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# The Verdict

Round-up of corporate  
crime developments  
across CMS

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Summer 2015



# Swiss spotlight

Switzerland to strengthen legislation against corruption in the private sector.

On 3 June 2015, the council of states (a chamber of the federal parliament) (the '**Council**') approved new rules designed to combat private sector corruption more effectively. Coinciding with the recent FIFA arrests, the parliamentary debate was of considerable public interest. As investigations develop in Switzerland, the USA and other jurisdictions concerning FIFA, international sports organisations are facing increasing reputational issues (with knock-on effects for sponsors) and political support is declining. The competent committee of the second chamber of the parliament (the '**Second Chamber**') has already voted to tighten the screws another notch.

Penal provisions on bribery in the private sector are currently contained in the Unfair Competition Act (the '**Act**'). The Act, by its nature, aims to ensure fair and undistorted competition by prohibiting conduct that conflicts with the principle of good faith in dealings between competing parties or suppliers of goods and services on the one hand, and customers on the other. Consequently, the law covers private sector bribery only if it affects the competitive relationship between two or more players in a particular market. International sports organisations are typically incorporated as non-commercial associations and so are exempt from the scope of the Act. In addition, the current law provides that prosecution of private sector bribery requires the filing of a criminal complaint. Though it contains a fairly broad definition of parties entitled to file such a complaint, this requirement has proven to be an important hurdle, with only a handful of investigated cases in recent years.

The Council has now resolved to move the penal provisions on private sector bribery from the Act to the Penal Code. As a result, offers of or requests for

undue advantages in exchange for carrying out, or omitting to carry out, an act in connection with a person's function in '*any undertaking or organisation in the private sector*', either in contravention of his duties or in the exercise of his discretion, will now be a standalone criminal offence. The provision covers undue advantages for the benefit of the individual or for the benefit of a third party (e.g. the employer organisation).

However, the requirement of a criminal complaint as a prerequisite to prosecution has only been abolished in relation to cases of public interest. During the Council's debate, it was said that public interest would typically be assumed in matters involving organisations that hold a powerful position in their sector of activities, so that a lack of governance could negatively affect a multitude of stake-holders. Another example given was the use of false deeds (e.g. such as false company accounts) to enable or cover-up bribe payments, since such behaviour would undermine public trust in the reliability of such instruments.

The Second Chamber will deliberate the bill during its autumn session. However, preparatory debates suggest that this chamber will eliminate the requirement of a criminal complaint completely, making private sector bribery an offence that may always be prosecuted *ex officio*.

Penalties are unaltered by these changes, however, with perpetrators facing the relatively modest penalty of up to three years' imprisonment. As a result, bribery in the private sector – unlike bribery in the public sector – continues to qualify only as a misdemeanour and cannot constitute a predicate offence to money laundering pursuant to Swiss law.



# CMS round-up

## **Austria: Criminal law and procedure reforms**

Austrian criminal law and procedure has been subject to extensive recent reforms to achieve more consistency and efficiency in court proceedings. The reform of the Criminal Procedure Act came into force on 1 January 2015 and one of its objectives was to improve the rights of the accused during investigation and trial.

One change is that the accused can now challenge the appointment of experts commissioned by the public prosecutor based on prejudice or lack of expertise and may nominate a more suitable expert.

The reform also introduced a maximum duration of three years for investigations in criminal proceedings, requiring the public prosecutor to justify any longer duration to the court. However, there is an explicit exception for investigations involving assistance from foreign courts and authorities. In the context of complex corporate crime cases, such cross-border elements will usually be in place.

## **Germany: Anti-bribery law reforms**

A draft bill currently going through Parliament will extend criminal liability for bribery in the private sector beyond the current regime (where it is only punishable if a benefit is granted to a representative of a business partner as consideration for an unfair preferential treatment in competition). The intended reform will make any conduct that aims to induce the recipient of a benefit to improperly perform his functions a punishable offence.

In July 2015, the German government also adopted a draft bill against corruption in the health care sector, which aims to close an existing loophole in German anti-bribery legislation. To date, bribery in the health care sector has only been sanctioned under professional regulations and regulations on promotion of medical products.

## **Italy: New Anti-Bribery Bill Approved**

A new anti-bribery bill (AC 3008) came into force on 14 June 2015 (the 'Bill').

The Bill amends the existing law by:

- (i) increasing the penalties for various bribery offences, misappropriation and Mafia conspiracies;
- (ii) extending the offence of extortion to persons in charge of public services;
- (iii) introducing a new mitigation methodology and new provisions concerning compensation for public entities injured by the offence;
- (iv) modifying provisions on suspension of penalties and plea bargaining;
- (v) reinforcing the role of the National Authority for Anti-Corruption;
- (vi) extending accounting fraud offences to all companies, not just quoted companies; and
- (vii) increasing the maximum levels of fines payable by corporates for various corporate offences.

## **The Netherlands: Individuals charged with bribery relating to public procurement**

On 10 July 2015, the Dutch Public Prosecution Service announced that it would formally charge two police officers and four members of the Ministry of Defence's staff for accepting bribes in connection with tenders for government contracts relating to the procurement of vehicles for the police and military. The total value involved was several hundred million euros. The prosecution claims the defendants accepted gifts ranging from the use of tank cards and rebates in premiums for lease cars to all-inclusive multi-day cruises in the Mediterranean. The investigation identified 47 suspects. Charging decisions on companies and individuals that have allegedly offered gifts to the public officials are still pending.

## **Poland: Significant changes to criminal procedure**

On 1 July 2015, a significant amendment to Polish criminal procedure came into force, increasing the adversarial nature of Polish criminal proceedings. Judges will now act as objective arbitrators and the responsibility for obtaining and presenting evidence lies solely with the parties (i.e. the public prosecutor, injured party and

defendant), as opposed to the judges, who previously played a leading interrogatory role.

Parties can now also use private documents prepared specifically for the purposes of the criminal investigation as evidence (e.g. private expert opinions). These changes may increase the role and importance of internal investigations conducted by companies in relation to allegations of corporate crime.

The possibility of concluding plea agreements was also expanded to include all offences (previously the most serious cases were excluded).

## **Scotland: Bribery in the headlines**

Corporate crime has been the focus of much press attention this summer, as four members involved in a scheme for the allocation of public building work at the City of Edinburgh Council pled guilty to corruption. Sentences of 13 years and two months were passed between the four men, together with director disqualifications. The public officials at the Council received the longest sentences, in recognition of their breach of a position of public trust. Despite the relatively small amounts involved in the case (only £72,000) the sentences handed down are severe in comparison to historic sentencing trends. The Court stated that the sentences should serve as a warning and deterrent for others.

## **UK: Two DPAs expected before the end of the year**

In a recently published interview the Director of the Serious Fraud Office (SFO) indicated that at least two deferred prosecution agreements (DPAs) may be concluded this year. The Financial Times has subsequently named one of the companies currently in negotiations with the SFO as Rotherham-based Sarclad, a small company in the metal industry. So far there has been little clarity around the circumstances in which DPAs might be offered and on what terms. Should these DPAs be concluded, we would expect welcome clarity and guidance as to when a DPA may be a viable option for resolving corporate offending.

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