

Switzerland

I. Brief Introduction to the Legal System of Switzerland

The Swiss legal system is based on the civil law tradition. As such, it depends heavily on written codes as a primary source for authoritative statements of law. Accordingly, judicial decisions are of less importance than they are in common law jurisdictions. Even though a line of judicial decisions establishing a particular legal practice does carry substantial weight, the common law rule of binding precedent (*stare decisis*) is not recognized. Traditionally, more weight is given to the writings of legal scholars than in common law countries.

Switzerland is a federal union of twenty-six federating states called “Cantons” and a federal power, which we call “the Confederation.” The basic features of the Swiss federal system are defined in the Swiss Federal Constitution which lays out the institutional structure of the state, the respective powers of the Cantons and the Confederation and mechanisms for coordinating the two levels. The basic concept is that of federalism, which is not only a rule governing state organization, but also a fundamental political principle deeply rooted in the Swiss legal culture.

The Federal Supreme Court of Switzerland is the final court of appeals. Due to Switzerland's system of direct democracy, the Court has no authority to review the constitutionality of federal statutes, but the people can strike down a proposed law by referendum. According to settled case law, however, the Court is authorized to review the compliance of all Swiss law with certain categories of international law, especially the European Convention of Human Rights.

Swiss civil proceedings generally consist of three phases. First is the “assertion phase,” where the parties present the facts of the case to the court. The parties must plead all relevant facts, submit the documentary evidence, and name any other evidence they wish to rely upon. Next comes the “evidentiary phase,” where evidence is taken on the relevant facts that are in dispute and cannot be proved by documentary evidence alone. Typically, the court issues a decision on the facts that need to be proved and designates the party that has the burden of proof. The actual taking of evidence takes place in a subsequent hearing. Then there is the “post-hearing phase,” where the parties have the opportunity to comment on the evidence that has been taken before the court renders a judgment. Typically, the average duration of



commercial civil proceedings before the courts of first instance is between one and two years. This time period can double if one of the parties appeals to higher instance courts. Of course, in complex cases or cases in which, for example, evidence needs to be taken abroad, a given proceeding may take considerably longer.

II. Switzerland's Anticorruption Law

Switzerland ratified the OECD Convention on May 31, 2000. Implementing legislation entered into force on May 1, 2000. The standards set by the OECD Convention were implemented in the Swiss Penal Code¹ by introducing a new chapter on bribery. Apart from provisions concerning bribery of Swiss officials, the focus of the legislative changes was on a new provision allowing for penal sanctions of foreign officials.

Bribery law

The current Swiss legal system contains a set of rules regarding bribery of Swiss public officials and the acceptance of such bribes in the Penal Code. The respective articles are “bribery” (active offence) and the corresponding “acceptance of bribes” (passive offence) and “granting an advantage” (active offence) and the corresponding “acceptance of advantage” (passive offence). Any person who offers, promises, or gives a Swiss public official an advantage which is not due to him, or offers, promises, or gives such an advantage to a third party, in order to cause that public official to carry out or to fail to carry out an act in connection with his official activity which is contrary to his duty or dependent on his discretion, commits bribery. Any person, who demands, secures the promise of or accepts such an advantage commits “acceptance of bribes.”

Foreign official

As for foreign officials, any person who offers, promises or gives 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 who is acting for a foreign state or international organization an advantage which is not due to him, or gives such an advantage to a third party, in order for that person to carry out or fail to carry out an act in connection with his official activities which is contrary to his duties or dependent on his discretion is considered to commit bribery and is considered liable to a custodial sentence of a maximum of five years or to a monetary penalty. Equally, also the acceptance of bribes by foreign officials is being punished with a custodial sentence of a maximum of five years or a monetary penalty. According to Switzerland's Unfair Competition Act (UCA)², both the person who bribes (“active bribery in the private sector”) and the person who accepts the bribe (“passive bribery in the private sector”) are subject to criminal prosecution. Both the Penal Code and the UCA declare the active and the passive bribery as punishable. Whereas under the Penal Code bribery can be punished with a custodial sentence of up to five years or a monetary penalty, the penalties under the UCA are limited to a custodial sentence of maximum three years or a monetary

¹ Swiss Criminal Code of 21 December 1937, SR 311.0.

² Federal Act against Unfair Competition (UCA) of 19 December 1986, SR 241.0.

penalty. The monetary penalty under the Penal Code can amount to up to CHF 1 million. Additionally, an enterprise may be fined up to CHF 5 million if one of its employees or another individual acting on behalf of the enterprise is found guilty of bribery.

Public vs. private

The distinction between “private” and “public” may be difficult to make. According to the Swiss legal understanding, a functional approach is applied and the question is one of substance, not form: whoever performs a public function is considered a “public official. This distinction also applies to foreign officials. The Penal Code defines a Swiss public official as “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.” Equally, a foreign official is defined as 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 who is acting for a foreign state or international organization.”

The new Code of Criminal Procedure³ that entered into force on January 1, 2011 replaced the previous 26 different cantonal criminal procedures codes with one harmonized federal act and introduced a standardized criminal procedure that is now applicable throughout Switzerland. Thus, the new Code of Criminal Procedure reformed the criminal procedure in Switzerland in a fundamental manner. For the issue of bribery and bribery of foreign officials, however, the entry into force of the new code did not have direct consequences.

III. Assessment

Recent years have brought increased international awareness that corruption seriously damages the economy and must therefore be universally combated. For this reason, on December 19, 2008, the Federal Council decided to create an interdepartmental working group on combating corruption, and entrusting it with the task of harmonizing anti-corruption efforts on the national level and enhancing the coordination of strategy implementation in the fight against corruption in conformity with the pertinent international recommendations.

³ Swiss Criminal Procedure Code of 5 October 2007, SR 312.0.

Switzerland's implementation of the OECD Convention has been evaluated in each of the three phases by the Working Group. In the Phase 3 evaluation, the Working Group reported that Switzerland has made progress in enforcing its anti-bribery laws and cited the recent conviction of one natural and one legal person in two cases of foreign bribery. Nonetheless, the Working Group complained that the number of convictions remains low.

Switzerland is a member of GRECO and has been evaluated in each of its evaluation cycles. The country is not a member of the IACA.

Transparency International ranks Switzerland #6 on its Corruption Perception Index, indicating that bribery is not prevalent in Swiss society.

Switzerland signed the UN Convention on December 10, 2003. On September 24, 2009, the Convention was ratified by Switzerland. The accession to the UN Convention did not require the adoption of any implementing provisions, as the provisions introduced with the accession to the OECD Convention did already meet the requirements set by the UN Convention.

IV. Texts

Swiss Criminal Code of 21 December 1937, SR 311.0
[http://www.admin.ch/ch/d/sr/c311_0.html (in German)]
http://www.admin.ch/ch/e/rs/c311_0.html (unofficial English translation)]

Federal Act against Unfair Competition (UCA) of 19 December 1986, SR 241.0
[<http://www.admin.ch/ch/d/sr/c241.html> (in German, no unofficial English translation)]

Swiss Criminal Procedure Code of 5 October 2007, SR 312.0
[http://www.admin.ch/ch/d/sr/c312_0.html (in German)]
http://www.admin.ch/ch/e/rs/c312_0.html (unofficial English translation)]