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In a nutshell

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Law tightened up in the combat against private corruption

The amended federal act dealing with corruption as a criminal offence comes into force on 1 July 2016. Its intention, in particular, is to improve the efficiency of combatting corruption in the private sector. The criminal offence of private corruption is being transferred from the Federal Act on Unfair Competition ("UCA") to the Criminal Code (Arts. 322^{octies} and 322^{novies} CC), which means that it is no longer a precondition that the corrupt act must distort the market in an inadmissible way and falsify competition. The intention, for example, is to make it easier to catch corrupt acts in the award of sporting events. In addition to this, corruption in the private sector is to be investigated and prosecuted ex officio in future. That remains subject to the minor-cases exception inserted by Parliament, which are still going to require a criminal complaint to be filed first.

The amendment is also leading to a change in the criminal-code provisions concerning the granting and acceptance of advantages by office holders (Arts 322^{quinquies} and 322^{sexies} CC). Giving so-called sweeteners is also going to become punishable if the advantages do not benefit the office holder himself or herself but benefit a third party, with a view to influencing the office holder and with the office holder's knowledge. It is possible, for instance, for the entity involved to be a political party or a sports club. From 1 July 2016 onwards, it is thus no longer going to be necessary for the office holder himself or herself to derive a benefit from the undue advantage. The same change is also being made with regard to members of the armed forces as laid down in the Military Criminal Code.

This «In a nutshell» contains a summary of the most important changes that affect combatting private corruption.

I. Background to the changes concerning private corruption

According to the law applicable until 30 June 2016, the criminal offence of corrupting private individuals was dealt with in Art. 4a combined with Art. 23 UCA and was thus inexorably linked with the concept of unfair competition, which in places led to inconsistent results, given that whether actions that were equivalent were punishable or not depended on whether or not a competitive situation was involved. Whereas bribery with the aim of concluding a contract although the product purchased did not present the best price/performance ratio was already punishable under the law applicable up until now, that was not the case if the corrupt act occurred after conclusion of the contract, for instance to induce the person responsible for quality control to turn a blind eye to inadequate quality. A further hurdle used also to exist in that criminal prosecution under the law to date required the filing of a formal criminal complaint. Furthermore, the consequence of the link with the Federal Act on Unfair Competition was that it was doubtful whether corrupt acts in connection with the award of major sports events were covered at all by Art. 4a in combination with Art. 23 of that act.

With the amendment of the criminal law on corruption, it is thus the intention that combatting corruption in the private sector should become more effective and that the scope of the criminal-law provision should be clarified.

II. Rearrangement of the provision on combatting private corruption

From 1 July 2016 onwards, the giving and taking of bribes involving private individuals is to be governed by the new provisions in Arts. 322^{octies} and 322^{novies} CC. On the basis of this amendment, a prison sentence of up to three years or a fine is the new penalty for bribery for anyone who offers, promises or grants an undue advantage to an employee, a proprietor, a representative or other agent of a third party in the private sector in connection with the latter's official or commercial activity for a disloyal or discretionary action or omission for his or her benefit or for the benefit of a third party. The same penalty is also threatened for employees, proprietors, representatives, etc., if they demand, arrange for the promise of or accept an undue advantage in connection with their official or commercial activity in exchange for a disloyal or discretionary action or omission for themselves or for a third party.

Removal of the link with unfair competition

The characteristics of the offences defined in Arts. 322^{octies} and 322^{novies} CC correspond to those of Art. 4a UCA. That being so, the views expressed in the existing doctrine on Art. 4a UCA can be invoked to assist in the interpretation of the new provisions. Nonetheless, there is an important change in the broadening of the scope, in that with the transfer of private corruption from the UCA to the CC the corrupt behaviour is also punishable even if it has no effect on competition. The new provision will thus also come into play for actions of corruption in connection with monopolies or if corruption occurs after conclusion of a contract. The Federal Council's dispatch cites the example of a supplier of brake components bribing, for instance, an automobile manufacturer's quality manager to turn a blind eye to the inadequate quality of goods. By contrast with the legal situation to date, such an action is to be punishable from 1 July 2016 onwards. By abandoning the requirement for there to be distortion of competition, acts of corruption in the award, for example, of football competitions are also to be brought under the criminal-law provision provided the other preconditions for an offence to be committed are met. In this, it is possible for the corruption to affect foreign private individuals too, provided there is a connecting factor with Switzerland, such as the action being carried out in Switzerland or the perpetrator being a Swiss citizen.

