Financial crime in Switzerland: overview

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A Q&A guide to financial crime in Switzerland.

The Q&A gives a high level overview of matters relating to corporate fraud, bribery and corruption, insider dealing and market abuse, money laundering and terrorist financing, financial record keeping, due diligence, corporate liability, immunity and leniency, and whistleblowing.

To compare answers across multiple jurisdictions, visit the Financial and Business Crime *Country Q&A tool*.

This Q&A is part of the multi-jurisdictional guide to financial crime law. For a full list of jurisdictional Q&As visit *www.practicallaw.com/financialcrime-guide*.

Fraud

Regulatory provisions and authorities

1. What are the main regulatory provisions and legislation relevant to corporate fraud?

Fraud, in general terms, is governed by Article 146 of the Swiss Criminal Code (SCC). There are no specific statutory provisions dealing with corporate or business fraud under Swiss law. However, several offences may be committed simultaneously in the context of corporate activities.

Moreover, criminal liability of corporations can be triggered under Article 102 of the SCC in connection with fraud or other offences (*see Question 35*).

Offences

2. What are the specific offences relevant to corporate fraud?

Under Article 146 of the SCC, the offence of fraud requires the following elements:

- **Deception.** For example:
  - making false representations;
  - concealing true facts;
  - reinforcing an erroneous belief.

- **Malice.** The perpetrator must act maliciously. Malice implies, for example, that the perpetrator prevents the defrauded party from verifying false information or that such verification cannot be reasonably expected due, for example, to a particular relationship of trust or express reassurances. Malice is presumed where the perpetrator constructs a web of lies in order to deceive the other person. However, malice is not fulfilled where the defrauded party could have reasonably verified the false information or the concealment of facts without much effort.
- **Error.** The false representation or the concealment of true facts must trigger an error, thereby causing the defrauded party to both:
  - act to the detriment of his/her interests or a third party's financial interests;
  - suffer a corresponding damage.

- The perpetrator must act wilfully and with the intention of unlawfully enriching himself/herself or a third party.

In a corporate context, fraud is often accompanied by the use of false or incorrect documents in view of securing an advantage for the perpetrator(s) or third parties. This is punishable under the general fraud provision contained in Article 146 of the SCC, but can also amount to the forgery of documents under Article 251 of the SCC. Such examples include:

- **Accounting fraud.** This is defined as a manipulation of financial statements, accounts and other financial documents so as to create a facade of a company's financial health, for example, in view of obtaining financing from a third party or bank.
- **Securities-related fraud.** Securities-related fraud or fraud occurring in the sale of securities can also involve the use of false or forged documents (for example, an incorrect prospectus, material or financial reports) constituting a written misstatement of facts within the meaning of Article 251 of the SCC. Additionally, such conduct may be in breach of the criminal provisions of the Federal Collective Investment Schemes Act (FCISA) and the Federal Stock Exchange Act (FSEA).

In the above context, a misstatement of facts constitutes forgery if and when an incorrect or untrue written statement is used in relation to a document that has qualified probative value, thereby breaching the assumption of truthfulness inherent to the document. This will be the case particularly where either the:

- Person issuing the document has legal duties of care with respect to the content of the document.
- Specific content of the document is imposed by law or commercial practice.

Enforcement

> 3. Which authorities have the powers of prosecution, investigation and enforcement in cases of corporate or business fraud? What are these powers and what are the consequences of non-compliance? Please identify any differences between criminal and regulatory investigations.

Authorities

Criminal investigation and prosecution. The Swiss criminal authorities have jurisdiction:

- Where the perpetrator's acts or the results thereof are deemed to have occurred on Swiss soil.
- For acts committed abroad (although under strict conditions) (*see Question 39*).

(*Articles 3* and *8, SCC*).

In transnational cases of fraud, the following elements (among others) can bring about the jurisdiction of the Swiss criminal authorities:

- If the perpetrator's act or conduct took place on Swiss soil (for example, the act of deception).
- If the perpetrator enriched himself/herself in Switzerland (for example, through a Swiss bank account).
- If the victim's impoverishment occurred in Switzerland.

The Swiss criminal authorities can further assist foreign authorities by way of mutual legal assistance, namely by executing certain coercive measures required in the course of a foreign criminal investigation (*see Question 38*).

Switzerland's federal structure means that the cantonal or federal authorities may have jurisdiction to investigate and prosecute fraud, depending on the specific circumstances of the case. The competent authority responsible for investigating corporate and business fraud is the cantonal Public Prosecutor's Office (PPO) or that of the Confederation, that is, the Office of the Attorney General of Switzerland (OAG).

Fraud offences are investigated by the OAG if they are:

- Committed by or against federal authorities.
- Substantially committed abroad.
- Committed in two or more cantons with no single canton being the predominant centre of the criminal activity.

The OAG has a right to delegate the investigation to the cantonal PPO in minor cases (*paragraph 2, Article 25, Federal Code of Criminal Procedure (CCP)*).

In all other cases, the PPO of the relevant canton in Switzerland is responsible for investigating fraud offences. As a rule, the criminal authorities at a company's seat are in charge of leading investigations against said company and the individuals acting on behalf of it (*Article 36, CCP*).

The PPO is usually assisted in its investigations by specialised business crime units of the criminal police.

Regulatory investigation and administrative enforcement. Corporate and business fraud committed in relation to an entity subject to regulatory supervision may lead to regulatory investigations and administrative enforcement. Such is the case for regulated entities subject to the supervision of the Financial Market Supervisory Authority (FINMA), such as financial institutions.

Further, if FINMA obtains knowledge of corporate and business fraud offences, it must notify the competent criminal prosecution authorities. FINMA and the competent prosecution authority may also collaborate in exchanging information (*Article 38, Federal Act on the Swiss Financial Market Supervisory Authority (Financial Market Supervision Act) (FINMASA)*) or co-ordinate their investigations, as far as is practicable.

For more information on FINMA, *The regulatory authorities*.

Prosecution powers

The prosecution powers inherent to the competent PPO include:

- Opening or discontinuing an investigation, thereby bringing or dropping charges against a suspect.
- Ordering coercive measures.
- Hearing the parties and gathering other evidence.
- Sentencing the accused by means of a summary penalty order, in certain limited situations (*see below*).
- Requesting the judgment of the accused by the criminal courts.

The criminal authorities have a closed number of lawful coercive measures at their disposal, which may only be ordered on reasonable grounds of suspicion and in accordance with the principle of proportionality (*Articles 196 et seq, CCP*).

Not all criminal authorities are equal with respect to the scope and powers at their disposal, for example, certain coercive measures cannot be ordered without judicial review and therefore require validation by the Coercive Measures Court. Moreover, the powers and autonomy of the police will generally be limited, insofar as it acts under the supervision of the PPO in the framework of an investigation.

Powers of interview

The criminal authorities can:

- Interview the accused, witnesses or experts as well as persons providing information.
- Confront parties during hearings or, on the contrary, avoid confrontation through the implementation of protective measures in the interest of the victim or his/her family.
- Summon parties to a hearing and compel their attendance with the help of the police.
- Impose a fine in case of non-appearance or a refusal to testify without due cause.

(*Articles 142 et seq, CCP.*)

Powers of search/to compel disclosure

The accused has an absolute right to remain silent and to refuse to co-operate with the criminal authorities (*Article 158, CCP*). Other parties may invoke their right of refusal to testify or to provide evidence in certain situations (*Article 168 et seq; Article 265, CCP*) for example, in order to avoid breaching a professional secrecy (such as legal privilege or medical secrecy) or self-incriminating from a criminal or civil standpoint.

However, such right does not completely neutralise the rather extensive coercive powers of the prosecution authorities, who are entitled to:

- Punish those who refuse to answer or to produce documents without due cause with a fine.
- Order a search/raid or the seizure of evidence if the parties do not comply voluntarily with a production order.

A seizure or freezing order may be issued in order to:

- Safeguard means of evidence.
- Guarantee the payment of fines, monetary penalties or various procedural costs and indemnities.
- Ensure subsequent restitution of the assets to the harmed parties.
- Ensure subsequent confiscation/forfeiture or guarantee an equivalent compensatory claim.

Certain documents may, on the motion of the concerned parties, be sealed or excluded from the seizure such as:

- Strictly personal records.
- Correspondence with legal counsel or with other persons who are bound by professional privilege.

(*Articles 248 and 264, CCP.*)

Powers to obtain evidence

The criminal authorities have a wide range of measures available for gathering evidence. For example, they can:

- Interview individuals.
- Request the production of documents.
- Seize documents or electronic data.
- Undertake inspections.
- Conduct secret surveillance.
- Intercept mail or telecommunications.
- Monitor banking relations.
- Order the production of reports or medical files.
- Conduct DNA analyses.

- Take writing and voice samples.

In certain cases, coercive measures will need to be directly ordered or validated by the competent Coercive Measures Court.

The prosecution authorities can further request access to files and information from other Swiss-based authorities (*Articles 43 et seq, CCP*), and foreign authorities via international mutual legal assistance (*Articles 54 and 55, CCP) (see Question 38*)).

Power of arrest

The criminal authorities have the powers to search for suspects, arrest them with or without a prior warrant and detain them in pre-trial custody and for the duration for the trial (*Articles 212 et seq, CCP*). The suspect has a right to be heard before the prosecution authorities on the suspicions against him/her and before the Coercive Measures Court regarding his/her detention. The detention must be validated by the Coercive Measures Court within 96 hours following the arrest.

Detention in custody can be ordered if the suspect presents risks of:

- Evasion.
- Tampering with evidence or collusion/conspiracy.
- Reiteration or danger to the safety of others.

The decision to detain and the duration of the detention must be proportionate to the circumstances, and may, where possible, be substituted with alternative measures (*Articles 237 et seq, CCP*), such as:

- Bail.
- Handover of identity papers.
- Confinement to a specific location.
- Ban on contact with certain individuals.
- Obligation to check in regularly with the authorities.
- Requirement of a steady employment or monitored medical treatment.

Therefore, an accused can be released on bail from pre-trial custody. The security deposited may thereafter be confiscated to cover any monetary penalty, fine, procedural costs or damages allocated to a harmed party.

Court orders or injunctions

The PPO and, once the matter is handed over for trial, the competent courts, can issue interim mandatory orders (*Articles 196 et seq, CCP*). The police can do so only when authorised under the law, particularly if the matter is urgent. Such orders include:

- Summons to appear.
- Search warrants.
- Seizure or freezing orders.

- Orders for the production of documents or the disclosure of information.

To limit the risk of collusion/conspiracy, the authorities may also issue injunctions banning parties, under the threat of criminal sanctions, from entering into contact with or informing specific individuals of certain facts, for example:

- A witness banned from disclosing the subject of his/her hearing.
- A bank banned from informing an account holder of a freezing over his/her assets.

Seizure and freezing orders may be challenged before the court of appeals within ten days of their service. The lifting of such measures can also be requested at any given time thereafter.

4. Which authority makes the decision to charge and on what basis is that decision made? Are there any alternative methods of disposal and what are the conditions of such disposal?

The PPO or the Office of the OAG will be in charge of opening and directing investigations against the perpetrators in the preliminary phase of the proceedings. To a certain extent, the investigation may be delegated to the (cantonal/federal) police. It is the PPO who notifies the actual charges to a suspect.

On completion of the investigation, the PPO or OAG may send the accused to trial by means of a written accusation act. Such accusation act must comply with the legal requirements under Article 325 of the CCP and may be returned to the PPO or OAG by the courts in the event that the act or the investigation file is deemed insufficient or irregular.

