruption guidelines, which are based on the results of said risk analysis and which are not limited to simply defining the prohibited acts of corruption, but also describe the related criminal and employment law sanctions. The corruption guidelines should be drafted in a way that is readily understandable by the reader and should also discuss sensitive topics such as expenses, gifts for visitors, invitations, sponsoring etc.
- Creation of a Compliance Point or Division commensurate with the size of the undertaking, and which has both qualified leadership and sufficient personnel.
- Recurring training in regard to the corruption guidelines by said compliance personnel so as to sensitise all employees about the issue of corruption.
- Regular internal controls with regard to compliance with the corruption guidelines as well as reasonable and consistent imposition of sanctions in cases of breach.
- Ensuring that the relevant accounting procedures are conducted in an orderly manner and that all payments are objective and traceable.

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