Requirement for a link with a commercial or official activity and existence of a tripartite relationship

It remains the case with the new rule too that private corruption is only punishable if it occurs in connection with a commercial or official activity and if a tripartite relationship exists. Arts. 322^{octies} and 322^{novies} CC are only applicable if the legal interests of a third party (such as an employer or client) are violated, given that the latter could expect of their employees or agents to abide by their duties of good faith towards them and to perform their tasks with integrity and loyalty and in accordance with statutory obligations. The venal behaviour of an individual not acting against a statutory duty of good faith towards a third party and thus occurring outside of commercial or official relationships is thus not prohibited by the

criminal-code provision on private corruption. On this particular point, the Federal Council dispatch explicitly states that it is not the intention to extend the provision to honorary activities within civil society. The chairwoman of a district association who receives a bribe to campaign in favour of a road or building project is not to be covered by the criminal-code provision on private corruption according to the Federal Council dispatch.

It is precisely when it comes to corrupt actions in the context of international sports associations that particular weight is attached to the interpretation of the criterion of commercial or official activity. According to the Federal Council dispatch, it is the intention that managerial functions performed as an ancillary activity ought to fall within the definition of a commercial or official activity to the extent that they are remunerated like official activities. Other criteria for interpretation of the criterion of commercial or official activity are the nature of the function, the extent of the responsibility or the importance and mode of operation of the body concerned.

Concept of undue advantage
It is stated clearly in Art. 322^{decies} CC that advantages that are permitted under the regulations on the conduct of official duties or are contractually approved by third parties as well as minor, socially customary advantages are to continue to be permitted and do not constitute undue advantages. On this point too, it thus remains fundamentally possible to have recourse to the views expressed in the doctrine on Art. 4a (2) UCA. It is stated in the Federal Council dispatch that it must be determined before the action concerned takes place which advantages are permitted or authorised. It is stated explicitly that accepting or granting advantages that are beneficial to the employer (discounts, fidelity bonuses and the like) remain admissible.

Ex officio investigation and prosecution with the exception of minor cases
One important change affecting Arts. 322^{octies} and 322^{novies} CC concerns the fact that the criminal-code provisions have been basically worded as offences entailing mandatory investigation and prosecution. In the course of the parliamentary deliberation, however, resistance formed against making this into an absolute rule, and the houses of parliament agreed to insert a second paragraph in Arts. 322^{octies} and 322^{novies} CC, according to which in minor cases the offence would only be investigated and prosecuted if a criminal complaint was filed. The law does not state what precisely is to be understood by a minor case. The outcome of leaving this term open for interpretation later on is that there will be considerable legal uncertainty until such time as a certain routine in handling such cases becomes established. It emerged in the parliamentary deliberation that the following criteria in particular ought to be available for claiming that a particular case is a minor one:

- The sum involved in the action is not high, in other words the undue advantage (amount of the bribe) is at most a few thousand francs (a comparable sum is applicable, for instance, for delimitating particularly minor cases of money counterfeiting).
- The safety and health of third parties are not affected by the action.
- It is not a multiple or repeat offence or one committed by a gang.
- No documentary offences are committed in connection with the corruption.

According to what Federal Councillor Sommaruga said in her speech, the size of an undertaking or the financial circumstances of those involved are not to not play any role in judging whether the sum of the bribe paid represents a minor case of corruption or not. Apart from that, it must be assumed that a case will not be considered a minor one if the action harms the safety and health of third parties. The same also applies in cases of multiple bribery or bribery organised by gangs or if, in connection with the offence, documents have been forged, for instance.

Still not a predicate offence to money laundering
Despite these various points being tightened up, private corruption in Switzerland (in contrast to public corruption) is still not a predicate offence to money laundering, given that the scale of sanctions laid down in the UCA (up to three years' imprisonment) has been taken over into the CC without any modifications and that it is still classified as a lesser offence rather than a serious crime. The criminal-code provision on money laundering (Art. 305bis CC) presupposes that a serious crime has been committed as a predicate offence (with the exception of the fiscal predicate offence, which is not relevant here).

Aggravated risk for businesses
Given that the criminal-law provision on private corruption has been transferred to the Criminal Code and that it is the declared aim of the amendment to combat private corruption more effectively (ex officio from now on), it is to be assumed that there will be (more) convictions for private corruption. That also means that businesses face an aggravated risk of Art. 102 (2) CC being used to sanction them if it can be held against them that they did not take all the necessary and reasonably expected organisational precautions to prevent such an offence from occurring. That being so, businesses are urgently advised to draw up internal guidelines as to which «advantages» are admissible and which ones fall under the heading of «undue advantage». In this context, it is possible that tricky questions may arise as to where to draw the line as regards models for the payment of commissions. It is, however, clear from what is written in the Federal Council dispatch that advantages that benefit the employer (discounts, fidelity bonuses and the like) are to remain admissible.

Please do not hesitate to contact us if you have any questions in connection with combatting private corruption more effectively, and we should be happy to assist you in any measure you might need to adopt.

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