Exceptional means of disposing of the case include:

- **Summary penalty orders.** A summary penalty order (*Articles 352 et seq, CCP*) can be issued under the following conditions:
  - the facts have been admitted by the accused or have been reasonably established;
  - the sanction sought by the PPO is either a fine, a monetary penalty of up to 180 daily penalty units, community service of up to 720 hours, and/or a custodial sentence of no more than six months.

    If unchallenged within a ten-day period, the summary penalty order becomes akin to a final and binding judgment.

- **Accelerated proceedings.** Accelerated proceedings (*Articles 358 et seq, CCP*) can be initiated if:
  - they are launched on the motion of the accused (and only the accused);
  - the matter has not yet been sent to trial;
  - the accused has admitted all the relevant facts and the civil claims against him/her (if any) at least in principle;
  - the sanction sought by the PPO is not more than a five-year custodial sentence.

Accelerated proceedings, which are the Swiss equivalent of a plea bargain, require the accused to retain a lawyer, failing which one will be appointed to him/her *ex officio*.

- **Discontinuation or closing of proceedings.** The proceedings can be discontinued by the PPO at any given time up to the point where the matter is sent to trial. After this point, the proceedings can be closed by means of judgment (acquittal or conviction), or exceptionally discontinued in the event of insurmountable procedural obstacles (for example, an expired statute of limitations, or the death of the accused).
- **Reparations.** The PPO can refrain from investigating or discontinue the investigation in exchange for reparations, if (*Article 53, SCC*):
  - the likely sentence is a fine or a custodial sentence of up to two years;
  - any past convictions do not raise concerns about potentially negative future behaviour of the accused;
  - there is no overriding public or private interest that speaks against discontinuing the matter.

  If the parties agree on a reparation after the matter is sent to trial, the court can no longer discontinue the proceedings but only issue a guilty verdict that carries no sanction (unless, obviously, the accused is acquitted). However, while reparations are widely accepted on the cantonal level, even in white-collar crime cases (see, in Geneva, the HSBC case (press release of 4 June 2015, available at: *http://ge.ch/justice/classement-de-la-procedure-contre-hsbc-la-banque-accepte-de-payer-40-millions-de-francs*) and the Addax case (press release of 5 July 2017, available at: *http://ge.ch/justice/procedure-contre-addax-reparation-hauteur-de-31-millions-de-francs-et-classement-de-la-procedure*), this is not the case on the federal level, before the OAG. Moreover, a pending political initiative aims at restricting the use of Article 53 of the SCC in such context.

5. What are the sanctions for participating in corporate fraud?

Civil/administrative proceedings or sanctions

Corporate or business fraud committed in relation to an entity subject to the supervision of the Financial Market Supervisory Authority (FINMA) may lead to regulatory investigations and administrative enforcement.

Sanctions imposed by the administrative authorities include the following:

- Orders for redress.
- Occupational bans or the withdrawal of licences to conduct financial activities subject to supervision.
- Declaratory rulings or findings of a breach, followed, where appropriate, by a published decision (that is, naming and shaming).
- The confiscation/forfeiture of any profit that a supervised entity or individuals in senior functions has made through a serious violation of the supervisory provisions.

For more information on FINMA, see box*: The regulatory authorities*.

Criminal proceedings
Right to bail. See *Question 3*.

Sanctions. Fraud is punishable by a custodial sentence of up to five years, or a monetary penalty of up to CHF540,000 (that is, 180 daily penalty unites).

Fraud committed as part of a professional, criminal scheme is punishable by a custodial sentence of up to ten years or a monetary penalty of no less than CHF240,000 (that is, 90 daily penalty units).

The custodial sentence and penalty are determined by taking into account the perpetrator's:

- Culpability and fault.
- Criminal record.
- Personal situation.
- The impact of the inflicted penalty on their future.

This is in addition to various other elements that may warrant a reduction of the sentence (for example, reparations and sincere apologies).

Furthermore, depending on the circumstances, the sanction may include:

- A prohibition from practising a profession or a comparable activity for a period of six months to five years (*Article 67, SCC*).
- The publication of the judgment (*Article 68, SCC*).
- Expulsion of foreign nationals from Switzerland (*Articles 66a et seq; SCC*; *Federal Act on Foreign Nationals (FNA)*).

The criminal authority can further order:

- The confiscation/forfeiture of assets belonging to the company, individual perpetrator or third party.
- An equivalent compensatory claim, if the proceeds of the crime are no longer available (for example, if they have been spent or otherwise dissimulated).
- The allocation or restitution of assets to the injured party, where appropriate.

Any individual and any person aiding and abetting a perpetrator can become liable for fraud (*Articles 25 and 146, SCC*).

Companies can also face corporate criminal liability under certain circumstances (*see Question 35)*.

Civil suits
An injured party can assert its civil claims in the frame of the criminal proceedings as a so-called private claimant (*Articles 115 et seq, CCP*). Such assertion must occur before the matter is sent to trial.

A withdrawal of the civil claim during the investigation or before the closure of the proceedings before the first instance criminal court has no material effect, the injured party can re-introduce his/her claim before the civil courts anytime thereafter. Moreover, if the criminal authorities deem that the civil courts are better suited to adjudicate the claimant's claims, the claimant may be invited to file his/her claim separately before the civil courts. However, this should remain exceptional. The civil claims will also need to be asserted before the civil courts if the:

- Criminal proceedings are discontinued or settled by means of a summary penalty order.
- Private claimant has failed to sufficiently justify or quantify his/her claim or to pay up security in respect of such claim.
- Accused was acquitted and the factual situation has not been sufficiently established in order to rule on the civil claims.

Safeguards

6. Are there any measures in place to safeguard the conduct of investigations? Is there a process of appeal? Is there a process of judicial review?

Right to legal advice and privilege
The suspect can, in principle, freely choose whether or not to be assisted by an attorney (or several attorneys, as long as the proceedings are not unduly delayed). However, in some cases a defence counsel is mandatory (*Article 130, CCP*). For example, when the detention period exceeds ten days or if the accused risks a custodial sentence exceeding one year and/or expulsion from Switzerland. The criminal prosecution authorities must inform the suspect (in a language that he/she understands) of their:

- First hearing.
- Right to a defence counsel.

All communications between the accused and their defence counsel are privileged. The criminal authorities are prohibited from reading such correspondence and must, on the motion of the concerned party or counsel, exclude it from the file if it has been seized during a search or otherwise provided by a third party to the authority, or launch sealing procedures should they consider that no privilege applies.

Right to exclude unlawfully obtained evidence
The criminal authorities are not bound by a limited means of evidence. However, the manner in which evidence is collected is strictly governed by the CCP and restricted by the parties' rights as derived from the Swiss Federal Constitution and the European Convention on Human Rights (ECHR).

The CCP distinguishes between two types of unlawful evidence:

- Certain methods of evidence gathered in the course of the proceedings that result in the evidence being absolutely unusable. For example, the use of physical violence and coercion using threats, promises, lies and deceit is absolutely prohibited, meaning that the resulting evidence must in all circumstances be excluded from the file of the proceedings (*Article 140, CCP*).
- So-called "relatively useable evidence", obtained through illegal means in breach of certain other CCP provisions, which will be left on file if there is an overwhelming public interest in exploiting the relevant evidence.

Provision of written rights
The CCP has codified a number of criminal defence rights and procedural guarantees, such as the:

- Right to a fair and speedy trial (*Articles 3 and 5, CCP*).
- Right to be heard and to participate in the gathering of evidence (*Article 147, CCP*).
- Presumption of innocence and the principle of *in dubio pro reo* (when in doubt, for the accused) (*Article 10, CCP*).

There are also many others derived from the Swiss Federal Constitution and the ECHR.

In any event, all the procedural defence rights derived from the ECHR are fully applicable and may be invoked by any suspect or accused in Switzerland.

Relevant process for judicial review
As a matter of principle, the decisions rendered by the PPO during its investigation are subject to appeal, with several exceptions (for example, refusals of requests for evidence gathering, unless urgency prevails). The right to appeal against incidental decisions (that is, decisions taken during proceedings) under the Swiss Federal Supreme Court depends in principle on the existence of a damage that is difficult to repair. This is the case, for example, regarding the sealing of evidence, where the claimant claims privilege over documents or data that the PPO wishes to install to the file.

Moreover, judicial review is mandatory for certain coercive measures, the Coercive Measures Court must intervene, particularly in matters of detention and secret surveillance.

Final judgments (acquittals or convictions and sentencing) may, in principle, be brought before the cantonal appeals authority and then before the Swiss Federal Supreme Court, either by the accused, the PPO or the claimant, insofar as they can claim a legitimate interest in appealing.

Bribery and corruption

Regulatory provisions and authorities

7. What are the main regulatory provisions and legislation relevant to bribery and corruption?

The relevant provisions on bribery and corruption offences are contained in the Swiss Criminal Code (SCC) and include the following:

- Active and passive bribery of Swiss public officials (*Articles 322ter and 322quater, SCC*).
- Granting or accepting an undue advantage to/by Swiss public officials (*Articles 322quinquies and 322sexies, SCC*).
- Active and passive bribery of foreign public officials (*Article 322septies, SCC*).
- Active and passive bribery of private individuals (*Articles 322**o**cties and 322novies, SCC*).

Further, in practice, companies usually consider several guidelines, including the Organisation for Economic Co-operation and Development (OECD) Good Practice Guidance.

Corruption offences can be prosecuted and judged in parallel with offences relating to the abuse of and misconduct in public office (*Articles 312* and *314, SCC*) and the breach of official secrecy (*Article 320, SCC*).

Moreover, criminal liability of a company may come into play, where the company has failed to take all reasonable organisational measures to prevent the commission of (among an exhaustive list of offences) bribery and corruption offences (*paragraph 2, Article 102, SCC*).

For more information on corporate criminal liability, see*Question 35*.

8. What international anti-corruption conventions apply in your jurisdiction?

Switzerland is a signatory to the following three international anti-corruption conventions:

- OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions 1997 (OECD Bribery Convention).
- Council of Europe Civil Law Convention on Corruption 1999 (Civil Law Convention on Corruption).
- UN Convention against Corruption 2003 (Corruption Convention).

In addition to these conventions, Switzerland has ratified the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of Proceeds of Crime (Council of Europe Convention).

Moreover, Switzerland is a party to various bilateral treaties in matters of mutual assistance that facilitate the seizure, confiscation and repatriation of the proceeds of crimes, including those stemming from corruption.

Offences

9. What are the specific bribery and corruption offences in your jurisdiction?

Foreign public officials
Article 322septies of the SCC prohibits active and passive bribery of foreign officials, and it is a criminal offence for a:

- Person to offer, promise or grant a foreign official or a third party an undue advantage (active bribery).
- Foreign official to solicit or accept an undue advantage (passive bribery).

The above-cited notions can be further defined as follows:

- **Foreign officials.** The law defines foreign officials as members of a foreign judicial or other authority who pursues an official activity, be it a member of a judicial or other authority, a public official, an officially-appointed expert, translator or interpreter, an arbitrator, or a member of the armed forces. Employees of foreign state-owned or state-controlled companies may qualify as public officials, so long as they pursue an official activity. Moreover, private persons who fulfil official duties will be treated as public officials (*Article 322decies, SCC*).
- **The advantage.** The (undue) advantage is the means of bribery. An advantage is defined as any ascertainable enhancement in the beneficiary's situation, whether in economic, legal or personal terms. The advantage is "undue", where it is not permitted under staff regulations or is not of negligible value. Typically, the undue advantage may consist of gifts, bonuses, commissions or other benefits in kind. However, an advantage is not "undue", if it is permitted by staff regulations or if it is of minor value in conformity with social customs (*Article 322decies, SCC*).

The criminal act must be committed both:

- In return for an act or omission of the foreign official that is contrary to his/her duties towards the state, principal or employer or dependent on his/her discretion.
- In connection with the foreign official's public (official) duties (that is, an "equivalence connection").
- As opposed to domestic public officials, advantages granted to incite a foreign official to act in accordance with his/her public duties ("facilitating payments") are not punishable (*Article 322septies, SCC*).

Domestic public officials
Articles 322ter and 322quater SCC prohibit active and passive bribery of domestic officials. The requirements are the same as those for foreign officials, with the sole difference being that the public official acts in an official capacity for a Swiss body or authority.

In addition to bribery of domestic officials, the SCC prohibits under Articles 322quinquies and 322sexies SCC the granting or accepting of an advantage related to unlawful favours, which are not directly linked to a specific official act, but are focused on future favourable official behaviour, that is, the so-called "grooming" of the official. Unlike

bribery, the advantage does not have to be linked to an immediate tangible counter-performance, rather, such advantage must aim at influencing future official behaviour.

The latter two provisions are "catch-all offences", where proof of the connection between the undue advantage and the counter-performance cannot be established (which is at times the case for "facilitation payments").

Private commercial bribery

Until 1 July 2016, bribery in the private sector was only prosecuted on the motion of a claimant (that is, if a criminal complaint was lodged), if such bribery was found to distort competition under Article 4A of the Unfair Competition Act (UCA). Without distortion of competition, there were no sanctions for bribery committed in the private sector.

However, since 1 July 2016, bribery in the private sector also constitutes a criminal offence under Articles 322 octies and 322 novies of the SCC, where it is a criminal offence for:

- A person to offer, promise or grant an undue advantage to an employee, partner, agent or any other auxiliary of a third party in the private sector (active bribery).
- An employee, partner, agent or any other auxiliary of a third party in the private sector person to demand, secure the promise of or accept an undue advantage (passive bribery).

The criminal act must be committed both:

- In exchange for an act (or omission) of the private individual in violation to his/her duties or in the exercise of his/her discretion.
- In connection with the commercial or professional activities.

Defences

10. What defences, safe harbours or exemptions are available and who can qualify?

Under Article 322decies of the SCC the individual perpetrator's liability may be excluded where it can be shown that the advantage:

- Conforms with public employment law or has been contractually approved.
- Is of minor value in line with social customs, such as gifts. This exception is subject to a case-by-case analysis.

Further, other standard defences under general criminal law, such as the state of necessity (*Article 18, SCC*), are available to the accused. However, considering the offence of bribery, they are of limited, if any, practical relevance.

In the context of corporate liability for bribery offences, the accused company can argue that the:

- Underlying bribery offence was not committed "within the company" (that is, by an individual forming part of the company).
- Underlying offence did not fulfil all its objective and subjective components.
- Company undertook all requisite and reasonable organisational precautions to prevent the bribery offence.

(*Paragraph 2, Article 102, SCC.*)

11. Can associated persons (such as spouses) and agents be liable for these offences and in what circumstances?

The SCC provides no limitations as to the population of perpetrators of active bribery.

For the perpetrators of passive bribery, only the public officials can be held liable for committing the offence as main perpetrators. However, agents and associated persons or so-called intermediaries may face prosecution and be held liable criminally as instigators and accomplices for the committed offences (albeit with a reduced sentence for accomplices (*Article 25, SCC)*).

Moreover, agents and associated persons can be the target of enforcement measures, such as the seizure/freezing of assets (*Articles 263 et seq, CCP*) and subsequent confiscation/forfeiture (*Articles 70 et seq, SCC*), if and to the extent that the criminal proceeds can be traced back to them and if they cannot prove good faith and appropriate consideration when acquiring said assets. Such third parties can also be prosecuted for money-laundering if they accept assets stemming from corruption, if they knew or should have known their illegal derivation.

Enforcement

12. Which authorities have the powers of prosecution, investigation and enforcement in cases of bribery and corruption? What are these powers and what are the consequences of non-compliance? Please identify any differences between criminal and regulatory investigations.

Authorities
For details of jurisdiction over offences committed in Switzerland, see *Question 3*.

For cases with transnational components, the competence of Swiss criminal authorities may be given in the following scenarios:

- If the corrupt individual was in Switzerland at the time of receiving the promise, the offer of, or the actual bribe or undue advantage.
- If the act of consideration in exchange for the advantage or bribe was or should have been accomplished in Switzerland.
- If the corrupter had recourse to intermediaries or agents in Switzerland in view of committing bribery.
- If the proceeds of the corruption were deposited in Switzerland.
- If the person under a duty of care was supposed to act in Switzerland to prevent the bribery.
- In the case of corporate liability, if the organisational deficiency can be located in Switzerland.
- If the corrupt person or the corrupter are Swiss nationals (principle of "active personality") (*Article 7, SCC*).

In addition, illegal acts committed by Swiss public officials abroad are also punishable under Article 16 of the Federal Act on the Liability of the Federal Government, the Members of Authorities and its Public Officials (GLA).

Also, the OECD Bribery Convention provides for universal jurisdiction if the corrupter is a Swiss national acting in the context of an international business transaction.

In cases of bribery and corruption offences, the cantonal PPO has jurisdiction, except for certain cases where the prosecution powers rest with the OAG, such as if the bribery was committed:

- By or against federal authorities.
- Substantially abroad.
- In two or more cantons with no single canton being the predominant centre of the criminal activity.

Prosecution powers
The powers of prosecution, investigation and enforcement in cases of bribery and corruption are the same as with respect to fraud (*see Question 3*).

Powers of interview
See *Question 3*.

Powers of search/to compel disclosure
See *Question 3*.

Powers to obtain evidence
See *Question 3*.

Power of arrest
See *Question 3*.

Court orders or injunctions
See *Question 3*.

13. Which authority makes the decision to charge and on what basis is that decision made? Are there any alternative methods of disposal and what are the conditions of such disposal?

See *Question 4*.

Convictions and sanctions

14. What are the sanctions for participating in bribery and corruption?

Civil/administrative proceedings or penalties
See *Question 5*.

Criminal proceedings or penalties
Right to bail. See *Question 3*.

Penalties. Bribery of (Swiss or foreign) public officials is considered a crime under Swiss law. Individuals found guilty of bribing public officials may be sentenced to a:

- Custodial sentence of up to five years.
- Monetary penalty of up to CHF540,000 (that is, 180 daily penalty units).

Further, depending on the circumstances, the sanction may include:

- A prohibition from practising a profession or a comparable activity for a period of between six months to five years (*Article 67, SCC*).
- The publication of the judgment (*Article 68, SCC*).
- Expulsion from Switzerland for foreign nationals (*Articles 66a et seq, SCC; FNA*).

By contrast, bribery of private individuals as well as the giving and accepting of undue advantages are considered misdemeanours under Swiss law, punishable by a:

- Custodial sentence of up to three years.
- Monetary penalty of up to CHF540,000 (that is, 180 daily penalty units).

In minor cases of private bribery, the offence may only be prosecuted if a complaint is filed (as opposed to *ex officio* prosecution).

When prosecuted in connection with bribery, companies may be sanctioned with a fine of up to CHF5 million (*see Question 36*).

Tools of forfeiture. The authority can further order:

- The confiscation/forfeiture of assets belonging to the accused individual perpetrator, company or to third parties.
- If the proceeds of the crime are no longer available (for example, they have been spent or otherwise dissimulated), the confiscation/forfeiture of an equivalent compensatory claim.
- The allocation or restitution of assets to the injured party, where appropriate.

The above tools target as much the direct proceeds of corruption (that is, the bribe) as the indirect benefits accrued as a result of corruptive acts (for example, the proceeds and profits from deals and contracts obtained through corruption).

Various international treaties (*see Question 8*) and the applicable rules on international mutual legal assistance (*see Question 38*) apply, in addition to the Federal Act on the Freezing and the Restitution of Illicit Assets held by Foreign Politically Exposed Persons (Foreign Illicit Assets Act (FIAA)), which is applicable in Switzerland as of 1 July 2016. This law entitles the Swiss Federal Council to order the seizure/freezing over assets in relation to Politically Exposed Persons (PEPs) in view of potential mutual legal assistance proceedings or their subsequent forfeiture.

The persons/entities/states whose interests are harmed by a corruption offence may, where appropriate, file a civil claim before the criminal authorities and request the restitution of the criminal proceeds (*see Question 5*

Safeguards

15. Are there any measures in place to safeguard the conduct of investigations? Is there a process of appeal? Is there a process of judicial review?

See *Question 6*.

Tax treatment

16.Are there any circumstances under which payments such as bribes, ransoms or other payments arising from blackmail or extortion are tax-deductible as a business expense?

Swiss federal and cantonal tax laws explicitly prohibit tax deductibility with respect to bribes or "hidden commissions" paid to domestic or foreign public officials.

Since the bribery of private individuals became a punishable offence under the SCC in 2016 (and not only a breach of the Unfair Competition Act) bribes or hidden commissions paid to private individuals are also non-deductible.

Insider dealing and market abuse

Regulatory provisions and authorities

17. What are the main regulatory provisions and legislation relevant to insider dealing and market abuse?

Until 2016, insider dealing and market manipulation were governed by the Federal Stock Exchange Act (FSEA), which included both:

- Regulatory provisions (*Articles 33e and 33f, FSEA*).
- Criminal provisions (*Articles 40 and 40a, FSEA*).

Switzerland has since adopted the Financial Market Infrastructure Act (FMIA) that entered into force on 1 January 2016. FMIA aims to bring Swiss regulations in financial market infrastructures and derivatives trading in line with international standards and the evolving market conditions.

Offences

18. What are the specific offences that can be used to prosecute insider dealing and market abuse?

Insider dealing
Obtaining a financial advantage personally or for a third party by exploiting insider information is prohibited under Article 154 of the FMIA either by:

- Acquiring or disposing of securities or derivatives admitted to trading on a trading venue.
- Disclosing insider information to third parties.
- Recommending to a third party the acquisition or alienation of such securities on the basis of insider information.

Article 154 of the FMIA distinguishes between three types of insiders (a distinction, which plays a role when assessing the penalty imposed):

- **Primary insiders (or tippers).** Persons who have qualified access to insider information (for example, members of the board).
- **Secondary insiders (or tippees).** Persons who obtain insider information from primary insiders or are tipped-off by primary insiders.
- **Fortuitous or accidental insiders.** Persons who, without being primary or secondary insiders, get access by accident to confidential information (for example, by receiving an email by mistake).

Market abuse

The offence of market abuse or price manipulation under Article 155 of the FMIA aims to protect loyal and fair conduct on the stock market as well as equal opportunities; indirectly, it also protects investors' assets. Punishable conduct involves causing a substantial (and usually sudden) rise or fall in the market value of securities admitted to trading on a trading venue in Switzerland by fraudulent behaviour.

Fraudulent behaviour involves:

- Disseminating false or misleading information against their better knowledge (that is, market rigging).
- Acquiring or selling securities directly or indirectly for personal benefit or the benefit of associated persons (that is, sham transactions).

The perpetrator must act with the intention of securing a personal advantage or an advantage for a third party; whether the perpetrator actually obtained such advantage is irrelevant.

Other breaches

Other criminal provisions of the FMIA (*Articles 147 et seq, FMIA*) target breaches of various duties in relation to the financial market, such as the violation of professional secrecy, notification, record-keeping, clearing, risk-mitigation and disclosure duties.

Defences

19. What defences, safe harbours or exemptions are available and who can qualify?

Articles 142 and 143 of the FMIA (which is equally applicable to the criminal law provisions) and the provisions of the underlying Financial Market Infrastructure Ordinance (FMIO) contain exceptions amounting to "admissible conduct". They concern transactions:

- Executed in preparation of a public tender (that is, "no one can be his/her own insider" principle).
- Made for the purpose of price management.
- Transactions made in the course of repurchase programmes.

(*Articles 123 et seq, FMIO.*)

Enforcement

> 20. Which authorities have the powers of prosecution, investigation and enforcement in cases of insider dealing and market abuse? What are these powers and what are the consequences of non-compliance? Please identify any differences between criminal and regulatory investigations.

Authorities
The OAG is responsible for prosecuting criminal offences related to insider dealing or market abuse (*Article 156, FMIA*). Breaches of administrative regulations are investigated by FINMA. The two authorities co-ordinate their action when they intervene in matters.

For more information on FINMA, see box*: The regulatory authorities*.

Prosecution powers
For the criminal authorities, see *Question 3*.

FINMA enjoys broad powers to investigate and sanction insider dealing and market abuses from a regulatory perspective (*Articles 24 et seq, FINMASA*). FINMA can impose measures in order to:

- Restore compliance with the law.
- Organise extraordinary on-site inspections at a financial intermediary's business premises or instruct an audit company to conduct the inspection.
- Initiate enforcement proceedings.
- Order the forfeiture of profits obtained by the supervised financial intermediary at fault.

(*Article 31 et seq, FINMASA.)*

Financial market enforcement typically goes through the following phases:

- An informal investigation of a suspected breach.

- Opening and conducting of administrative enforcement proceedings.
- Issuance of a ruling or discontinuation of proceedings.
- Possible challenge of ruling before the courts or, failing such, the implementation of FINMA's legally binding order.

FINMA is also entitled to take appropriate precautionary measures where the investors, policyholders, creditors or the financial market as a whole are at risk, including in the following situations:

- The appointment of an investigating agent, who may be empowered to act in place of the company's management, thereby temporarily superseding the powers of certain individuals.
- Publication of information on the appointment of an investigating agent on the company website (if the agent features in the Commercial Register).
- Freezing/blocking of accounts.
- Imposing of temporary trading restrictions and limits on the nature and scope of business activities.

Powers of interview
See *Question 3*.

Powers of search/to compel disclosure
See *Question 3*.

Powers to obtain evidence
See *Question 3*.

Power of arrest
See *Question 3*.

Court orders or injunctions
See *Question 3*.

21. Which authority makes the decision to charge and on what basis is that decision made? Are there any alternative methods of disposal and what are the conditions of such disposal?

For criminal proceedings, see *Question 4*.

If the FINMA has reasonable grounds for suspecting a criminal offence, it may report the case to the OAG.

When opening its own investigation, FINMA often follows-up on information it receives from third parties or regulatory authorities regarding suspected violations of law. It takes action to restore compliance, making use of coercive administrative measures under supervisory law where necessary.

Convictions and sanctions

22. What are the sanctions for participating in insider trading and market abuse?

Civil/administrative proceedings or penalties

General penalties are applicable to anyone, regardless of whether or not the involved persons are subject to regulatory supervision.

Certain sanctions may be ordered only if the criminal offence is committed within an enterprise subject to regulatory supervision (for example, market traders or intermediaries), such as occupational bans or the withdrawal of licences to conduct business.

The wilful failure to comply with a legally enforceable decision issued by FINMA is punishable with a fine of up to CHF100,000 (*Article 48, FINMASA*). The provision of false information is also sanctioned by FINMASA, with a custodial sentence of up to three years or monetary penalties of up to CHF540,000 (that is, 180 daily penalty units) or CHF250,000 in case of negligence (*Article 45, FINMASA*).

Criminal proceedings

Right to bail. See *Criminal proceedings*.

Penalties. Criminal sanctions for participating in insider trading and market abuse is as follows:

- **Primary insiders and market abuse.** Penalties are:
  - a custodial sentence of up to three years; and/or
  - a monetary penalty of up to CHF540,000.
- **Primary insiders obtaining a financial gain in excess of CHF1 million.** Penalties are:
  - a custodial sentence of up to five years; and/or
  - a monetary penalty of up to CHF540,000.
- **Secondary insiders.** Penalties are:
  - a custodial sentence of up to one year; and/or
  - a monetary penalty of up to CHF540,000.
- **Fortuitous insiders.** Penalties include monetary penalties of up to CHF100,000.

Civil suits

See *Civil/administrative proceedings or sanctions*.

Safeguards

> 23. Are there any measures in place to safeguard the conduct of investigations? Is there a process of appeal? Is there a process of judicial review?

For criminal proceedings, see *Question 6*.

Rulings issued by the Financial Market Supervisory Authority (FINMA) can be challenged and may be subject to judicial review before the Federal Administrative Court and, ultimately, the Federal Supreme Court.

Money laundering, terrorist financing and financial/trade sanctions

Regulatory provisions and authorities

> 24. What is the main legislation and regulatory provisions relevant to money laundering, terrorist financing and/or breach of financial/trade sanctions?

Money laundering

Switzerland has strict regulations in place to prevent money laundering, implementing the international standards of the Financial Action Task Force (FATF), an international body of experts whose Secretariat is housed at the OECD.

Swiss regulations on money laundering mainly comprise the following laws and regulations:

- SCC.
- Federal Act on Combating Money Laundering and Terrorist Financing (Anti-Money Laundering Act) (AMLA)) and its underlying Ordinance on Combating Money Laundering and Terrorist Financing (Anti-Money Laundering Ordinance) (AMLO)).
- FINMA Ordinance on Combating Money Laundering and Terrorist Financing (FINMA Anti-Money Laundering Ordinance) (AMLO-FINMA)).

- Anti-money laundering regulations of various self-regulatory organisations (SROs).
- Other various ordinances and directives.

Further, in the context of the Swiss banking industry, the above acts are complemented by:

- The Federal Banking Act (BA).
- Self-regulatory Agreement on the Swiss banks' code of conduct with regard to the exercise of due diligence (CDB).

Although originally conceived as a code of conduct to which Swiss banks voluntarily subscribed, the CDB has been recognised by FINMA as a minimum standard applicable to all Swiss banks regarding identification procedures and measures to prevent capital evasion and tax-related offences.

Terrorist financing

Swiss regulations concerning terrorist financing include the following laws and underlying ordinances:

- SCC.
- AMLA and AMLO.
- AMLO-FINMA.

Financial/trade sanctions

The relevant provisions concerning financial/trade sanctions are contained in the Federal Act on the Implementation of International Sanctions (EmbA).

The Federal Council is the competent authority to enact, in the form of ordinances, financial/trade sanctions aiming at securing compliance with international law and ordered by:

- The UN.
- The Organisation for Security and Co-operation in Europe.
- Switzerland's most important trading partners.

The Federal Council may further implement financial/trade sanctions to protect Switzerland's interests (*paragraph 2, Article 1, EmbA*).

Offences

25. What are the specific offences that can be used to prosecute money laundering, terrorist financing and breach of financial/trade sanctions?

Money laundering

Criminal offences under the SCC. Money laundering is an act that attempts to frustrate the identification of the origin, the tracing or the forfeiture of assets which the perpetrator knows or must assume originate from a crime or an aggravated tax misdemeanour (so-called "predicate offence") (*Article 305*bis*, SCC*). The assets must originate from either:

- A crime, that is an offence carrying a custodial sentence of more than three years (*paragraph 2, Article 10, SCC*). Potential predicate offences include (among others):
    - fraud (*Article 146, SCC*);
    - active bribery of Swiss (*Article 322ter, SCC*) or foreign officials (*Article 322septies, SCC*);
    - participation in a criminal organisation (*Article 260ter, SCC*).
- An aggravated tax misdemeanour, that is, tax fraud (which implies the use of forged documents) in relation to direct taxes (for example, income tax and profit tax), where the tax evaded exceeds CHF300,000 within a given tax period (*paragraph 1bis, Article 305bis, SCC*).

The perpetrator is also liable where the predicate offence was committed abroad, provided that such offence is both:

- Liable to prosecution at the place of commission.
- Deemed a crime (or a qualified tax offence) under Swiss law.

(*Paragraph 3, Article 305bis, SCC.*)

The perpetrator of the predicate offence can personally commit money laundering with respect to the proceeds of such predicate offence.

Article 305bis of the SCC further prohibits acts of money laundering committed in relation to assets, including actions aimed at breaking the paper trail and therefore disguising the criminal origin of the assets, such as by, among other things:

- Physically hiding the assets.
- Exchanging, selling or donating the assets or the assets changing hands.
- Using multiple successive account transfers, transfers to an associated party or to an account where the beneficial owner has not been correctly identified.

However, the latest case law from the Swiss Federal Supreme Court has found that the mere act of transferring money abroad does not in itself amount to money laundering, provided the paper trail can be traced.

Insufficient diligence in financial transactions and reporting. Financial intermediaries who accept, keep on deposit or assist in the investment or sale of assets belonging to a third party are liable to criminal prosecution, if they fail to establish the identity of the beneficial owner of the assets with sufficient diligence (*Article 305ter, SCC*). However, financial intermediaries are authorised to report to the Money Laundering Reporting Office Switzerland (MROS) any observations that would indicate the suspicious origin of the assets, in order to avoid criminal liability.

For more information on the MROS, see box: *The regulatory authorities*.

Criminal offences under the AMLA, AMLO and AMLO-FINMA. The AMLA applies to any entity or natural person falling under the definition of a financial intermediary (*Article 2, AMLA*), such as:

- Banks and investment companies.
- Fund managers handling share accounts or distributing shares in collective investment schemes.
- Life insurance institutions that deal in direct life insurance or offer or distribute shares in collective investment schemes.
- Casinos.
- Other entities and persons operating in the non-banking sector, such as lawyers or hotel managers, provided they accept or hold on deposit assets belonging to a third party or assist in the investment or sale of assets belonging to a third party in a professional capacity.
- All individuals and legal entities that deal in commercial goods and in doing so accept cash.

The AMLA is a framework Act and contains provisions detailing due diligence requirements, transaction reporting, identification procedures and recordkeeping requirements for financial intermediaries when handling third-party assets.

Reporting. The AMLA provides the obligation for financial intermediaries to file a suspicious activity report with MROS, where they:

- Know or have reasonable grounds to suspect that assets involved in the business relationship or that cash payments made in the course of a commercial transaction:
  - relate to a money laundering offence;
  - constitute the proceeds of a crime or an aggravated tax misdemeanour (*paragraph 1, Article 305bis, SCC*).
- Terminate negotiations aimed at establishing a business relationship because of a reasonable suspicion.

(*Article 9, AMLA*.)

The intentional or negligent breach of the duty to timely file a suspicious activity report with the MROS may entail criminal penalties (*Article 37, AMLA*).

Further, according to case law, due to the financial intermediary's position as a so-called "guarantor" holding a duty of safeguard under the AMLA, the money laundering offence may also be committed by way of omission (*Article 11, SCC*). This is if the offender knows or has reason to believe that the involved assets have a criminal background but fails to take action, such as by filing a suspicious activity report with MROS.

Freezing. Subject to certain exceptions, the financial intermediary is under a duty to freeze the assets that are the subject matter of his/her suspicious activity report as soon as he/she is informed by MROS that such report was handed over to the criminal prosecution authorities (*Article 10, AMLA*). Moreover, the financial intermediary is prohibited from informing the person concerned by the suspicious activity report or any third party that such report was made (*Article 10a, AMLA*).

For more information on the MROS, see box: *The regulatory authorities*.

Terrorist financing
Criminal offences under the SCC. In Switzerland, it is a criminal offence to:

- **Support a criminal organisation (*Article 260ter, SCC*).** This means participating in or supporting/servicing a long-lasting organisation of three or more people, characterised by the submission to rules, division of tasks, lack of transparency relating to its structure, organisation and criminal activities, as well as the commission of acts of criminal violence.
- **Finance terrorism (*Article 260quinquies, SCC*).** This means accumulating or making available assets with the intent of financing a violent crime destined to intimidate the public or to coerce a state or international organisation into carrying out or not carrying out an act. The concept of *mens rea* is excluded where the perpetrator does not know with certainty that the funds are to be used to finance terrorism.

Criminal offences under the AMLA, AMLO and AMLO-FINMA. Article 9 of the AMLA provides the obligation for financial intermediaries to file a suspicious activity report with MROS, where they:

- Know or have reasonable grounds to suspect that assets involved in the business relationship:
  - are at the disposal of a criminal organisation; or
  - serve the financing of terrorism.
- Know or have reasonable grounds to suspect that cash payments made in the course of a commercial transaction are at the disposal of a criminal organisation.

For more information on the MROS, see box: *The regulatory authorities*.

Financial/trade sanctions
The Federal Council is the competent authority for implementing financial/trade sanctions aiming at securing compliance with international law, including human rights, or protecting Switzerland's interests.

Compulsory measures may):

- Directly or indirectly restrict transactions involving goods and services, payment and capital transfers, and the movement of persons, as well as scientific, technological and cultural exchange.
- Include prohibitions, licensing and reporting obligations as well as other restrictions of rights.

(*Paragraph 3, Article 1, Federal Act on the Implementation of International Sanctions (EmbA.)*

Defences

26. What defences, safe harbours or exemptions are available and who can qualify?

Subject to the developments below, no specific defences are available to the accused, apart from the standard defences set out in the SCC such as duress or state of necessity (*Article 17 et seq, SCC*). However, considering the offences at hand, they are of limited, if any, practical relevance. The statute of limitation applicable to the prosecution of criminal offences under Swiss law is also a defence argument that should always be considered.

Money laundering
Money laundering requires the perpetrator to have acted intentionally. In practice, the accused may want to argue that he/she ignored the criminal source of the relevant assets and acted with negligence.

Terrorist financing
Specific statutory exemptions are available if the:

- Act is carried out with a view to establishing a democratic regime or a state governed by a rule of law or with the aim of safeguarding human rights.
- Financing is intended to support acts that are not in violation of international laws and rules on the conduct of armed conflicts.

(*Paragraphs 3 and 4, Article 260 quinquies, SCC.*)

Financial/trade sanctions
The Federal Council may stipulate exceptions in order to support humanitarian activities or to safeguard overriding Swiss interests, in particular for the provision of food supplies, medicines and therapeutic products for humanitarian purposes (*paragraphs 1 and 2, Article 2, EmbA*).

Enforcement

27. Which authorities have the powers of prosecution, investigation and enforcement in cases of money laundering? What are these powers and what are the consequences of non-compliance? Please identify any differences between criminal and regulatory investigations.

Authorities
Prosecution and investigation. Money laundering offences based on breaches of the SCC can be prosecuted at the federal or cantonal levels. Specifically, the competent prosecution authority is:

- The Office of the OAG if the offence is:
    - committed by or against federal authorities;

- substantially committed abroad; or
- committed in two or more cantons with no single canton being the predominant centre of the criminal activity.

- The PPOs, in all other cases.

Offenders against money laundering provisions of the SCC are prosecuted ex officio.

The MROS plays a central role in the prosecution of money laundering. The MROS' key task is to act as a hub between the financial intermediaries and the criminal prosecution authorities. It receives both mandatory and voluntary suspicious activity reports (SARs) regarding suspected cases of money laundering, filed by financial intermediaries. The MROS, which is part of the Federal Office of Police, examines and analyses the SARs. If the MROS concludes that a SAR deserves further investigation, it forwards the case to the competent prosecutors (*paragraph 4, Article 23, AMLA*).

Breaches of the duty to report any suspicious activity to the MROS (*Article 37, AMLA*) are investigated by the Federal Department of Finance (FDF) (*paragraph 1, Article 50, FINMASA*) pursuant to the procedural rules set out in the ACLA.

Supervision and enforcement. The Financial Market Supervisory Authority (FINMA) is the main regulator and supervision authority responsible for enforcing the financial due diligence obligations imposed by the AMLA (*Article 56, FINMASA*) for financial service providers operating in the banking sector, for example:

- Banks.
- Securities dealers.
- Insurers and institutions under the Federal Act on Collective Investment Schemes.

Financial intermediaries operating in the non-banking or para-banking sector (for example, credit card companies, credit and leasing companies, asset managers and trustees) must either be:

- Affiliated to a self-regulatory organisation (SRO).
- Authorised as a directly subordinated financial intermediary supervised by FINMA.

There are 11 currently available SROs in Switzerland that are licensed and supervised by FINMA (*paragraph 1, letter b, Article 18, AMLA*).

If, as part of its general prudential and regulatory supervisory powers, FINMA becomes aware of a breach of the duty to report any suspicious activity to the MROS (*Article 37, AMLA*), it must report the case to the FDF.

For more information on the MROS and FINMA, see box: *The regulatory authorities*.

Prosecution powers
For criminal proceedings, see *Question 20*.

The proceedings opened by the FDF are governed by the ACLA. The investigating official enjoys investigative powers which place him/her in a situation comparable to that of the PPO who:

- Leads the investigation and collects evidence.
- Proceeds with on-site inspections.
- Hears the parties and compiles the file of the investigation.
- Undertakes coercive measures, such as searches/raids and seizures, arrests and forced appearances.

(*Article 139 et seq, CCP; Article 37 et seq, ACLA*.)

For a further description of the ACLA-governed proceedings, see *Question 28*.

As a supervisory authority, FINMA must ensure that supervised financial intermediaries make every effort to comply with the due diligence obligations set out in the AMLA. In case of breach of the criminal provision of the AMLA, the authority responsible for prosecution and judgement is the FDF (*paragraph 1, Article 50, FINMASA*).

For more information on FINMA and the FDF, see box: *The regulatory authorities*.

Powers of interview
For criminal proceedings, see *Question 3*.

Powers of search/to compel disclosure
For criminal proceedings, see *Question 3*.

Powers to obtain evidence
For criminal proceedings, See *Question 3*.

Power of arrest
For criminal proceedings, see *Question 3*.

For proceedings opened by the FDF, the powers of arrest are limited to cases that present a certain "importance" and where risks of evasion and collusion/tampering with evidence can be established (*Article 52, ACLA*). Detention in custody cannot exceed the probable duration of a custodial sentence (or the equivalent of a probable penalty or fine if converted to a custodial sentence) and the investigation should be expedited to the maximum extent possible (*Article 57, ACLA*). Bail is also available on the payment of sureties (*Article 60, ACLA*).

Court orders or injunctions
For criminal proceedings, see *Question 3*.

Protections available
For criminal proceedings, see *Question 3*.

28. Which authority makes the decision to charge and on what basis is that decision made? Are there any alternative methods of disposal and what are the conditions of such disposal?

For criminal proceedings, *see Question 3*.

For proceedings opened by the FDF the start of the procedure is generally marked by the opening of an investigation.

When the investigating official believes that their investigation is complete and that no offence has been committed, they will issue an order dismissing the case (*Article 62, ACLA*).

Conversely, if the official believes, at the end of their investigation, that an offence has been committed, they will draw up a final report, which is notified to the accused, who may be heard on the accusations, consult the file and request further investigations (*Article 60, ACLA*).

After the accused has been able to assert his/her right to be heard, the administrative authority issues any of the following:

- Dismissal order.
- Sentencing warrant.
- Special confiscation order.

(*Article 62 et seq, ACLA*.)

Therefore, the administrative authority concerned is competent to adjudicate on infringements. However, in case a custodial sentence or measure is envisaged, only the court is competent, and the administration must then transmit the file to it (*Articles 21 and 73, ACLA*). The administrative authority then retains the status of a party in the judicial proceedings.

Convictions and sanctions

29. What are the sanctions for participating in money laundering, terrorist financing offences and/or for breaches of financial/trade sanctions?

Money laundering
Right to bail. See *Criminal proceedings*.

Penalties. The Financial Market Supervisory Authority (FINMA) can impose tough regulatory measures against supervised entities, such as:

- The prohibition to the members of the board or top executive management from practicing their current and/or future functions on behalf of the supervised financial intermediary for a period of up to five years (*Article 33, FINMASA*).
- Withdrawal of a business licence (*Article 37, FINMASA*).

In such cases, the supervised financial intermediary may also be subject to criminal sanctions under the FINMASA, such as sanctions punishing operations without a licence or a FINMA-issued authorisation (*Article 44, FINMASA*). Funds that were obtained by means of a qualified violation of the supervisory provisions may be confiscated/forfeited (*Article 35, FINMASA*).

Criminal sanctions under the AMLA. Violations by a financial intermediary of its duty to report suspicious transactions (*Article 37, AMLA*), is punishable by:

- A monetary penalty of up to CHF500,000, where the perpetrator acted wilfully.
- A monetary penalty of up to CHF150,000, where the perpetrator acted negligently.

Criminal sanctions under the SCC. A so-called "simple" money laundering offence (*paragraph 1, Article 305bis, SCC*) is punishable by:

- A custodial sentence of up to three years.
- A monetary penalty of up to CHF540,000 (that is, 180 daily penalty units).

A so-called "qualified" money laundering offence (*paragraph 2, Article 305bis, SCC*) is punishable by:

- A custodial sentence of up to five years combined with a monetary penalty of up to CHF1.5 million (that is, 500 daily penalty units).
- A monetary penalty.

A qualified money laundering offence is given in particular where the perpetrator:

- Acts as a member of a criminal organisation.
- Acts as a member of a gang formed for recurrent commission of money laundering.
- Achieves a large turnover or substantial profit through commercial money laundering.

Additionally, the offence of insufficient diligence in financial transactions by financial intermediaries (*Article 305 ter, SCC*) is punishable by a custodial sentence of up to one year or a monetary penalty of up to CHF540,000 (that is, 180 daily penalty units).

Further, the criminal authority can order:

- The confiscation/forfeiture of assets belonging to the individual perpetrator, the accused company or a third party.

  Forfeiture also applies to all assets subject to the power of disposal of any criminal organisation, which is presumed in the case of the assets of a person who supports a criminal organisation, until or unless the contrary is proven (*Article 72, SCC*).

- An equivalent compensatory claim, assuming that such proceeds are no longer available.
- The allocation or restitution of assets to the harmed party, where appropriate.

Under Swiss law, criminal liability primarily rests with the perpetrator/individual. Persons aiding and abetting the perpetrator to launder money may also become liable (*Articles 25 and 305bis, SCC*).

For criminal liability of a company, see *Question 35*.

Terrorist financing
Right to bail. See *Criminal proceedings*.

Penalties. The sanctions for terrorist financing under the FINMASA and the AMLA are the same as for money laundering (*see above, Money laundering*).

Criminal sanctions under the SCC. The provision of funds to a criminal organisation (*Article 260 ter, SCC*) is punishable by:

- A custodial sentence of up to five years.
- A monetary penalty of up to CHF 540,000 (that is, 180 daily penalty units). The court may impose a lower penalty if the perpetrator makes an effort to foil the criminal activity of the organisation.

Terrorist financing (*Article 260 quinquies, SCC*) is punishable by:

- A custodial sentence of up to five years.
- A monetary penalty of up to CHF540,000 (that is, 180 daily penalty units).

For criminal liability of a company, *see Question 35*.

Financial/trade sanctions
Right to bail. See *Question 5*.

Penalties. A breach of the ordinances issued by the Federal Council that implements trade/financial sanctions is subject to criminal prosecution under the EmbA.

A so-called "simple" breach of financial/trade sanctions provisions is punishable by (*paragraphs 1 and 3, Article 9, EmbA; Article 333, SCC*):

- A custodial sentence of up to one year or a monetary penalty of up to CHF540,000 (that is, 180 daily penalty units), for cases of intentional breach.
- A monetary penalty of up to CHF270,000 (that is, 90 daily penalty units), in cases of negligence.

A so-called "qualified" breach of financial/trade sanctions provisions (*paragraph 2, Article 9, EmbA; Article 333, SCC*) is punishable by either:

- A custodial sentence of up to five years.

- A monetary penalty of up to CHF540,000.

A refusal to provide information, produce documents or grant access to business premises for inspection, or the provision of false or misleading information (*Article 10, EmbA*) is punishable by a monetary penalty of up to CHF100,000 in cases of intentional breach or CHF40,000 in cases of negligence.

Further, irrespective of the criminal liability of any particular person, property and assets that are subject to compulsory measures can be forfeited in the event that their continued lawful use is not guaranteed (*paragraph 1, Article 13, EmbA*).

Attempted offences as well as aiding and abetting are also liable to prosecution (*paragraph 2, Article 10, EmbA*).

Safeguards

30. Are there any measures in place to safeguard the conduct of investigations? Is there a process of appeal? Is there a process of judicial review?

For criminal proceedings, see *Question 6*.

For proceedings opened by the FDF:

- Any person who is affected by an investigation act may file a complaint within three days before the Federal Criminal Court (*paragraphs 1 and 3, Article 28, ACLA*).
- The accused may challenge the administrative authority's orders/warrants before the same authority within 30 days (*Article 67, ACLA*).
- Any new decisions issued upon such challenge may further be subject to judicial review if the accused requests to be judged by a court. If the accused person exercises this right or if, a measure implying custodial detention comes into play (*see Question 28*) the administration will divest itself of the case and forward the file to the competent cantonal court via a Public Prosecutor's Office (PPO). This transmission marks the beginning of the judicial procedure (*Articles 73 et seq. ACLA*).

Rulings issued by FINMA may be challenged and subject to judicial review before the Federal Administrative Court and, ultimately, the Federal Supreme Court.

Financial record keeping

31. What are the general requirements for financial record keeping and disclosure?

In Switzerland, all commercial businesses must properly keep and preserve records of their accounts as necessary in order to properly reflect the financial situation of the business and determine liabilities and claims in connection with them. Articles 957 et seq. of the Swiss Code of Obligations (SCO) provide for different levels of accounting and reporting requirements, depending on the size and economic significance of the relevant entity.

As a general rule, financial records and underlying documents must be preserved during a conservation/retention period of ten years as of the end of the financial year (*Article 958f, SCO*), subject to special rules either in the law or in the internal regulations/articles of association of the company. For VAT purposes, records must be kept for 20 years (*Article 70, Value Added Tax Act*).

Micro-sized enterprises
Micro-sized enterprises include:

- Sole proprietorships.
- Partnerships with less than CHF500,000 in revenue in the last financial year.
- Associations and foundations which are not required to be entered in the Commercial Register.
- Foundations that are not required to appoint an auditor.

Such enterprises only need to keep *simple accounts* on income and expenditure and provide a simple overview of their financial position (*paragraph 2, Article 957, SCO*).

Small and medium-sized enterprises (SMEs)
Enterprises of a certain size and economic significance (for example sole proprietorships and partnerships that have achieved revenues of at least CHF500,000 in the preceding financial year as well as all legal entities) must keep *complete accounts* and prepare their financial reports in accordance with the SCO (*paragraph 1, Article 957, SCO*).

SMEs must observe the following accounting principles:

- Clarity.
- Complete, truthful and systematic recording of transactions.
- Documentary proof for individual accounting procedures.
- Verifiability of financial information.

(*Article 957a, SCO*.)

Moreover, SMEs must prepare an annual report consisting of the annual, statutory financial statements of the individual SME, comprising a balance sheet, a profit and loss statement and notes (*paragraph 2, Article 958, SCO*).

Larger enterprises
Larger enterprises must observe additional requirements for the annual report, including:

- Providing additional and more detailed information in the notes to the annual statements.
- Preparing a cash flow statement as part of the annual accounts.
- Drawing up a management report.

(*Article 961, SCO*.)

Larger enterprises are defined as enterprises required by law to conduct an ordinary audit (*Article 961, SCO*). These enterprises are:

- Publicly traded companies (for example, companies listed on the stock exchange or having issued bonds).
- Entities that exceed two of the following thresholds in two consecutive financial years:
    - total assets of CHF20 million;
    - sales revenue of CHF40 million;
    - 250 full-time positions on annual average.
- Entities that are required to prepare consolidated accounts.

(*Paragraph 1, Article 727, SCO*.)

Financial accounting standards

In addition to preparing the statutory accounts, the following must prepare their financial statements in accordance with a recognised financial reporting standard*:*

- Listed companies (if required by the stock exchange).
- Large co-operatives (with at least 2000 members).
- Foundations required by law to undergo an ordinary audit.

(*Paragraph 1, Article 962, SCO*.)

Furthermore, among others, shareholders representing at least 20% of the share capital may also request financial statements to be prepared in accordance with a recognised financial reporting standard (*paragraph 2, Article 962, SCO*).

Disclosure

The criminal authorities may oblige a private company to disclose financial records in criminal investigations and administrative proceedings. The company must comply with a production order unless it can resist compulsory disclosure of information (for example, an overriding business secret that needs to be safeguarded).

32. What are the penalties for failure to keep or disclose accurate financial records?

Under the SCC, criminal liability can be triggered for the following:

- Failure to comply with accounting regulations (*Article 325, SCC*).
- Failure to keep proper accounts (*Article 166, SCC*).
- Criminal mismanagement in the context of bankruptcy (*Article 165, SCC*).
- Forgery of documents if the financial records are inaccurate (*Article 251, SCC*).

Civil liability for damages, voidance of contracts or corporate resolutions, as well as administrative sanctions (particularly those involving publicly listed companies) are contingent consequences to false or improper accounts.

33. Are the financial record keeping rules used to prosecute white-collar crimes?

White-collar crimes, such as fraud and bribery, criminal mismanagement, forgery of documents, and various tax-related offences, may entail the breach of financial record-keeping rules as a prerequisite to such offence.

A thorough analysis of the applicable rules and related commercial practices is especially relevant for determining whether or not the forgery of documents took place.

The use of complex deceitful constructions will also be of particular relevance in assessing fraudulent activities, and this will have an impact on the sanction imposed if the use of improper accounting was committed professionally or in view of securing a commercial profit.

Records must be kept for ten years, unless exceptions apply. However, the statute of limitations for crimes is 15 years. For this reason, criminal authorities will often strive to order the production of records or, in matters of urgency, directly search and seize such records before the ten-year time-limit expires.

Due diligence

34. What are the general due diligence requirements and procedures in relation to corruption, fraud or money laundering when contracting with external parties?

Corruption and fraud

As a general rule, Swiss companies must implement and monitor all reasonable organisational measures necessary to prevent criminal acts (such as corruption or fraud) from being committed within or by (that is, in representing) the company. Fraud and corruption trigger a company's primary liability under Article 102 of the SCC, which can therefore be prosecuted in parallel to, and in fact irrespective of, the individual perpetrators (*see Question 35*).

The criminal authorities will rely on international compliance standards to assess whether a company has implemented and monitored the implementation within its structure of all the necessary and reasonable organisational measures (for example, the OECD Good Practice Guidance). In the course of criminal proceedings, it is up to the criminal authorities to identify the measures that are lacking, and the company needs to show that it took all the necessary measures to prevent the criminal conduct.

Companies may also implement anti-bribery standards in order to prevent, detect and respond to bribery offences and comply with anti-bribery laws (*see Question 43*).

Money laundering

The AMLA and AMLO-FINMA contain provisions with respect to the prevention of money laundering.

Under the AMLA, at the outset of each business relationship with a new contracting/external party, financial intermediaries must:

- Verify the identity of the contracting party.
- Establish the identity of the beneficial owner and the person controlling the legal entity.
- Repeat the verification of the identity of the contracting party or the establishment of the identity of the beneficial owner, where doubts arise throughout the business relationship concerning the identity of the contracting party or the beneficial owner.
- Identify the contracting party's purpose and intention for entering into the business relationship.

(*Article 3 et seq, AML.*)

Additionally, on entering into a new business relationship, financial intermediaries must establish a risk profile, that is, assign the contracting party and the transaction to a risk category (*paragraph 1, Article 6, AMLA*). These categories of risks must be of at least two kinds (for example, normal and increased risks).

The criteria for assigning the contracting party and the transaction to a risk category depends on the specific circumstances of the case including, the business activity in question. However, transactions involving assets exceeding CHF100,000 that are physically transferred at one time or in instalments always constitute "increased risk" transactions (*Article 14, AMLO-FINMA*).

The risk profile also establishes whether a business relationship and/or a transaction is unusual, in which case additional due diligence requirements apply, including the:

- Assessment regarding whether the contracting party is the beneficial owner of the assets.

- Origin of the assets.
- Intended use of the withdrawn assets.
- Background and plausibility of the deposited assets.
- Origin of the contracting party and beneficial owner's wealth.
- Contracting party and beneficial owner's professional or occupation activity.

(*Article 15, AMLO-FINMA*.)

Moreover, as a general rule, financial intermediaries must keep records of all their transactions, in such a manner that other qualified persons are able to make a reliable assessment of the transactions and business relationships and of compliance with the AMLA obligations (*Article 7, AMLA*).

Corporate liability

35. Under what circumstances can a corporate body itself be subject to criminal liability?

In Switzerland, corporate criminal liability applies to all legal entities under private law, certain legal entities under public law, as well as companies and sole proprietorships.

These companies may be held criminally liable under certain circumstances, as set out in Article 102 of the Swiss Criminal Code (SCC). This provision distinguishes between two types of corporate liability:

- Secondary criminal liability.
- Primary criminal liability.

Secondary corporate criminal liability
Corporate criminal liability may be triggered in connection with any offence set out in the SCC if:

- The offence was committed within the company.
- The offence was committed in the conduct of the company's business activities.
- If the company has a deficient internal organisation.
- If as a result of the company's deficient organisation, the criminal authorities were unable to identify the perpetrator(s) of the committed offence.

(*Paragraph 1, Article 102, SCC*.)

Secondary corporate liability is therefore only applicable if the underlying offence cannot be attributed to a specific individual due to the company's deficient organisation. However, according to case law, such underlying offence must be fulfilled in all its objective and subjective components.

Primary corporate criminal liability
Under primary liability, a company may be held liable, where it has failed to take all reasonable organisational measures to prevent the commission of any of the offences exhaustively listed in paragraph 2 of Article 102 of the SCC. This includes:

- Participation in criminal organisations (*Article 260ter, SCC*).
- Financing of terrorism (*Article 260quinquies, SCC*).
- Money-laundering (*Article 305bis, SCC*).
- Bribery of Swiss and foreign public officials (*Articles 322ter and 322septies, SCC*).
- Granting an advantage to Swiss public officials (*Article 322quinquies, SCC*).
- Bribery of private individuals (*Article 322octies, SCC*).

The law does not define the exact scope of the organisational measures required under the law. According to scholars, the company's internal regulations and international standards should be examined in order to assess whether the appropriate measures have been taken. More specifically, the company will be required to demonstrate that its employees were made aware of, trained in and monitored regarding such rules.

Primary liability is a direct, autonomous and joint liability. However, the fulfilment of all the conditions of the underlying offence must be demonstrated by the prosecution authorities. Primary liability does not mean causal liability, as, according to case-law, the proceedings must be dropped or the company must be acquitted if the prosecution authorities fail to provide actual proof of the fulfilment of an underlying offence.

Criminal sanctions
In both primary and secondary liability, the company is liable to a fine of up to CHF5 million.

Further, a company may be punishable to a fine of up to CHF5,000 under administrative criminal law for the wrongdoings of its officers or employees, where the identification of the responsible individual would be unduly burdensome (*paragraph 1, Article 7, ACLA*). However, in certain areas of the law, such amount was significantly increased. For example, in case of a breach of financial regulations such as the FINMASA, a company may be punishable to a fine of up to CHF50,000 (*Article 49, FINMASA*).

Cartels

36.Are cartels prohibited in your jurisdiction? How are cartel offences defined? Under what circumstances can a corporate body be subject to criminal liability for cartel offences?

Cartels are prohibited in Switzerland. The main legal basis in Switzerland is the Federal Act on Cartels and other Restraints of Competition (CartA).

The CartA applies to both legal entities and individuals, insofar as they are deemed undertakings. Undertakings are defined as all consumers or suppliers of goods or services active in commerce regardless of their legal or organisational form (*paragraph 1bis, Article 2, CartA*).

Under the CartA, a cartel offence is understood as:

- Unlawful agreements affecting competition (*Article 5, CartA*).
- Unlawful practices by dominant undertakings (*Article 7, CartA*).

Unlawful agreements affecting competition
The CartA prohibits agreements that significantly restrict competition on the market for specific goods or services, without being justified on grounds of economic efficiency, as well as agreements that eliminate effective competition (*paragraph 1, Article 5, CartA*).

By law, the following agreements are presumed to eliminate effective competition and are therefore considered hard-core restrictions:

- **Horizontal agreements.** Agreements between actual or potential competitors that directly or indirectly fix prices, restrict quantities of goods or services to be produced, purchased or supplied, or allocate markets geographically or according to trading partners.
- **Vertical agreements.** Agreements between undertakings at different levels of the production chain that set minimum or fixed prices (resale price maintenance) or allocate territories to the extent that sales by other distributors into those territories are not permitted (absolute territorial protection).

(*Paragraphs 3 and 4, Article 5, CartA*.)

Such a presumption can be rebutted, where it can be shown that, as a matter of fact, effective competition is not eliminated by the above-mentioned agreements.

Unlawful practices by dominant undertakings
Dominant undertakings behave unlawfully if, by abusing their position in the market, they hinder other undertaking in their effort to start or continue to compete, or disadvantage trading partners (*paragraph 1, Article 7, CartA*).

Criminal (administrative) sanctions
The CartA is predominantly enforced by the Swiss Competition Commission (ComCo) and its investigative body, the Secretariat. Only the ComCo (not the civil courts) can impose criminal (administrative) penalties on legal entities.

- Specifically, an undertaking that is involved in a cartel or that misuses its dominant position can be charged with a fine of up to 10% of the turnover that it achieved in Switzerland in the preceding three financial years (*paragraph 1, Article 49a, CartA*).

In addition, a fine can be imposed on an undertaking for a breach of an amicable settlement, a final and non-appealable ruling of the competition authorities, or a decision of an appellate body (*Article 50, CartA*).

In both cases above, the maximum fine is 10% of the (group) turnover achieved by the company (and its group) in Switzerland in the preceding three financial years. In determining the amount of the fine, due account will be taken of the likely profit that resulted from the unlawful behaviour. Further, the Federal Ordinance on Sanctions Imposed for Unlawful Restraints of Competition (CASO) contains detailed provisions on the calculation of penalties.

Corporate liability
There are no direct criminal sanctions against individuals for cartel offences. Swiss law does not provide for imprisonment of company employees (such as managers or employees) for cartel conduct. However, individuals acting for an undertaking, but not the undertaking itself, wilfully violating a settlement decision, a final and non-appealable ruling of the competition authorities or a decision of an appellate body may be fined up to CHF100,000 (*Article 54, CartA*). Conversely, wilful violation of the CartA by participating in an unlawful agreement or in an abuse of a dominant position does not give rise to sanctions against employees, only against the legal entity.

Appeal mechanism
A decision of the ComCo is subject to an appeal before the Federal Administrative Tribunal within 30 days of the service of the decision. The decision of the Federal Administrative Tribunal is subject to a further appeal before the Federal Supreme Court within the same time-limit.

For more information on the ComCo,see box*: The regulatory authorities*.

Immunity and leniency

37. In what circumstances it possible to obtain immunity/leniency for co-operation with the authorities?

The CCP specifically provides for the possibility for the accused to negotiate a penalty in exchange for confessions and co-operative behaviour (*Articles 358 et seq, CCP*). Therefore, accelerated proceedings can be launched if:

- They are requested by the accused (and the accused only).
- Before the matter is sent to trial.
- The accused has admitted all the relevant facts and the civil claims against them (if any).
- The sanction sought by the prosecutor does not exceed five years of custodial sentence.

Accelerated proceedings require the accused to retain a lawyer, failing which one will be appointed *ex officio*.

This pragmatic solution can shorten the proceedings, lower the costs and the publicity involved, as well as negotiate a lower sentence.

Certain other laws foresee consequences for voluntary co-operation, such as:

- Articles 6 et seq of CASO for co-operation in anti-trust or anti-cartel investigations.
- Articles 175 et seq of the Federal Direct Tax Act (LFID), which provide that voluntary co-operation or disclosure can mitigate or exclude a fine or punishment.
- Article 13 of the ACLA, which provides that voluntary disclosure can exclude punishment.

Cross-border co-operation

38. What international agreements and legal instruments are available for local authorities?

Obtaining evidence
Swiss authorities can request legal assistance from foreign jurisdictions in obtaining evidence for ongoing criminal proceedings in Switzerland. Conversely, foreign states can request legal assistance from Swiss authorities in obtaining evidence for ongoing criminal proceedings in a foreign state.

Switzerland has a range of multilateral and bilateral treaties in place with various states, which provide a legal basis for obtaining evidence from foreign jurisdictions, the most important treaties being:

- EC Convention on Mutual Assistance in Criminal Matters between the member states 2000.
- The European Convention on the Laundering, Search, Seizure and Confiscation of the Proceeds from Crimes (CLau).
- The Convention Implementing the Schengen Agreement (CISA).
- Notice on co-operation between the Commission and the courts of the EU member states in the application of Articles 101 and 102 of the TFEU (formerly Articles 81 and 82 of the EC Treaty) (OJ 2004 C101/54) (Commission and Court Competition Co-operation Notice).

On a bilateral level, Switzerland has concluded:

- Amendment agreements to the European Convention on Mutual Assistance in Criminal Matters with its neighbouring states, Germany, Austria, France and Italy. These agreements are aimed at simplifying and expediting the legal assistance proceedings.
- Bilateral treaties on mutual assistance in criminal matters with several jurisdictions, including Algeria, Australia, Brazil, Canada, Ecuador, Egypt, Hong Kong, Mexico, Peru, Philippines and the US. These treaties provide a specific legal basis for obtaining evidence.

The exact scope and procedure applicable will depend on the applicable treaty or federal law provision. The transmission of evidence to a state with which Switzerland does not have a treaty or international agreement requires the authorisation of the Swiss Federal Office of Justice.

Under the Federal Act on International Mutual Assistance in Criminal Matters (IMAC)) acts of mutual assistance include the:

- Search for evidence, in particular searches/raids, seizures, production orders, expert opinions, hearings and confrontations of persons.
- Handing over of files and documents.
- Notification of documents.
- Handing over of objects or assets in view of confiscating/forfeiting them or returning them to the rightful owner or otherwise entitled person.

Seizing assets

The Swiss criminal authorities can:

- Seize or order the freezing of assets that derive from criminal activities.
- Request assistance from overseas authorities in seizing assets, subject to the reciprocity principle.
- At the express request of a foreign state, the Swiss competent authority may order provisional measures to preserve the status quo and secure assets, if mutual assistance does not appear to be obviously inadmissible or inappropriate under the terms of the IMAC.

The IMAC states that objects or assets that have been seized as collateral may be handed over on the request to the competent foreign authority at the end of mutual assistance proceedings so that they may be confiscated or returned to their rightful owners.

Sharing information

The Federal Act on International Mutual Assistance in Criminal Matters (MLAT) allows for the transnational sharing or exchange of information between criminal authorities. However, the traditional MLAT process is lengthy, especially if the decisions rendered in the course of the MLAT proceedings are systematically appealed. It can take several months and sometimes even years between the MLA request and the actual transmission of documents.

For this reason, alternative ways to obtain information include:

- Spontaneous transmission of information to foreign authorities under the IMAC.
- Joint investigations, which enable the facilitated, immediate and spontaneous exchange of information and evidence between the criminal prosecution authorities involved.
- Direct dealings between the police (for example, via Interpol or Europol).
- Direct contact of Swiss witnesses by foreign authorities, provided that direct service is expressly laid down in a relevant treaty.

However, co-operation, unlike traditional mutual legal assistance in criminal matters, in principle cannot involve any means of coercion or violate the parties' procedural guarantees. In that sense, only traditional mutual legal

assistance allows for searches, raids, transmissions of bank statements or other data requiring the prior lifting of privilege, formal hearings, wiretapping and recordings, and so on.

39. In what circumstances will domestic criminal courts assert extra-territorial jurisdiction?

Swiss criminal authorities only have jurisdiction if the offence was committed on Swiss soil or if the results of an offence committed abroad unfolded in Switzerland (*Articles 3 and 8, SCC*). Case law sets out further rules and guidelines on the connection of an offence or of its results with Switzerland, depending on the offence in question (*see Question 3 and Question 12*).

Moreover, several SCC provisions grant Swiss authorities competence even if the offence was committed abroad (*Articles 4 et seq, SCC*), for example:

- Crimes against the Swiss state or national security.
- Crimes against minors, under certain conditions.
- Offences that the Swiss authorities are obliged to prosecute (for example, those under an international treaty or convention, under certain conditions).
- Similarly the Swiss authorities can also have competence if the perpetrator or victim is a Swiss national (under certain conditions), or failing that, if the extradition was refused and the perpetrator committed a particularly serious crime that is proscribed by the international community.

40. Does your jurisdiction have any statutes aimed at blocking the assertion of foreign jurisdictions within your territory? Are there statutes aimed at blocking the assertion of foreign jurisdictions within their territory?

Only Swiss authorities have jurisdiction for taking evidence on Swiss territory, unless direct notifications of acts are laid down expressly in a treaty or international agreement (*see Question 38*).

It is prohibited to take evidence on Swiss territory:

- For any person carrying out activities on behalf of a foreign state, a foreign party or organisation.
- Without due authorisation.
- Where such activities are the responsibility of a public authority or public official.

(*Paragraph 1, Article 271, SCC.*)

A breach of this provision is punishable by a custodial sentence of up to three years or a fine of up to CHF540,000 (that is, 180 daily penalty units).

It is further prohibited for any person:

- To abduct another person by using violence, false pretences or threats.
- To take that person abroad in order to hand him/her over to a foreign authority, party or other organisation or to expose him/her to a danger to life or bodily integrity.

(*Paragraph 2, Article 271, SCC.*)

A breach of this provision is punishable by a custodial sentence of no less than one year.

The purpose of Article 271 of the SCC is to block the assertion of foreign jurisdiction on Swiss soil and to prevent states or individuals from bypassing international conventions on mutual legal assistance.

Additionally, Swiss law provides for further restrictions that must be observed by individuals and entities when providing information directly to foreign authorities such as the:

- Criminal law provision on economic espionage, which is designed to protect the Swiss public and economic interest and makes it a crime to disclose manufacturing or business secrets (*Article 273 and 162, SCC*).
- Swiss bank customer secrecy laws, which are designed to protect the disclosure of client related information entrusted within the scope of the employment contract (*Article 47, BA*).
- Data protection laws, which limit the grounds for cross-border transmission of personal data and set further restrictions depending on the standards of the recipient state.

Whistleblowing

41. Are whistleblowers given statutory protection?

As the law stands, there is no specific statutory protection for whistleblowers. Under Swiss labour law, employees must observe a duty of loyalty and a duty of confidentiality towards their employer, including a duty of business secrecy (*paragraphs 1 and 4, Article 321a, SCO*). As a result of these duties, employees report irregularities or grievances pursuant to the following three-step procedure:

- **Step 1.** The employee must first report the misconduct internally to their employer (internal whistleblowing).

- **Step 2.** Failing appropriate remedial measures from the employer, the employee is entitled to report the case to the authorities (external whistleblowing).
- **Step 3.** Failing a response from the authorities, the employee is entitled to report the case to the public and/or third parties as a means of last resort (external whistleblowing).

A breach of theses escalation principles may result in a breach of the employees' contractual duties and, therefore, lead to the termination of the employment contract.

Employees who report irregularities or grievances within a company to the authorities or public face significant legal uncertainties. Under Swiss law, termination in response to lawful whistleblowing may be deemed wrongful (*Articles 336 et seq, SCO*), in which case the employee will at most be entitled to financial compensation of up to six months' salary.

Further, Swiss criminal authorities may treat disclosing confidential information to the public as a criminal offence, for example breaching:

- Manufacturing or business secrecy (*Article 162, SCC*).
- Official secrecy (*Article 320, SCC*).
- Banking secrecy (*Article 47, BA*).
- Professional confidentiality (*Article 35, Federal Act on Data Protection (FADP)*).

However, since mid-2015, the Swiss Federal Police (Fedpol) has implemented an external web-based reporting platform which enables the general public to directly report information on any criminal acts of bribery anonymously. The reported information is reviewed for criminal relevance and then transferred for processing to the relevant department within the Federal Criminal Police or, if need be, to the competent external authority (for example, the cantonal police).

Given the applicable legislation framework, it is in the best interest of the companies (*Article 102, SCC*) and their organs/corporate bodies (*paragraph 1, Article 716a, SCO*) to close the legislative gaps by implementing internal regulation on whistleblowing. A proposed legislative amendment foresees providing increased legal certainty for whistleblowers (*see Question 42*).

Reform, trends and developments

42. Are there any impending developments or proposals for reform?

Whistleblowing
At present, whistleblowers are not protected by law (*see Question 41*).

The Federal Council suggested an amendment to the SCO to afford whistleblowers a legal protection from a civil perspective. The proposed legislative amendment of the SCO consists of allowing whistleblowers to report misconduct at the workplace to the authorities, without fearing breaching their loyalty obligations if*:*

There is reasonable suspicion.

The report is made to an internal or external body responsible that is responsible for it.

(*Paragraph 1, new Article 321abis, SCO.*)

Additionally, termination of the employment relationship by the employer in response to a lawful reporting under the new Article 321a bis of the SCO will explicitly be deemed wrongful). The employee will at most be entitled to financial compensation of up to six months' salary.

Parliament has sent back the law proposal to the Federal Council in Autumn of 2015 with the mandate to make the draft legislation more understandable and easier to formulate. However, the basic "cascading" structure should be maintained.

Anti-corruption legislation

Until 1 July 2016, bribery of public officials and bribery of private individuals were governed by two different legal acts (the SCC) and the Unfair Competition Act (UCA), respectively).

As of 1 July 2016, bribery of private individuals is included in the SCC, in addition to the UCA, which remains in force. The new provisions aim to provide a more effective legal framework for the prosecution of bribery in the private sector. As a result, bribery in the private sector is prosecuted ex officio and is disconnected from market distortion (contrary to what prevails under Article 4 of the UCA).

Anti-money laundering legislation

The AMLA and AMLO-FINMA are being revised. It is expected that the revisions will enter into force in 2020.

On 1 June 2018, the Federal Council initiated the consultation over draft amendments to the AMLA. The draft legislation takes into account the most important recommendations from the FATF Mutual Evaluation Report on Switzerland and strengthens the integrity of the Swiss financial market. The opening of the consultation procedure coincides with the publication of the report from the interdepartmental co-ordinating group on combating money laundering and the financing of terrorism (CGMF) on the risks of money laundering for legal entities. The report analyses the risks associated with various legal forms in Switzerland and abroad, and reinforces the draft's proposed measures concerning services for companies and trusts. The consultation ended on 21 September 2018.

The main new features are as follows:

- The AMLA's scope of application is to be extended to "advisers", that is, lawyers and trustees, among others, and corporate entities who/which in a professional capacity, create, manage or administer local or foreign companies or trusts.
- Financial intermediaries are required to continuously verify information on the beneficial owner (a simple finding is no longer sufficient).
- An obligation to regularly update customer information is introduced to all business relationships, including low-risk clients.

- The catalogue of examples with criteria relating to business relationships involving increased risks is expanded and clarified. This concerns in particular the criterion relating to the complexity of the structures used. Where domiciliary companies are used, the reasons must be determined.
- For groups of companies, provisions on the implementation of requirements regarding compliance at a group level with the basic principles of the AMLA, as well as the overall management of legal and reputational risks by financial intermediaries that have branches abroad or manage a financial group with foreign companies.

Public procurement legislation
The laws governing public procurement are currently being revised, aiming to further harmonise the various existing federal and cantonal laws and to implement the requirements of the revised WTO Government Procurement Agreement. One pillar of the pending revision is the introduction of tighter rules preventing bribery and corruption offences from being committed in public procurement procedures. The new law has not yet entered into force.

Market practice

43. What are the main steps foreign and local companies are taking to manage their exposure to corruption/corporate crime?

First and foremost, developing a strong compliance programme allows corporations to limit their exposure to corporate criminal liability under Article 102 of the SCC.

There is no universal compliance programme, which means that an individual approach (adapted namely to structure, size and risks of activities involved) will be crucial in implementing successful compliance methods.

Swiss companies typically use several risk-mitigation practices to manage their risk exposure to white collar crimes.

Compliance officer
From a corporate governance standpoint, appointing a compliance officer, whose duties should, among others, include regular reporting of compliance-related issues to senior management, is key. In particular, the compliance officer should work with all levels of management to ensure appropriate contingency planning for handling a potential compliance breach.

Code of conduct
A well-written and comprehensive code of conduct serves as a central guidance document for employee decision-making and should include, amongst others, provisions addressing:

- Conflicts of interest.
- Disclosure of information.

- Privacy and confidentiality.
- Political contributions (for example, lobbying practices).
- Reporting procedures (for example, a whistleblowing system)
- Guidelines regarding integrity and anti-corruption.

Organisational regulations
Specific organisational regulations and internal instructions (which reflect anti-money laundering, anti-corruption, anti-insider trading and other relevant legislation) should also lie at the core of compliance programmes. Additionally, a company may establish internal avenues for reporting improper conduct (for example, whistleblowers hotlines).

Regular in-house training
Regular in-house training sessions pertaining to the content and implementation of the aforementioned code of conduct and internal regulations should be ensured for all employees.

International standardisation organisation (ISO) standard 37001 on anti-bribery management systems.
An ISO Standard provides guidance for a management system designed to help companies to prevent, detect and respond to bribery offences and comply with anti-bribery laws. Companies may consider implementing an ISO Standard 37001 as an additional and effective tool to protect the company and its management and board members from their risk exposure to corruption/white collar crimes.

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The regulatory authorities

Financial Market Supervisory Authority (FINMA)
W *www.finma.ch*
Status. FINMA is Switzerland's state supervisory authority over the financial markets and financial institutions.

Principal responsibilities. FINMA acts as a supervisory authority of banks, insurance companies, exchanges, securities dealers, collective investment schemes, distributors and insurance intermediaries. FINMA is responsible, among others, for combatting money laundering and issuing operating licences for companies in the supervised sectors.

FINMA imposes sanctions and also acts as a regulatory body, issuing its own ordinances and circulars.

Federal Department of Finance (FDF)
W *www.efd.admin.ch*

Status. The Federal Department of Finance is the Swiss Ministry of Finance.

Principal responsibilities. The FDF is responsible for the investigation and prosecution of the criminal law provisions of the AMLA and the FINMASA by financial intermediaries.

Money Laundering Reporting Office Switzerland (MROS)
W *www.fedpol.admin.ch/fedpol/de/home/themen/kriminalitaet/geldwaescherei.html*
Status. The MROS is part of the Federal Office of the Police, which is part of the Swiss Ministry of Justice and the Police. The MROS is not a police authority in itself, but rather an administrative unit with special tasks.

Principal responsibilities. The MROS is responsible for receiving and analysing suspicious activity reports (SARs) in connection with money laundering, terrorist financing, money of criminal origin or criminal organisations. When receiving suspicious activity reports, the MROS effectively performs a preliminary assessment to dismiss reports lacking in substance and, where necessary, forwards the reports on to the appropriate prosecuting authorities for further investigation.

State Secretariat for Economic Affairs (SECO)
W *www.seco.admin.ch*
Status. The SECO is part of the Federal Department of Economic Affairs, Education and Research.

Principal responsibilities. The SECO is the federal government's centre of expertise for all core issues relating to economic policy. Part of its responsibilities are the administration and enforcement of trade/financial sanctions.

Swiss Competition Commission (ComCo)
W *www.weko.admin.ch/weko/en/home.html*
Status. The ComCo is part of the Federal Department of Economic Affairs, Education and Research.

Principal responsibilities. The ComCo, an independent federal authority, and its Secretariat are responsible for applying the Cartel Act. The tasks of the Competition Commission include combating harmful cartels, monitoring dominant companies for signs of anti-competitive conduct, enforcing merger control legislation and preventing the imposition of restraints of competition by the state.

Online resources

Swiss Federal Law
W *www.admin.ch/bundesrecht/00566/index.html?tang=de*

Description. Compilation of the Swiss laws and ordinances maintained by the Federal Authorities of the Swiss Confederation. The full compilation is available in German, French and Italian.

Swiss Federal Law (English Translations)

W *www.admin.ch/bundesrecht/00566/index.html?tang=en*

Description. Classified compilation of English translations of certain Swiss laws and ordinances maintained by the Federal Authorities of the Swiss Confederation. The translations are provided for information purposes only and have no legal force.

Swiss Federal Supreme Court (SFSC)

W *www.bger.ch/fr/index.htm*

Description. The SFSC is the highest judicial authority in Switzerland. It rules as the final instance on all appeals against decisions of the highest cantonal courts, as well as, in some cases, the Federal Criminal Court, the Federal Administrative Court and the Federal Patent Court. The court ensures that Swiss federal law is correctly applied in individual cases and that the rights of citizens enshrined in the Constitution are protected.

Swiss Federal Criminal Court (SFCC)

W *www.bstger.ch/en/index.html*

Description. The SFCC hears, among other things, criminal cases involving offences against federal interests, explosives offences, international cases of white-collar crime, cases relating to organised crime, corruption and money laundering, and offences related to civil aviation or war material.

Swiss Administrative Federal Court (FAC)

W *www.bvger.ch/bvger/en/home.html*

Description. The FAC adjudicates appeals against decisions rendered by Swiss federal authorities as well as, in certain matters, some cantonal authorities. In individual cases, it may issue judgments in complaints proceedings. Where the FAC is the lower instance court, its judgments may be appealed to the Federal Supreme Court.

Contributor profiles

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Areas of practice. White collar crime; administrative criminal law; international judicial and administrative assistance; financial and commercial litigation and insolvency.

Recent transactions

- Acting for an ultra-high net worth individual in a high-stake civil litigation regarding company directors' liability.
- Acting for the CEO of a fund management company in Madoff-related criminal proceedings.
- Acting for an ex-minister of an Arab Spring country in criminal proceedings relating to bribery of public officials and money laundering.
- Acting for the CEO of an oil trading company in criminal proceedings relating to bribery of public officials.

Languages. French, English, German

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